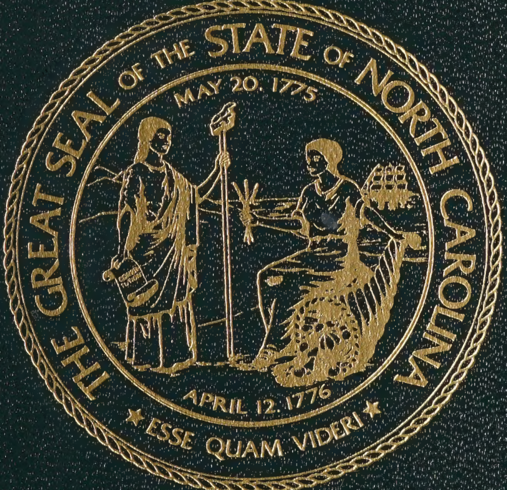
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED


MAY 20. 1775
APRIL 12. 1776
ESSE QUAM VIDERI

2009 EDITION

Digitized by the Internet Archive
in 2026 with funding from
State Library of North Carolina

https://archive.org/details/generalstatuteso00nort_80

State Library of North Carolina
Raleigh

GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 4

Chapters 15 Through 18A

Prepared Under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
The Editorial Staff of the Publisher

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For EDITORIAL QUESTIONS concerning this publication, or REPRINT PERMISSION, please call:
800-833-9844

For CUSTOMER SERVICE ASSISTANCE concerning replacement pages, shipments, billing or other matters, please call:

Customer Service Department at	800-833-9844
Outside the United States and Canada	518-487-3000
FAX	518-487-3584

For INFORMATION ON OTHER MATTHEW BENDER PUBLICATIONS, please call:

Your account manager or	800-223-1940
Outside the United States and Canada	518-487-3000

COPYRIGHT © 2009
BY
MATTHEW BENDER & COMPANY, INC.,
A MEMBER OF THE LEXISNEXIS GROUP.

All rights reserved.

LexisNexis and the Knowledge Burst logo are registered trademarks, and
Michie is a trademark of Reed Elsevier Properties Inc., used under license.
Matthew Bender is a registered trademark of
Matthew Bender Properties Inc.

4536014 (hardbound volume)
4535014 (hardbound set)
4640516 (softbound set)

ISBN 978-1-4224-5146-5 (hardbound volume)
ISBN 978-1-4224-5142-7 (hardbound set)
ISBN 978-1-4224-5140-3 (softbound set)

LexisNexis®

Matthew Bender & Company, Inc.

701 East Water Street, Charlottesville, Va. 22902-5389

www.lexisnexis.com

(Pub.45350) (HB)
(Pub.46405) (SB)

Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within Chapters 15 through 18A, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 “from and after 60 days after the adjournment of the session” in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting Chapters 15 through 18A of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reports:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2009

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper
Attorney General of North Carolina

Table of Contents

For complete listing of chapters set out in the North Carolina General Statutes, see the Table of Contents included in Volume 1.

VOLUME 4

Chapter 15. Criminal Procedure, G.S. 15-1 to 15-224
- Art. 1. General Provisions, G.S. 15-1 to 15-10.4
- Art. 2. Record and Disposition of Seized, etc., Articles, G.S. 15-11 to 15-17
- Art. 3. Warrants, G.S. 15-18 to 15-24.1
- Art. 4. Search Warrants [Repealed.]
- Art. 4A. Administrative Search and Inspection Warrants, G.S. 15-27.2
- Art. 5. Peace Warrants [Repealed.]
- Art. 6. Arrest, G.S. 15-39 to 15-47
- Art. 7. Fugitives from Justice, G.S. 15-48 to 15-54
- Art. 8. Extradition [Transferred.]
- Art. 9. Preliminary Examination [Repealed.]
- Art. 10. Bail [Repealed.]
- Art. 11. Forfeiture of Bail [Repealed.]
- Art. 12. Commitment to Prison, G.S. 15-125 to 15-127
- Art. 13. Venue, G.S. 15-128 to 15-136
- Art. 14. Presentment [Repealed.]
- Art. 15. Indictment, G.S. 15-140 to 15-155
- Art. 15A. Investigation of Offenses Involving Abandonment and Nonsupport of Children, G.S. 15-155.1 to 15-155.3
- Art. 15B. *Pretrial Examination of Witnesses and Exhibits of the State* [Repealed.]
- Art. 16. Trial before Justice [Repealed.]
- Art. 17. Trial in Superior Court, G.S. 15-162 to 15-176.2
- Art. 17A. Informing Jury in Case Involving Death Penalty, G.S. 15-176.3 to 15-176.8
- Art. 17B. Informing Jury of Possible Punishment upon Conviction, G.S. 15-176.9
- Art. 18. Appeal [Repealed.]
- Art. 19. Execution, G.S. 15-187 to 15-196
- Art. 19A. Credits against the Service of Sentences and for Attainment of Prison Privileges, G.S. 15-196.1 to 15-196.4
- Art. 20. Suspension of Sentence and Probation, G.S. 15-197 to 15-209
- Art. 21. Segregation of Youthful Offenders [Repealed.]
- Art. 22. Review of Criminal Trials [Repealed and Recodified.]
- Art. 23. Expunction of Records [Recodified.]

Chapter 15A. Criminal Procedure Act, G.S. 15A-1 to 15A-2012

Subchapter I. General

- Art. 1. Definitions and General Provisions, G.S. 15A-1 to 15A-101.1
- Art. 2. Jurisdiction [Reserved.]
- Art. 3. Venue, G.S. 15A-131 to 15A-140
- Art. 4. Entry and Withdrawal of Attorney in Criminal Case, G.S. 15A-141 to 15A-144
- Art. 5. Expunction of Records, G.S. 15A-145 to 15A-172
- Art. 6. [Reserved.]

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES

Art. 7. [Reserved.]
Art. 8. Electronic Recording of Interrogations, G.S. 15A-211 to 15A-220
Art. 9. Search and Seizure by Consent, G.S. 15A-221 to 15A-230
Art. 10. Other Searches and Seizures, G.S. 15A-231 to 15A-240
Art. 11. Search Warrants, G.S. 15A-241 to 15A-259
Art. 12. Pen Registers; Trap and Trace Devices, G.S. 15A-260 to 15A-265
Art. 13. DNA Database and Databank, G.S. 15A-266 to 15A-270.1
Art. 14. Nontestimonial Identification, G.S. 15A-271 to 15A-284.49
Art. 14A. Eyewitness Identification Reform Act, G.S. 15A-284.50 to 15A-284.53
Art. 15. Urgent Necessity, G.S. 15A-285
Art. 16. Electronic Surveillance, G.S. 15A-286 to 15A-298
Art. 16A. Discontinuation of Telecommunications Services, G.S. 15A-299

SUBCHAPTER III. CRIMINAL PROCESS

Art. 17. Criminal Process, G.S. 15A-301 to 15A-305
Art. 18. [Reserved.]
Art. 19. [Reserved.]

SUBCHAPTER IV. ARREST

Art. 20. Arrest, G.S. 15A-401 to 15A-409
Art. 21. [Reserved.]
Art. 22. [Reserved.]

SUBCHAPTER V. CUSTODY

Art. 23. Police Processing and Duties upon Arrest, G.S. 15A-501 to 15A-510
Art. 24. Initial Appearance, G.S. 15A-511 to 15A-520
Art. 25. Commitment, G.S. 15A-521 to 15A-530
Art. 26. Bail, G.S. 15A-531 to 15A-547.6
Art. 27. [Reserved.]
Art. 28. [Reserved.]

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS

Art. 29. First Appearance Before District Court Judge, G.S. 15A-601 to 15A-610
Art. 30. Probable-Cause Hearing, G.S. 15A-611 to 15A-620
Art. 31. The Grand Jury and Its Proceedings, G.S. 15A-621 to 15A-640
Art. 32. Indictment and Related Instruments, G.S. 15A-641 to 15A-646
Art. 33. [Reserved.]
Art. 34. [Reserved.]

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS

Art. 35. Speedy Trial [Repealed.]
Art. 36. Special Criminal Process for Attendance of Defendants, G.S. 15A-711 to 15A-720
Art. 37. Uniform Criminal Extradition Act, G.S. 15A-721 to 15A-760
Art. 38. Interstate Agreement on Detainers, G.S. 15A-761 to 15A-770
Art. 39. Other Special Process for Attendance of Defendants, G.S. 15A-771 to 15A-773

Art. 40. [Reserved.]
Art. 41. [Reserved.]

Subchapter VIII. Attendance of Witnesses; Depositions

Art. 42. Attendance of Witnesses Generally, G.S. 15A-801 to 15A-810
Art. 43. Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings, G.S. 15A-811 to 15A-820
Art. 44. Securing Attendance of Prisoners as Witnesses, G.S. 15A-821 to 15A-823

Subchapter VIII-A. Rights of Crime Victims and Witnesses

Art. 45. Fair Treatment for Certain Victims and Witnesses, G.S. 15A-824 to 15A-829
Art. 46. Crime Victims' Rights Act, G.S. 15A-830 to 15A-849
Art. 47. [Reserved.]

Subchapter IX. Pretrial Procedure

Art. 48. Discovery in the Superior Court, G.S. 15A-901 to 15A-920
Art. 49. Pleadings and Joinder, G.S. 15A-921 to 15A-930
Art. 50. Voluntary Dismissal, G.S. 15A-931 to 15A-940
Art. 51. Arraignment, G.S. 15A-941 to 15A-950
Art. 52. Motions Practice, G.S. 15A-951 to 15A-970
Art. 53. Motion to Suppress Evidence, G.S. 15A-971 to 15A-980
Art. 54. [Reserved.]
Art. 55. [Reserved.]

Subchapter X. General Trial Procedure

Art. 56. Incapacity to Proceed, G.S. 15A-1001 to 15A-1010
Art. 57. Pleas, G.S. 15A-1011 to 15A-1020
Art. 58. Procedures Relating to Guilty Pleas in Superior Court, G.S. 15A-1021 to 15A-1029
Art. 58A. Procedures Relating to Felony Guilty Pleas in District Court, G.S. 15A-1029.1 to 15A-1030
Art. 59. Maintenance of Order in the Courtroom, G.S. 15A-1031 to 15A-1039
Art. 60. [Reserved.]
Art. 61. Granting of Immunity to Witnesses, G.S. 15A-1051 to 15A-1060
Art. 62. Mistrial, G.S. 15A-1061 to 15A-1070
Art. 63. [Reserved.]
Art. 64. [Reserved.]

Subchapter XI. Trial Procedure In District Court

Art. 65. In General, G.S. 15A-1101 to 15A-1110
Art. 66. Procedure for Hearing and Disposition of Infractions, G.S. 15A-1111 to 15A-1118
Art. 67 to 70. [Reserved.]

Subchapter XII. Trial Procedure in Superior Court

Art. 71. Right to Trial by Jury, G.S. 15A-1201 to 15A-1210
Art. 72. Selecting and Impaneling the Jury, G.S. 15A-1211 to 15A-1220

Art. 73. Criminal Jury Trial in Superior Court, G.S. 15A-1221 to 15A-1250
Art. 74 to 77. [Reserved.]

Subchapter XIII. Disposition of Defendants

Art. 78. Order of Commitment to Imprisonment, G.S. 15A-1301 to 15A-1310
Art. 79. [Reserved.]
Art. 80. Defendants Found Not Guilty by Reason of Insanity, G.S. 15A-1321 to 15A-1330
Art. 81. General Sentencing Provisions, G.S. 15A-1331 to 15A-1340
Art. 81A. Sentencing Persons Convicted of Felonies, G.S. 15A-1340.1 to 15A-1340.9
Art. 81B. Structured Sentencing of Persons Convicted of Crimes, G.S. 15A-1340.10 to 15A-1340.33
Art. 81C. Restitution, G.S. 15A-1340.34 to 15A-1340.49
Art. 81D. Permanent No Contact Order Against Convicted Sex Offender, G.S. 15A-1340.50
Art. 82. Probation, G.S. 15A-1341 to 15A-1350
Art. 83. Imprisonment, G.S. 15A-1351 to 15A-1360
Art. 84. Fines, G.S. 15A-1361 to 15A-1367
Art. 84A. Post-Release Supervision, G.S. 15A-1368 to 15A-1368.6
Art. 84B. Medical Release of Inmates, G.S. 15A-1369 to 15A-1370
Art. 85. Parole, G.S. 15A-1370.1 to 15A-1380
Art. 85A. Parole of Certain Convicted Felons [Repealed.]
Art. 85B. Review of Sentences of Life Imprisonment Without Parole [Repealed.]
Art. 86. Reports of Dispositions of Criminal Cases, G.S. 15A-1381 to 15A-1390
Art. 87. [Reserved.]

Subchapter XIV. Correction of Errors And Appeal

Art. 88. Post-Trial Motions and Appeal, G.S. 15A-1401 to 15A-1410
Art. 89. Motion for Appropriate Relief and Other Post-Trial Relief, G.S. 15A-1411 to 15A-1430
Art. 90. Appeals from Magistrates and District Court Judges, G.S. 15A-1431 to 15A-1440
Art. 91. Appeal to Appellate Division, G.S. 15A-1441 to 15A-1459
Art. 92. Innocence Inquiry Commission, G.S. 15A-1460 to 15A-1475
Art. 93 to 99. [Reserved.]

Subchapter XV. Capital Punishment

Art. 100. Capital Punishment, G.S. 15A-2000 to 15A-2009
Art. 101. North Carolina Racial Justice Act, G.S. 15A-2010 to 15A-2012
Chapter 15B. Victims Compensation, G.S. 15B-1 to 15B-37
Art. 1. Crime Victims Compensation Act, G.S. 15B-1 to 15B-29
Art. 2. The Crime Victims Financial Recovery Assistance Act, G.S. 15B-30 to 15B-37
Chapter 15C. Address Confidentiality Program, G.S. 15C-1 to 15C-13
Chapter 16. Gaming Contracts and Futures, G.S. 16-1 to 16-6
Art. 1. Gaming Contracts, G.S. 16-1 to 16-2
Art. 2. Contracts for "Futures", G.S. 16-3 to 16-6
Chapter 17. Habeas Corpus, G.S. 17-1 to 17-46

Art. 1. Constitutional Provisions, G.S. 17-1 to 17-2
Art. 2. Application, G.S. 17-3 to 17-8
Art. 3. Writ, G.S. 17-9 to 17-12
Art. 4. Return, G.S. 17-13 to 17-15
Art. 5. Enforcement of Writ, G.S. 17-16 to 17-28
Art. 6. Proceedings and Judgment, G.S. 17-29 to 17-38
Art. 7. Habeas Corpus for Custody of Children in Certain Cases [Repealed.]
Art. 8. Habeas Corpus Ad Testificandum, G.S. 17-41 to 17-46
Chapter 17A. Law-Enforcement Officers [Recodified.]
Chapter 17B. North Carolina Criminal Justice Education and Training System [Recodified.]
Chapter 17C. North Carolina Criminal Justice Education and Training Standards Commission, G.S. 17C-1 to 17C-13
Chapter 17D. North Carolina Justice Academy, G.S. 17D-1 to 17D-4
Chapter 17E. North Carolina Sheriffs' Education and Training Standards Commission, G.S. 17E-1 to 17E-12
Chapter 18. Regulation of Intoxicating Liquors [Repealed.]
Chapter 18A. Regulation of Intoxicating Liquors [Repealed.]

Chapter 15.

Criminal Procedure.

Article 1.

General Provisions.

Sec.
15-1. Statute of limitations for misdemeanors.
15-2, 15-3. [Repealed.]
15-4. Accused entitled to counsel.
15-4.1 through 15-5.4. [Repealed.]
15-6. Imprisonment to be in county jail.
15-6.1. Changing place of confinement of prisoner committing offense.
15-6.2. Concurrent sentences for offenses of different grades or to be served in different places.
15-6.3. Credit for service of sentence while in another jurisdiction.
15-7. Postmortem examinations directed.
15-8. Stolen property returned to owner.
15-9. [Repealed.]
15-10. Speedy trial or discharge on commitment for felony.
15-10.1. Detainer; purpose; manner of use.
15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner.
15-10.3. Mandatory disposition of detainers — procedure; return of prisoner after trial.
15-10.4. Mandatory disposition of detainers — exception as to prisoners who are mentally ill.

Article 2.

Record and Disposition of Seized, etc., Articles.

15-11. Sheriffs and police departments to maintain register of personal property confiscated, seized or found.
15-11.1. Seizure, custody and disposition of articles; exceptions.
15-11.2. Disposition of unclaimed firearms not confiscated or seized as trial evidence.
15-12. Publication of notice of unclaimed property; advertisement and sale or donation of unclaimed bicycles.
15-13. Public sale 30 days after publication of notice.
15-14. Notice of sale.
15-14.1. Sale of property through electronic auction.
15-15. Disbursement of proceeds of sale.
15-16. Nonliability of officers.
15-17. Construction of Article.

Article 3.

Warrants.

Sec.
15-18 through 15-24. [Repealed.]
15-24.1. Amendment of warrant to show ownership of property.

Article 4.

Search Warrants.

15-25 through 15-27.1. [Repealed.]

Article 4A.

Administrative Search and Inspection Warrants.

15-27.2. Warrants to conduct inspections authorized by law.

Article 5.

Peace Warrants.

15-28 through 15-38. [Repealed.]

Article 6.

Arrest.

15-39 through 15-42. [Repealed.]
15-43. House broken open to prevent felony.
15-44 through 15-47. [Repealed.]

Article 7.

Fugitives from Justice.

15-48 through 15-52. [Repealed.]
15-53. Governor may employ agents, and offer rewards.
15-53.1. Governor may offer rewards for information leading to arrest and conviction.
15-54. Officer entitled to reward.

Article 8.

Extradition.

15-55 through 15-84. [Transferred.]

Article 9.

Preliminary Examination.

15-85 through 15-101. [Repealed.]

Article 10.

Bail.

15-102 through 15-109. [Repealed.]

Article 11.
Forfeiture of Bail.

Sec.
15-110 through 15-124. [Repealed.]

Article 12.
Commitment to Prison.

15-125. [Repealed.]
15-126. Commitment to county jail.
15-127. [Repealed.]

Article 13.
Venue.

15-128. [Repealed.]
15-129. In offenses on waters dividing counties.
15-130. Assault in one county, death in another.
15-131. Assault in this State, death in another.
15-132. Person in this State injuring one in another.
15-133. In county where death occurs.
15-134 through 15-136. [Repealed.]

Article 14.
Presentment.

15-137 through 15-139. [Repealed.]

Article 15.
Indictment.

15-140 through 15-143. [Repealed.]
15-144. Essentials of bill for homicide.
15-144.1. Essentials of bill for rape.
15-144.2. Essentials of bill for sex offense.
15-145. Form of bill for perjury.
15-146. Bill for subornation of perjury.
15-147. [Repealed.]
15-148. Manner of alleging joint ownership of property.
15-149. Description in bill for larceny of money.
15-150. Description in bill for embezzlement.
15-151. Intent to defraud; larceny and receiving.
15-152. [Repealed.]
15-153. Bill or warrant not quashed for informality.
15-154. [Repealed.]
15-155. Defects which do not vitiate.

Article 15A.
Investigation of Offenses Involving Abandonment and Nonsupport of Children.

15-155.1. Reports to district attorneys of Work First Family Assistance and out-of-wedlock births.
15-155.2. District attorney to take action on report of aid to dependent child [Work First Family Assistance] or illegitimate [out-of-wedlock] birth.
Sec.
15-155.3. Disclosure of information by district attorney or agent.

Article 15B.
Pretrial Examination of Witnesses and Exhibits of the State.

15-155.4, 15-155.5. [Repealed.]

Article 16.
Trial before Justice.

15-156 through 15-161. [Repealed.]

Article 17.
Trial in Superior Court.

15-162 through 15-165. [Repealed.]
15-166. Exclusion of bystanders in trial for rape and sex offenses.
15-167. Extension of session of court by trial judge.
15-168. Justification as defense to libel.
15-169. Conviction of assault, when included in charge.
15-170. Conviction for a less degree or an attempt.
15-171. [Repealed.]
15-172. Verdict for murder in first or second degree.
15-173. Demurrer to the evidence.
15-173.1 through 15-175. [Repealed.]
15-176. Prisoner not to be tried in prison uniform.
15-176.1. District attorney may argue for death penalty.
15-176.2. [Repealed.]

Article 17A.
Informing Jury in Case Involving Death Penalty.

15-176.3. Informing and questioning potential jurors on consequences of guilty verdict.
15-176.4. Instruction to jury on consequences of guilty verdict.
15-176.5. Argument to jury on consequences of guilty verdict.
15-176.6 through 15-176.8. [Reserved.]

Article 17B.
Informing Jury of Possible Punishment upon Conviction.

15-176.9. Loss of motor vehicle driver's license.

Article 18.
Appeal.

15-177 through 15-186.1. [Repealed.]

Article 19.

Execution.

Sec.
15-187. Death by administration of lethal drugs.
15-188. Manner and place of execution.
15-189. Sentence of death; prisoner taken to penitentiary.
15-190. Person or persons to be designated by warden to execute sentence; supervision of execution; who shall be present.
15-191. Pending sentences unaffected.
15-192. Certificate filed with clerk.
15-193. Notice of reprieve or new trial.
15-194. Time for execution.
15-195. Prisoner taken to place of trial when new trial granted.
15-196. [Repealed.]

Article 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

15-196.1. Credits allowed.
15-196.2. Allowance in cases of multiple sentences.
15-196.3. Effect of credit.
15-196.4. Procedures for judicial award.

Article 20.

Suspension of Sentence and Probation.

15-197 through 15-202. [Repealed.]
15-203. Duties of the Secretary of Correction; appointment of probation officers; reports; requests for extradition.
15-203.1. [Repealed.]
15-204. Assignment, compensation and oath of probation officers.
15-205. Duties and powers of the probation officers.
15-205.1. [Repealed.]
15-206. Cooperation with Department of Correction and officials of local units.
15-207. Records treated as privileged information.
15-208. [Repealed.]
15-209. Accommodations for probation offices.

Article 21.

Segregation of Youthful Offenders.

15-210 through 15-216. [Repealed.]

Article 22.

Review of Criminal Trials.

15-217. [Repealed.]
15-217.1. [Recodified.]
15-218 through 15-222. [Repealed.]

Article 23.

Expunction of Records.

15-223, 15-224. [Recodified.]

Editor's Note. — Session Laws 1973, c. 1286, repealed, transferred and amended numerous sections in this Chapter and elsewhere in the General Statutes, largely relating to pretrial procedure, and enacted a new Chapter 15A, the Criminal Procedure Act.

Session Laws 1973, c. 1286, ss. 27, 28, and 31, provided: "Sec. 27. All statutes which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

"Sec. 28. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except G.S. 12 [G.S. 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amended Session Laws 1973, c. 1286, s. 31, so as to make the provisions of the act that were to become effective on July 1, 1975 effective Sept. 1, 1975.

ARTICLE 1.

General Provisions.

§ 15-1. Statute of limitations for misdemeanors.

The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State. (1826, c. 11; R.C., c. 35, s. 8; Code, s. 1177; Rev., s. 3147; 1907, c. 408; C.S., s. 4512; 1943, c. 543.)

Cross References. — As to what are misdemeanors, see G.S. 14-1. As to punishment for misdemeanors, see G.S. 14-3.

Legal Periodicals. — For case law survey as to criminal law and procedure, see 44 N.C.L. Rev. 970 (1966); 45 N.C.L. Rev. 910 (1967).

For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. General Consideration.
II. Particular Offenses.

I. GENERAL CONSIDERATION.

Section Not Repealed. — There is no stated purpose in G.S. 15A-641 that indicates the legislature intended to repeal this section. Furthermore, G.S. 15A-641 appears to be an effort by the legislature to codify the common law that permitted the use of presentments by grand juries but prohibited the arrest and trial of defendants on a presentment. Thus, this section has not been repealed and remains a part of the law of this State; it would support the order of the trial court denying defendant's motion to dismiss. State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

Effect of Statute on Privilege Against Self-Incrimination. — A witness cannot invoke the privilege against self-incrimination where he is either immune from prosecution, or where prosecution is barred by statute of limitations. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

A legal limitation of time of prosecution is in practical effect expurgation of crime; so after the lapse of time fixed by law, the privilege against self-incrimination ceases. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Meaning of "Deceit". — There has never been such an indictable offense as "deceit" but the meaning of this section has always been that misdemeanors, the gist of which was a malice or deceit, were within the exception of the section as formerly appearing. State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

There being no such offense as "deceit," this term would apply to "cheating by false token" of which deceit was the gist but would not include "conspiracy to cheat" the gist of which offense is the conspiracy and the cheating but an aggravation. "Deceit" is not restricted to "cheating by false token". It is an instance of an offense coming within the general description of misdemeanors by deceit. State v. Christiansbury, 44 N.C. 46 (1852); State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

Meaning of "Malicious Misdemeanors". — When, in the former wording of this section, the Legislature used the words "other malicious misdemeanors," which immediately followed the words "malicious mischief," it evidently intended to describe offenses of which malice was a necessary ingredient to constitute the criminal act, as in the case of malicious mischief. It was not the purpose to include within the exception from the operation of this section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the court might consider in imposing the punishment. State v. Frisbee, 142 N.C. 671, 55 S.E. 722 (1906).

What Constitutes a Presentment. — See State v. Morris, 104 N.C. 537, 10 S.E. 454 (1889).

Statute Tolled on Date of Indictment or Presentment. — In criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations. State v. Underwood, 244 N.C. 68, 92 S.E.2d 461 (1956); State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

The indictment marks the beginning of the prosecution and it arrests the running of the statute of limitations. State v. Williams, 151 N.C. 660, 65 S.E. 908 (1909).

Even If Defendant Is Apprehended and Tried More Than Two Years After Offense. — An indictment or presentment marks the beginning of the prosecution so as to toll the statute of limitations, even though defendant be apprehended and tried more than two years after the offense was committed. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

When Statute Tolled on Appeal to Superior Court. — In all misdemeanor cases, where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal to the superior court the accused may be tried upon the original warrant and the statute of limitations is tolled from the date of the issuance of the warrant. State v. Underwood, 244 N.C. 68, 92 S.E.2d 461 (1956); State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

Entry of Nolle Prosequi "With Leave." — This section does not begin to run from an entry of nolle prosequi "with leave." State v. Williams, 151 N.C. 660, 65 S.E. 908 (1909).

Effect of Preliminary Warrants. — There is no saving clause in this section as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards. State v. Hedden, 187 N.C. 803, 123 S.E. 65 (1924).

Void Warrant Does Not Toll Statute. — The issuance of a void warrant in a misdemeanor prosecution does not toll the running of this section, and where on appeal from a conviction upon such warrant in an inferior court defendant is tried upon an identical indictment returned by the grand jury more than two years after the commission of the offense, he is entitled to quashal of the indictment. State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

Defective Indictments Exception Not Applicable to Warrants. — The statute of limitations had run as a result of the defendant being charged with a fatally defective warrant; although defective indictments may be refiled within one year of dismissal, no such exception exists for defective warrants. State v. Madry, 140 N.C. App. 600, 537 S.E.2d 827, 2000 N.C. App. LEXIS 1240 (2000).

Trial on Second Bill After Two Years Barred. — Even an indictment within the statutory time limit will not uphold a trial and conviction on a second bill found after the statutory period. State v. Tomlinson, 25 N.C. 32 (1842); State v. Hedden, 187 N.C. 803, 123 S.E. 65 (1924).

No statute of limitation bars the prosecution of a felony. State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969).

Where a warrant charging a misdemeanor is amended to charge a felony, defendant's plea of the statute of limitations on the misdemeanor count becomes immaterial. State v. Sanderson, 213 N.C. 381, 196 S.E. 324 (1938).

Necessity for Pleading Statute. — For a person charged with the commission of a criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court. State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

Statute Not Presumed to Have Run. — Upon a trial on indictment for the sale of intoxicants where there was evidence of sales at undisclosed times, it would not be presumed that such sales occurred more than two years next preceding the prosecution when defendant has not pleaded this section, or in apt time called it to the court's attention or offered evidence as to the dates of sale. State v. Colson, 222 N.C. 28, 21 S.E.2d 808 (1942).

Jury is not restricted to the time stated in the indictment, but is at liberty, as directed by the trial judge, to consider acts charged and proved within the two years next before the finding of the indictment. State v. Newsome, 47 N.C. 173 (1855).

Wrong Name in Bill of Indictment. — A bill of indictment against a person by a wrong name, which is pleaded to in abatement, and the plea found, is, nevertheless, the same cause of action, and the elapse of two years is no bar to prosecution. State v. Hailey, 51 N.C. 42 (1858).

Applied in State v. Watts, 32 N.C. 369 (1849); State v. Claywell, 98 N.C. 731, 3 S.E. 920 (1887); United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982).

Cited in State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986); Dewitt v. Eveready Battery Co., 144 N.C. App. 143, 550 S.E.2d 511, 2001 N.C. App. LEXIS 432 (2001).

II. PARTICULAR OFFENSES.

Adultery is subject to two-year statute of limitations. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Bastardy proceedings are not governed by this section. State v. Perry, 122 N.C. 1043, 30 S.E. 139 (1898).

Conspiracy. — The section has no application to conspiracy, which is a felony. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901).

Each Overt Act of Conspiracy Tolls Statute. — A conspiracy is a continuing offense so that the statute of limitations is tolled as to the original conspiracy each time an overt act is committed in furtherance of the purpose and design of the conspiracy. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Where a count and the indictment alleged that a conspiracy continued from time to time with the commission of overt acts by the alleged conspirators in furtherance of conspiracy and to effectuate its unlawful purpose within two years of the finding of the indictment, the trial court correctly overruled defendants' motion to quash the first count in the indictment on the ground that a prosecution on such count was barred by this section. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Conspiracy to commit a misdemeanor is a misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Influencing Agents and Servants. — Violation of G.S. 14-353, which makes it a crime to influence agents and servants to violate duties owed employers, is not a malicious misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Public Nuisances. — No length of possession can bar an action to abate a public nuisance. State v. Holman, 104 N.C. 861, 10 S.E. 758 (1889).

§§ 15-2, 15-3: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to criminal process, see G.S. 15A-301 through 15A-305.

§ 15-4. Accused entitled to counsel.

Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (1777, c. 115, s. 85, P.R.; R.C., c. 35, s. 13; Code, s. 1182; Rev., s. 3150; C.S., s. 4515.)

Cross References. — As to constitutional provisions for counsel, see the N.C. Const., Art. I, § 23, and U.S. Const., Amend. VI. As to court's power to limit argument, see G.S. 7A-97.

Legal Periodicals. — For note on the right of counsel, see 32 N.C.L. Rev. 331 (1954).

CASE NOTES

Right Is Constitutional. — In all criminal prosecutions every man has the right to have counsel for his defense under N.C. Const., Art. I, § 23. State v. Sykes, 79 N.C. 618 (1878); State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

Right Is a Mandate in Capital Felony Cases. — Where the crime charged is a capital felony this right becomes a mandate. State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943); State v. Hedgebeth, 228 N.C. 259, 45 S.E.2d 563 (1947), cert. dismissed, 334 U.S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739 (1948).

Counsel Allowed Reasonable Time to Prepare Case. — The right to counsel and the right of confrontation are closely interrelated and, together, form an integral part of a fair trial. Hence, this requirement, as incorporated in this section, was not intended to be a mere formality. It does not contemplate that counsel shall be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense. State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943).

Right Following Waiver at Prior Stage. — Where defendant had waived his right to have assigned counsel at the preliminary hearing, but made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court, he was entitled to be represented by counsel. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Applied in State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967).

Cited in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932); Hammond v. North Carolina, 227 F. Supp. 1 (E.D.N.C. 1964); State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969); State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972).

§§ 15-4.1 through 15-5.1: Repealed by Session Laws 1969, c. 1013, s. 12.

§ 15-5.2: Repealed by Session Laws 1969, c. 1013, s. 6.

§§ 15-5.3, 15-5.4: Repealed by Session Laws 1969, c. 1013, s. 12.

§ 15-6. Imprisonment to be in county jail.

No person shall be imprisoned except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county. (1797, c. 474, s. 3, P.R.; R.C., c. 35, s. 6; 1879, c. 12; Code, s. 1174; Rev., s. 3151; C.S., s. 4517; 1973, c. 1141, s. 1.)

OPINIONS OF ATTORNEY GENERAL

This section has two prongs. First, it makes clear the type of facility in which a convicted defendant shall not serve a term of imprisonment, unless permitted under other legislation, and second, it provides that a person may only be sentenced to imprisonment in the county where the crime was committed. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Place of Imprisonment Where Sentence Is Less Than or Greater Than 180 Days. — Absent specific statutory authorization (see, e.g., G.S. 15A-711, 148-32.1, 162-38 to 162-40), imprisonment of misdemeanants with sentences of 180 days or less must be in the local confinement facility of the county where the crime was committed. If the sentence is greater than 180 days, commitment may be either to such a local facility or to the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Section Overridden by § 15A-1352 as to Certain Criminals. — While G.S. 15-6 applies to both felons and misdemeanants, G.S. 15A-1352 overrides G.S. 15-6 to the extent it provides for certain felons and misdemeanants to be sentenced to terms of imprisonment under the jurisdiction of the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Effect of § 15A-1352 on Section. — Section 15A-1352 is an exception to G.S. 15-6 as to those misdemeanants with sentences of more than 180 days, because they may be sentenced to serve their term of imprisonment under the jurisdiction of the Department of Correction, but as to those not placed in the custody of the Department of Correction, the only effect of G.S. 15A-1352 is to broaden the term "common jail" to include other types of local facilities which may be used under appropriate circumstances. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

County of Venue Irrelevant in Determining Place of Imprisonment. — Even though the venue of a criminal trial may properly be in a county other than the one in which the crime occurred, to the extent that G.S. 15-6 applies, it requires imprisonment to be in the county jail of the county where the crime occurred. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

§ 15-6.1. Changing place of confinement of prisoner committing offense.

In all cases where a defendant has been convicted in a court inferior to the superior court and sentenced to a term in the county jail or to serve in some county institution other than under the supervision of the State Department of Correction, and such defendant is subsequently brought before such court for an offense committed prior to the expiration of the term to be served in such county institution, upon conviction, plea of guilty or nolo contendere, the judge shall have the power and authority to change the place of confinement of the prisoner and commit such defendant to work under the supervision of the State Department of Correction. This provision shall apply whether or not the terms of the new sentence are to run concurrently with or consecutive to the remaining portion of the old sentence. (1953, c. 778; 1957, c. 65, s. 11; 1967, c. 996, s. 16.)

§ 15-6.2. Concurrent sentences for offenses of different grades or to be served in different places.

When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement. (1955, c. 57.)

Legal Periodicals. — For comment on this section, see 35 N.C.L. Rev. 112 (1956).

CASE NOTES

Concurrent sentences may be imposed for separate offenses, even though one is for a misdemeanor and the other a felony, so that one is required to be served in the State's prison and one in the county jail. State v. Brooks, 271 N.C. 462, 156 S.E.2d 676 (1967).

Applied in State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967).

Cited in State v. Fields, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

§ 15-6.3. Credit for service of sentence while in another jurisdiction.

When a person in actual confinement under sentence of another jurisdiction is brought for trial before a court of this State, the court may, upon sentencing, specifically impose a sentence to be concurrently served and direct that such person receive credit against the sentence imposed for all time subsequently served in the jurisdiction possessing physical custody of such person. (1971, c. 828.)

§ 15-7. Postmortem examinations directed.

In all cases of homicide, any officer prosecuting for the State may, at any time, direct a postmortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the State. (R.C., c. 35, s. 49; Code, s. 1214; Rev., s. 3152; C.S., s. 4518; 1973, c. 1141, s. 2.)

Cross References. — As to limitations on right to perform autopsies, see G.S. 130A-398.

CASE NOTES

Section Valid. — This section is a valid exercise of the police power of the State. Withers v. Board of Comm'rs, 163 N.C. 341, 79 S.E. 615 (1913).

Liability for Wrongful Mutilation. — Coroner and physicians performing autopsy may be held liable by father of deceased for wrongful mutilation when the autopsy is ordered by the coroner on his own initiative solely to ascertain the cause of death without suspicion of foul play, since in such case the coroner is without authority to order the autopsy, and his direction therefor can confer no immunity upon the physicians. Gurganious v. Simpson, 213 N.C. 613, 197 S.E. 163 (1938).

§ 15-8. Stolen property returned to owner.

Upon the conviction of any person for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose. (21 Hen. VIII, c. 11; R.C., c. 35, s. 34; Code, s. 1201; Rev., s. 3153; C.S., s. 4519; 1943, c. 543.)

§ 15-9: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-10. Speedy trial or discharge on commitment for felony.

When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the State could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment: Provided, the judge presiding may, in his discretion, refuse to discharge such person if the time between the first and second terms of the court be less than four months. (1868-9, c. 116, s. 33; Code, s. 1658; Rev., s. 3155; 1913, c. 2; C.S., s. 4521.)

CASE NOTES

Section is for the protection of persons held without bail. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied and appeal dismissed, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407 (1974); Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

It requires simply that under certain circumstances the prisoner be discharged from custody. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied and appeal dismissed, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968).

This section merely provides that under certain circumstances a defendant who has not been speedily tried shall be released from custody. It does not require that the prosecution against him be dismissed. State v. Hardin, 20 N.C. App. 193, 201 S.E.2d 74 (1973).

In a case where the court has ordered that defendant's trial must begin within a certain time period or he must be discharged, failure to try defendant within that time period, absent determination that defendant has been deprived of a speedy trial, results only in release of defendant from custody, but not dismissal of charges against him. State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407, cert. denied and appeal dismissed, 285 N.C. 376, 205 S.E.2d 101 (1974).

And not that he go quit of further prosecution. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied and appeal dismissed, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968).

This section does not bar further prosecution. Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

Requirements Peremptory. — This section is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. State v. Webb, 155 N.C. 426, 70 S.E. 1064 (1911).

Remedy Is by Certiorari. — A certiorari is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of this section. State v. Webb, 155 N.C. 426, 70 S.E. 1064 (1911).

"Speedy" cannot be defined in specific terms of days, months or years and the question of whether a defendant has been denied a speedy trial must be answered in light of the facts of each particular case. State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407, cert. denied and appeal dismissed, 285 N.C. 376, 205 S.E.2d 101 (1974).

But Four Factors Are Considered in Determining Whether Denial of Speedy Trial Is Unconstitutional. — The four generally accepted interrelated factors to be considered together in reaching a determination of whether the denial of a speedy trial assumes due process proportions are the length of the delay, the reason for the delay, the prejudice to the defendant, and waiver by defendant. State v. Roberts, 18 N.C. App. 388, 197 S.E.2d 54, cert. denied and appeal dismissed, 283 N.C. 758, 198 S.E.2d 728 (1973); State v. O'Kelly, 285 N.C. 368, 204 S.E.2d 672 (1974); State v. Wilburn, 21 N.C. App. 140, 203 S.E.2d 407, cert. denied and appeal dismissed, 285 N.C. 376, 205 S.E.2d 101 (1974).

Whether Right Denied Is Determined in Circumstances of Each Case. — Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in the circumstances of each case. State v. Setzer, 21 N.C. App. 511, 204 S.E.2d 921 (1974).

Balancing Test. — A claim that a defendant has been denied his right to a speedy trial is subject to a balancing test in which the conduct of both the prosecutor and defendant are weighed. State v. Roberts, 18 N.C. App. 388, 197 S.E.2d 54 (1973).

Convict in Penitentiary for Unrelated Crime Not Excepted from Guarantee. — A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him. State v. O'Kelly, 285 N.C. 368, 204 S.E.2d 672 (1974).

Burden is on an accused who asserts denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Arnold, 21 N.C. App. 92, 203 S.E.2d 395, aff'd, 285 N.C. 751, 208 S.E.2d 646 (1974).

Accused waives his right to a speedy trial unless he demands it. State v. Johnson, 3 N.C. App. 420, 165 S.E.2d 27, rev'd on other grounds, 275 N.C. 264, 167 S.E.2d 274 (1969).

§ 15-10.1. Detainer; purpose; manner of use.

Any person confined in the State prison of North Carolina, subject to the authority and control of the State Department of Correction, or any person confined in any other prison of North Carolina, may be held to account for any other charge pending against him only upon a written order from the clerk or judge of the court in which the charge originated upon a case regularly docketed, directing that such person be held to answer the charge pending in such court; and in no event shall the prison authorities hold any person to answer any charge upon a warrant or notice when the charge has not been regularly docketed in the court in which the warrant or charge has been issued: Provided, that this section shall not apply to any State agency exercising supervision over such person or prisoner by virtue of a judgment, order of court or statutory authority. (1949, c. 303; 1953, c. 603; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

§ 15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner.

(a) Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court within the State, shall be brought to trial within eight months after he shall have caused to be sent to the district attorney of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for a final disposition of the criminal charge against him; said request shall be accompanied by a certificate from the Secretary of

Correction stating the term of the sentence or sentences under which the prisoner is being held, the date he was received, and the time remaining to be served; provided that, for good cause shown in open court, the prisoner or his counsel being present, the court may grant any necessary and reasonable continuance.

(b) The Secretary of Correction shall, upon request by the prisoner, inform the prisoner in writing of the source and contents of any charge for which a detainer shall have been lodged against such prisoner as shown by said detainer, and furnished the prisoner with the certificate referred to in subsection (a). (1957, c. 1067, s. 1; 1967, c. 996, s. 15; 1973, c. 47, s. 2; c. 1262, s. 10.)

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Purpose of Section. — The primary purpose of this section is to provide a prisoner with a means by which he may require the State to try all the criminal charges against him to the end that he and the authorities may know the full extent of his debt to society for his criminal activities and that he may plan for his release when the debt has been satisfied. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967).

Effect of Detainer. — The presence of a detainer in a prisoner's file jeopardizes his chances for parole, proper good behavior credits and work release. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967); Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

Compliance with Section Is Required. — A defendant cannot claim the benefits afforded by this section without complying with its terms. State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978).

Where defendant did not follow the requirements of this section by making his demand upon the solicitor (now district attorney) by registered mail, but instead he sent a letter to the clerk of the superior court and the solicitor (now district attorney) did not receive the notice, the defendant is not entitled to his release for failure of the State to bring him to trial within eight months. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967).

An inmate must follow the section's requirements. He must send by registered mail a demand to the district attorney, and sending it to the clerk of the superior court unregistered is insufficient, when the district attorney does not know of the demand. Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

And Failure to Comply Deprives Prisoner of Its Benefit. — Failure to send the motion by registered mail to the district attorney of the judicial district in which the charges are pending will deprive defendant of the benefit of this section. State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976), cert. denied, 429 U.S. 1049, 97 S. Ct. 760, 50 L. Ed. 2d 765 (1977).

Defendant's letter requesting a speedy trial did not comply with the provisions of this section where, for example, he failed to send the letter by registered mail to the district attorney; he failed to give notice of his place of confinement; and he failed to include a certificate from the Secretary of Correction. Having failed to follow the provisions of the statute, defendant was not entitled to the statutory relief. State v. Wright, 28 N.C. App. 426, 221 S.E.2d 751, aff'd, 290 N.C. 45, 224 S.E.2d 624 (1976), cert. denied, 429 U.S. 1049, 97 S. Ct. 760, 50 L. Ed. 2d 765 (1977).

Oral requests for trial made by defendant's counsel to the district attorney were not sufficient to entitle defendant to a dismissal under the provisions of subsection (a) of this section. State v. McKoy, 33 N.C. App. 304, 235 S.E.2d 98, rev'd on other grounds, 294 N.C. 134, 240 S.E.2d 383 (1978).

Applied in State v. Watts, 25 N.C. App. 104, 212 S.E.2d 224 (1975); State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Cited in Courtney v. Pinion, 420 F. Supp. 890 (W.D.N.C. 1976); State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); Howell v. Barker, 684 F. Supp. 132 (E.D.N.C. 1988).

§ 15-10.3. Mandatory disposition of detainers — procedure; return of prisoner after trial.

The district attorney, upon receipt of the written notice and request for a final disposition as hereinbefore specified, shall make application to the court in which said charge is pending for a writ of habeas corpus ad prosequendum and the court upon such application shall issue such writ to the Secretary of Correction requiring the prisoner to be delivered to said court to answer the pending charge and to stand trial on said charge within the time hereinbefore provided; upon completion of said trial, the prisoner shall be returned to the State prison system to complete service of the sentence or sentences under which he was held at the time said writ was issued. (1957, c. 1067, s. 2; 1967, c. 996, s. 15; 1973, c. 47, s. 2; c. 1262, s. 10.)

§ 15-10.4. Mandatory disposition of detainers — exception as to prisoners who are mentally ill.

The provisions of G.S. 15-10.2 and 15-10.3 shall not apply to any prisoner who has been transferred and assigned for observation or treatment to any unit of the prison system which is maintained for those prisoners who are mentally ill or are suffering from mental disorders. (1957, c. 1067, s. 3.)

ARTICLE 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11. Sheriffs and police departments to maintain register of personal property confiscated, seized or found.

Each sheriff and police department in this State is hereby required to keep and maintain a book or register, and it shall be the duty of each sheriff and police department to keep a record therein of all articles of personal property which may be seized or confiscated by him or it, or of which he or it may have become possessed in any way in the discharge of his duty. Said sheriffs and police departments shall cause to be kept in said registers a description of such property, the name of the person from whom it was seized, if such name be known, the date and place of its seizure, and, where the article was not taken from the person of a suspect or prisoner, a brief recital of the place and circumstances concerning the possession thereof by such sheriff and police department. Such sheriff and police department shall also keep in said register appropriate entries showing the manner, date, and to whom said articles are disposed of or delivered, and, if sold as hereinafter provided, a record showing the disposition of the proceeds arising from such sale. (1939, c. 195, s. 1; 1973, c. 1141, s. 3.)

§ 15-11.1. Seizure, custody and disposition of articles; exceptions.

(a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner or a person, firm or corporation entitled to possession or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney refuses to release such property, the lawful owner or a person, firm or corporation entitled to possession may make application to the court for return of the property. The court, after notice to all parties, including the defendant, and after hearing, may in its discretion order any or all of the property returned to the lawful owner or a person, firm or corporation entitled to possession. The court may enter such order as may be necessary to assure that the evidence will be available for use as evidence at the time of trial, and will otherwise protect the rights of all parties. Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

(b) In the case of unknown or unapprehended defendants or of defendants willfully absent from the jurisdiction, the court shall determine whether an attorney should be appointed as guardian ad litem to represent and protect the interest of such unknown or absent defendants. Appointment shall be in accordance with rules adopted by the Office of Indigent Defense Services. The judicial findings concerning identification or value that are made at such hearing whereby property is returned to the lawful owner or a person, firm, or corporation entitled to possession, may be admissible into evidence at the trial. After final judgment all property lawfully seized by or otherwise coming into the possession of law-enforcement authorities shall be disposed of as the court or magistrate in its discretion orders, and may be forfeited and either sold or destroyed in accordance with due process of law.

(b1) Notwithstanding subsections (a) and (b) of this section or any other provision of law, if the property seized is a firearm and the district attorney determines the firearm is no longer necessary or useful as evidence in a criminal trial, the district attorney, after notice to all parties known or believed by the district attorney to have an ownership or a possessory interest in the firearm, including the defendant, shall apply to the court for an order of disposition of the firearm. The judge, after hearing, may order the disposition of the firearm in one of the following ways:

(1) By ordering the firearm returned to its rightful owner, when the rightful owner is someone other than the defendant and upon findings by the court (i) that the person, firm, or corporation determined by the court to be the rightful owner is entitled to possession of the firearm and (ii) that the person, firm, or corporation determined by the court to be the rightful owner of the firearm was unlawfully deprived of the same or had no knowledge or reasonable belief of the defendant's intention to use the firearm unlawfully.

(2) By ordering the firearm returned to the defendant, but only if the defendant is not convicted of any criminal offense in connection with the possession or use of the firearm, the defendant is the rightful owner of the firearm, and the defendant is not otherwise ineligible to possess such firearm.

(3) By ordering the firearm turned over to be destroyed by the sheriff of the county in which the firearm was seized or by his duly authorized agent. The sheriff shall maintain a record of the destruction of the firearm.

(4) By ordering the firearm turned over to a law enforcement agency in the county of trial for (i) the official use of the agency or (ii) sale, trade, or exchange by the agency to a federally licensed firearm dealer in accordance with all applicable State and federal firearm laws. The

court may order a disposition of the firearm pursuant to this subdivision only upon the written request of the head or chief of the law enforcement agency and only if the firearm has a legible, unique identification number. If the law enforcement agency sells the firearm, then the proceeds of the sale shall be remitted to the appropriate county finance officer as provided by G.S. 115C-452 to be used to maintain free public schools. The receiving law enforcement agency shall maintain a record and inventory of all firearms received pursuant to this subdivision.

This subsection (b1) is not applicable to seizures pursuant to G.S. 113-137 of firearms used only in connection with a violation of Article 22 of Chapter 113 of the General Statutes or any local wildlife hunting ordinance.

(c) Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith. (1977, c. 613; 1979, c. 593; 1994, Ex. Sess., c. 16, s. 1; 2000-144, s. 27; 2005-287, s. 1.)

Local Modification. — Mecklenburg: 2005-106, s. 1.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Legal Periodicals. — For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

CASE NOTES

Federal Procedures. — Assuming, without deciding, police department violated G.S. 15-11.1(a) by transferring cash seized under G.S. 90-112 to the federal DEA rather than to North Carolina Board of Education, the United States may adopt a seizure even when the person who seized the property had no authority to do so. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Where the State did not seek forfeiture under G.S. 90-112, the U.S. Attorney General did not abuse his discretion by not discontinuing the federal forfeiture proceeding and by following the equitable sharing provisions of 21 U.S.C. § 881(e)(1)(A) and 19 U.S.C. § 1616a(c)(1)(B)(ii). United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Application of Federal Law. — In a proceeding under G.S. 15-11.1(b1), seeking the destruction of weapons seized from a defendant's house in the execution of a search warrant, it was not error for the trial court to apply the federal law contained in 18 U.S.C.S. § 922(d)(3), prohibiting the transfer of a weapon to an unlawful user of a controlled substance, or in 18 U.S.C.S. § 922(g)(3), prohibiting an unlawful user of a controlled substance from receiving a firearm, as the trial court could not issue an order which would place it or defendant in violation of federal law. State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004).

A violation of this section does not mandate dismissal of the charges against defendant. State v. Ysut Mlo, 335 N.C. 353, 440 S.E.2d 98, cert. denied, 512 U.S. 1224, 114 S. Ct. 2716, 129 L. Ed. 2d 841 (1994).

Where a car was released to the executor of the victim's estate without the authority of the district attorney or the court charges were not dismissed. State v. Ysut Mlo, 335 N.C. 353, 440 S.E.2d 98, cert. denied, 512 U.S. 1224, 114 S. Ct. 2716, 129 L. Ed. 2d 841 (1994).

Substitute Evidence. — State's failure to present the actual money seized from defendant did not prejudice defendant because the jury was able to consider substitute evidence. State v. Davis, 160 N.C. App. 693, 586 S.E.2d 804 (2003).

Seizure of Currency. — Where law enforcement seized currency as potential evidence, once the district attorney determined that the evidence was not needed at trial, he had complete control to release the property to the lawful owner or to another entitled to possession without a court order; the district attorney's failure to designate the property as needed evidence or act in any way to deny release of the proceeds, established conclusively that the district attorney permitted release of the proceeds to the Department of Revenue under subsection (a). State v. Bonds, 120 N.C. App. 546, 463 S.E.2d 298 (1995).

Destruction of Rape Kit. — Defendant's rights were not violated by inadvertent destruction of rape kit by police nor was there any showing of bad faith on the part of the police where there was no reason for the police to believe the rape kit had any exculpatory value at the time of its destruction. State v. Banks, 125 N.C. App. 681, 482 S.E.2d 41 (1997), aff'd, 347 N.C. 390, 493 S.E.2d 58 (1997), cert. denied, 523 U.S. 1128, 118 S. Ct. 1817, 140 L. Ed. 2d 955 (1998).

A trial court could not base a finding that a defendant's spouse was an unlawful user of a controlled substance on her 10 and 14-year-old convictions for marijuana possession; 18 U.S.C.S. § 922(d)(3), prohibits the transfer of firearms to an unlawful user of a controlled substance where the possession of a firearm is concurrent with habitual drug use. State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004).

Order to Destroy Firearms Held Proper. — Trial court's order directing that weapons seized from defendant's residence upon the execution of a search warrant be destroyed was proper, under G.S. 15-11.1(b1), because (1) a deputy sheriff testified that defendant said defendant and his wife used marijuana about every other day, (2) under 18 U.S.C.S. § 922(d)(3), the trial court could not dispose of the weapons to an unlawful user of controlled substances, (3) under 18 U.S.C.S. § 922(g)(3), defendant, as an unlawful user of controlled substances, could not receive the weapons, and (4) under G.S. 15-11.1(b1)(2), the trial court could only return the weapons to defendant if he was not otherwise ineligible to possess them. State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004).

Order to Destroy Firearms Held Improper. — When an officer testified that defendant admitted that he and his wife used marijuana about every other day, that statement was hearsay as to defendant's wife, under G.S. 8C-1, N.C. R. Evid. 801(c), and could not be used as the basis for the trial court's finding that she was an unlawful user of controlled substances; thus, the trial court's order directing the destruction of her firearms, under G.S. 15-11.1(b1), based on this finding, was an abuse of discretion, because the wife was given no opportunity to contest the statement, nor was she represented by counsel at the time the testimony containing it was received. State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004).

Applied in State v. Thompson, 56 N.C. App. 439, 289 S.E.2d 132 (1982); State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

Cited in State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988); United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990); State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997); Seaborn v. Thompson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 24907 (M.D.N.C. Dec. 6, 2001); State v. Hill, 153 N.C. App. 716, 570 S.E.2d 768 (2002).

OPINIONS OF ATTORNEY GENERAL

If money or property is not seized as evidence of a controlled substance law violation, agents of the Department of Revenue may seize it for satisfaction of controlled substance excise taxes without an order from the court having jurisdiction over the criminal offense and without the district attorney's consent provided the seizure otherwise is made in compliance with law. See opinion of Attorney General to Secretary Janice H. Faulkner, 1994 N.C.A.G. 2 (July 19, 1994).

In the absence of a pre-existing valid court order directing that property seized pursuant to a search warrant or other lawful authority be retained by the court or delivered to another court, a law-enforcement agency in possession of the property is not required to obtain a court order prior to releasing it. See opinion of Attorney General to Secretary Janice H. Faulkner, 1994 N.C.A.G. 2 (July 19, 1994).

§ 15-11.2. Disposition of unclaimed firearms not confiscated or seized as trial evidence.

(a) Definition. — For purposes of this section, the term "unclaimed firearm" means a firearm that is found or received by a law enforcement agency and that remains unclaimed by the person who may be entitled to it for a period of 30 days after the publication of the notice required by subsection (b) of this section. The term does not include a firearm that is seized and disposed of pursuant to G.S. 15-11.1 or a firearm that is confiscated and disposed of pursuant to G.S. 14-269.1.

(b) Published Notice of Unclaimed Firearm. — When a law enforcement agency finds or receives a firearm and the firearm remains unclaimed for a period of 180 days, the agency shall publish at least one notice in a newspaper published in the county in which the agency is located. The notice shall include all of the following:

(1) A statement that the firearm is unclaimed and is in the custody of the law enforcement agency.

(2) A statement that the firearm may be sold or otherwise disposed of unless the firearm is claimed within 30 days of the date of the publication of the notice.

(3) A brief description of the firearm and any other information that the chief or head of the law enforcement agency may consider necessary or advisable to reasonably inform the public about the firearm.

(c) If the firearm remains unclaimed for a period of 30 days after the publication of the notice, then the person who found the firearm and turned it over to the law enforcement agency may claim the firearm provided the person satisfies the custodial law enforcement agency holding the firearm that the person is qualified under State and federal law to possess the firearm and also presents a pistol permit issued in accordance with Article 52A of Chapter 14 of the General Statutes.

(d) If the firearm remains unclaimed for a period of 30 days after the publication of the notice and the person who found the firearm does not claim it as provided by subsection (c) of this section, then the head or chief of the law enforcement agency may apply to the appropriate district court for an order of disposition of the unclaimed firearm. The application shall be written.

(e) Disposition of Firearm. — The judge, after hearing, may order the disposition of the firearm in one of the following ways:

(1) By ordering the firearm turned over to be destroyed by the sheriff of the county in which the law enforcement agency applying for the order of disposition is located or by the sheriff's duly authorized agent. The sheriff shall maintain a record of the destruction of the firearm.

(2) By ordering the firearm turned over to the law enforcement agency applying for the disposition of the firearm for (i) the official use of the agency or (ii) sale, trade, or exchange by the agency to a federally licensed firearm dealer in accordance with all applicable State and federal firearm laws. The court may order a disposition of the firearm pursuant to this subsection only if the firearm has a legible, unique identification number.

(f) Disbursement of Proceeds of Sale. — If the law enforcement agency sells the firearm, then the proceeds of the sale shall be retained by the law enforcement agency and used for law enforcement purposes. The receiving law enforcement agency shall maintain a record and inventory of all firearms received pursuant to this section. (2005-287, s. 2.)

§ 15-12. Publication of notice of unclaimed property; advertisement and sale or donation of unclaimed bicycles.

(a) Unless otherwise provided herein, whenever such articles in the possession of any sheriff or police department have remained unclaimed by the person who may be entitled thereto for a period of 180 days after such seizure, confiscation, or receipt thereof in any other manner, by such sheriff or police department, the said sheriff or police department in whose possession said articles are may cause to be published one time in some newspaper published in said county a notice to the effect that such articles are in the custody of such officer or department, and requiring all persons who may have or claim any interest therein to make and establish such claim or interest not later than 30 days from the date of the publication of such notice or in default thereof, such articles will be sold and disposed of. Such notice shall contain a brief description of the said articles and such other information as the said officer or department may consider necessary or advisable to reasonably inform the public as to the kind and nature of the article about which the notice relates.

(b) Notwithstanding subsection (a) of this section or Article 12 of Chapter 160A of the General Statutes, when bicycles which are in the possession of any sheriff or police department, as provided for in this Article, have remained unclaimed by the person who may be entitled thereto for a period of 60 days after such seizure, confiscation or receipt thereof, the said sheriff or police department who has possession of any such bicycle may proceed to advertise and sell such bicycles as provided by this Article, or may donate such bicycles to a charitable organization exempt under section 501(c) (3) of the Internal Revenue Code. If the bicycles are to be donated, the notice shall state that as the intended disposition if they are not claimed. (1939, c. 195, s. 2; 1965, c. 807, s. 1; 1973, c. 1141, s. 4; 1997-180, s. 1.)

Local Modification. — Mecklenburg: 2002-92, s. 1.

Editor's Note. — Session Laws 1997-180, s. 3, provides: "Any law, public or local, in conflict with this act is repealed."

§ 15-13. Public sale 30 days after publication of notice.

If said articles shall remain unclaimed or satisfactory evidence of ownership thereof not be presented to the sheriff or police department, as the case may be, for a period of 30 days after the publication of the notice provided for in G.S. 15-12, then the said sheriff or police department in whose custody such articles may be is hereby authorized and empowered to sell the same at public auction for cash to the highest bidder, either at the courthouse door of the county, the county law enforcement headquarters if the sale is conducted by the sheriff, or at the police headquarters of the municipality in which the said articles of property are located, and at such sale to deliver the same to the purchaser or purchasers thereof. (1939, c. 195, s. 3; 1973, c. 1141, s. 5; 1991, c. 531, s. 2.)

Local Modification. — City of Winston-Salem: 1995 (Reg. Sess., 1996), c. 637, s. 1.

§ 15-14. Notice of sale.

Before any sale of said property is made under the provisions of this Article, however, the said sheriff or police department making the same shall first advertise the sale by publishing a notice thereof in some newspaper published in the said county at least one time not less than 10 days prior to the date of sale, and by posting a notice of the sale at the courthouse door and at three other public places in the said county. Said notice shall specify the time and place of sale, and contain a sufficient description of the articles of property to be sold. It shall not be required that the sale lay open for increase bids or objections, but it may be deemed closed when the purchaser at the sale pays the amount of the accepted bid. (1939, c. 195, s. 4; 1973, c. 1141, s. 6.)

§ 15-14.1. Sale of property through electronic auction.

In addition to selling property as authorized in G.S. 15-13, a sheriff or police department may sell property in his or its possession through an electronic auction service. The sheriff or police department shall comply with the publication and notice requirements provided in G.S. 15-12 through G.S. 15-14 prior to any sale under this section. (2003-284, s. 18.6(c).)

§ 15-15. Disbursement of proceeds of sale.

From the proceeds realized from the sale of said property, the sheriff, police department or other officer making the same shall first pay the costs and expenses of the sale, and all other necessary expenses incident to a compliance with this Article, and any balance then remaining from the proceeds of said sale shall be paid within 30 days after the sale to the treasurer of the county board of education of the county in which such sale is made, for the benefit of the fund for maintaining the free public schools of such county. (1939, c. 195, s. 5; 1973, c. 1141, s. 7.)

§ 15-16. Nonliability of officers.

No sheriff, police department, or other officer shall be liable for any damages or claims on account of any such sale or disposition of such property, as provided in this Article. (1939, c. 195, s. 6; 1973, c. 1141, s. 8.)

§ 15-17. Construction of Article.

This Article shall not be construed to apply to the seizure and disposition of whiskey distilleries, game birds, and other property or articles which have been or may be seized, where the existing law now provides the method, manner, and extent of the disposition of such articles or of the proceeds derived from the sale thereof. (1939, c. 195, s. 7.)

Cross References. — As to the disposition of liquor, etc., seized, see G.S. 18B-503 and 18B-504.

Article 3.

Warrants.

§§ 15-18 through 15-24: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to warrants, see G.S. 15A-301 through 15A-305.

§ 15-24.1. Amendment of warrant to show ownership of property.

Any criminal warrant may be amended in the superior court, before or during the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property if, in the opinion of the court, such amendment will not prejudice the defendant. This section shall be construed as enlarging and not limiting the conditions and situations under which a warrant may be amended. (1965, c. 285.)

CASE NOTES

Applied in State v. Reeves, 62 N.C. App. 219, 302 S.E.2d 658 (1983).

ARTICLE 4.

Search Warrants.

§ 15-25: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to search warrants, see G.S. 15A-241 through 15A-259.

§§ 15-25.1, 15-25.2: Repealed by Session Laws 1969, c. 869, s. 8.

§§ 15-26 through 15-27.1: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to search warrants, see G.S. 15A-241 through 15A-259.

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

(a) Notwithstanding the provisions of Article 11 of Chapter 15A, any official or employee of the State or of a unit of county or local government of North Carolina may, under the conditions specified in this section, obtain a warrant authorizing him to conduct a search or inspection of property if such a search or inspection is one that is elsewhere authorized by law, either with or without the consent of the person whose privacy would be thereby invaded, and is one for which such a warrant is constitutionally required.

(b) The warrant may be issued by any magistrate of the general court of justice, judge, clerk, or assistant or deputy clerk of any court of record whose territorial jurisdiction encompasses the property to be inspected.

(c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

(1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property;

(2) An affidavit indicating the basis for the establishment of one of the grounds described in (1) above must be signed under oath or affirmation by the affiant;

(3) The issuing official must examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit;

(d) The warrant shall be validly issued only if it meets the following requirements:

(1) Except as provided in subsection (e), it must be signed by the issuing official and must bear the date and hour of its issuance above his signature with a notation that the warrant is valid for only 24 hours following its issuance;

(2) It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or the possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;

(3) It must indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal;

(4) It must be attached to the affidavit required to be made in order to obtain the warrant.

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours. If the warrant, however, was procured pursuant to an investigation authorized by G.S. 58-79-1, the warrant may be executed at any hour, is valid for 48 hours after its issuance, and must be returned without unnecessary delay after its execution or after the expiration of the 48 hour period if it is not executed. If the owner or possessor of the property is not present on the property at the time of the search or inspection and reasonable efforts to locate the owner or possessor have been made and have failed, the warrant or a copy thereof may be affixed to the property and shall have the same effect as if served personally upon the owner or possessor.

(f) No facts discovered or evidence obtained in a search or inspection conducted under authority of a warrant issued under this section shall be competent as evidence in any civil, criminal or administrative action, nor considered in imposing any civil, criminal, or administrative sanction against any person, nor as a basis for further seeking to obtain any warrant, if the warrant is invalid or if what is discovered or obtained is not a condition, object, activity or circumstance which it was the legal purpose of the search or inspection to discover; but this shall not prevent any such facts or evidence to be so used when the warrant issued is not constitutionally required in those circumstances.

(g) The warrants authorized under this section shall not be regarded as search warrants for the purposes of application of Article 11 of Chapter 15A of the General Statutes of North Carolina. (1967, c. 1260; 1979, c. 729; 1983, c. 294, ss. 1, 2; c. 739, ss. 1, 2.)

Legal Periodicals. — For comment as to warrants required for administrative health inspections, see 4 Wake Forest Intra. L. Rev. 117 (1968).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

CASE NOTES

Constitutionality. — Subdivision (c)(1) of this section is not unconstitutionally void for vagueness. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Alternative Criteria for Basis of Warrant. — Subdivision (c)(1) of this section creates two alternative criteria for determining whether to issue a warrant. The first, the "program of inspection test," is that the property is to be inspected as part of a legally authorized program of inspection which naturally includes that property. The second is a probable cause test. If an inspection meets either of these tests a warrant is properly issued under the statute. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

Under subdivision (c)(1) of this section, one of the following two conditions must be met before an administrative search warrant can be issued: First, the property to be searched or inspected must be searched or inspected as part of a "legally authorized program of inspection which naturally includes that property"; or second, there must be "probable cause for believing that there is a condition, object, activity or circumstance that legally justifies such a search or inspection of that property." In re Computer Technology Corp., 78 N.C. App. 402, 337 S.E.2d 165 (1985).

Warrant Protects Rights Under U.S. Const., Amend. IV. — A warrant showing that a specific business has been chosen for an Occupational Safety and Health Act search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's rights under U.S. Const., Amend IV. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

The statutory scheme for obtaining a warrant to conduct an administrative inspection, when complied with, provides ample protections against the constitutional proscription of general warrants. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Corporations have never possessed the kind of protection under U.S. Const., Amend. IV accorded to persons and their homes. Corporations' special status as creatures of the state exposes them to exhaustive state scrutiny in exchange for the privilege of state recognition. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843, rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Probable Cause Standards Under Section Are Sufficient. — While subdivision (c)(1) of this section sets forth standards for issuance of an administrative search warrant which are less stringent than the probable cause standards required in the criminal law sense under G.S. 15A-246, these standards are certainly sufficient to guarantee that a decision to search private property is justified by a reasonable governmental interest. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979), but see Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

The requirement of subdivision (c)(1) of this section that property is to be inspected as part of a legally authorized program of inspection which naturally includes that property comports with the criterion that a specific property has been chosen for a search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources. The statute must be interpreted as also requiring a showing to the magistrate that the general administrative plan for enforcement is based upon "reasonable legislative or administrative standards." Interpreted in this way, subdivision (c)(1) of this section requires a sufficient showing of probable cause and is constitutional. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

Basis for Probable Cause. — For purposes of an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Probable cause for an administration inspection warrant may be based on (1) specific evidence of an existing violation, or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. In order to meet the requirements of the second standard, an applicant for an inspection warrant must show that: (1) there exists a legally authorized inspection program which naturally included the property; (2) that the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) that the administrative standards are being applied to the particular establishment on a neutral basis. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

Probable Cause Where Not Part of Program of Inspection. — A warrant to conduct an inspection that is not part of a program of inspection may issue upon a showing of probable cause, the standard for which is the same as in the case of a search warrant in a criminal proceeding. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Requirements for warrant procedures set out in State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972), a criminal case, apply equally to the issuance of administrative inspection warrants, since the purpose of a warrant in either case is to provide for a determination of probable cause by a neutral officer. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981), but see Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Neutral Application of Inspection Program Required. — It is necessary for the agency to make a showing to the magistrate, or clerk, that the general administrative plan for enforcement is being applied on a neutral basis as to the particular establishment to be inspected. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, denied, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

Scope and Objects of Search Must Be Included in Warrant. — Unless an administrative inspection warrant advises the owner or possessor of the property proposed to be searched of the scope and objects of the search, beyond which limits the inspector may not go, it does not meet the requirements of subdivision (d)(3) of this section. In short, a valid search warrant serves not only to authorize a search of premises but also to afford reasonable notice to the possessor of property of the nature and extent of any search that is to be conducted. Brooks v. Taylor Tobacco Enters., Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

A warrant authorizing inspection of all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things is not overbroad. A warrant authorizing a general inspection of an industry naturally contemplates a comprehensive inspection since the location of possible violations is unknown. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

Warrant Improperly Granted. — Where there was no showing from which a magistrate could have independently determined (1) that there existed a legally authorized program of inspection which naturally included the property, (2) that the general administrative plan for enforcement was based upon reasonable legislative or administrative standards, and (3) that the administrative standards were being applied to plaintiff on a neutral basis, the warrant was improperly granted. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Sufficiency of Warrant Determined from Affidavits. — The rule that the sufficiency of a search warrant should properly be determined with reference to the supporting affidavits is applicable in the context of administrative inspection warrants. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Warrant Must Expressly Incorporate Supporting Affidavit. — If the warrant and the affidavit are to be construed together to provide sufficient proof of authority and notice of the extent of the proposed search, there must be an express reference to the affidavit in the warrant which is sufficient to put a reasonable person on notice of its incorporation. It is not enough that a warrant and its supporting affidavit be served together as a unit for the affidavit to serve to uphold the validity of the warrant. Brooks v. Taylor Tobacco Enters., Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

Sufficiency of Affidavit. — The "program of inspection" test under subdivision (c)(1) of this section requires the agent seeking the warrant to provide facts in an affidavit showing that a particular business has been selected for inspection pursuant to an administrative plan containing specific neutral criteria. The affidavit to support issuance of a warrant under this standard must contain an adequate description of the general administrative plan, the specific neutral criteria used to determine which businesses will be inspected under the plan, and facts showing why the particular business sought to be inspected comes within the plan. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Inclusion of underlying facts in the affidavit is necessary to make the warrant procedure meaningful. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

And Affidavit Insufficient Where Facts Not Included. — Where no facts from which the issuing officer could determine whether probable cause existed were included in the affidavit on which the administrative warrant was obtained, the affidavit was insufficient to support the issuance of an administrative search warrant. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

Conclusory allegations by the affiant, which are nothing more than a perfunctory restatement of the statutory language contained in subdivision (c)(1) of this section, are insufficient to meet the statutory requirements. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Specific Evidence of OSHA Violation Is Sufficient. — The "probable cause" standard permits an Occupational Safety and Health Act agent to obtain a warrant where he has specific evidence in an affidavit showing that conditions in violation of OSHA exist on the premises. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

But Not Necessary. — An Occupational Safety and Health Act agent's entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Statistical Likelihood of OSHA Violation Is Not Sufficient. — The attempt to show through statistics that an inspection of the business would be likely to reveal Occupational Safety and Health Act violations is not sufficient to meet the "probable cause" test under the statute. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Inspection of Corporate Records in Fraud Investigation. — An ex parte order from the superior court, directing officials of a certain corporation to make available the records pertaining to its transactions with two other corporations and with City of Charlotte, incident to an investigation into possible fraud and irregularities in the purchasing of parts, equipment and services by the city, was not an administrative search warrant to which the strictness of U.S. Const., Amend. IV, N.C. Const., Art. I, § 20, and this section would apply. Where such order was neither unreasonably broad nor indefinite, its issuance would be affirmed. In re Computer Technology Corp., 78 N.C. App. 402, 337 S.E.2d 165 (1985).

Applied in Durham Video & News, Inc. v. Durham Bd. of Adjustment, 144 N.C. App. 236, 550 S.E.2d 212, 2001 N.C. App. LEXIS 426 (2001).

Cited in South Blvd. Video & News, Inc. v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (1998).

ARTICLE 5.

Peace Warrants.

§§ 15-28 through 15-38: Repealed by Session Laws 1973, c. 1286, ss. 11, 26.

Cross References. — See Editor's note following the analysis to this Chapter.

ARTICLE 6.

Arrest.

§§ 15-39 through 15-42: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to arrest, see G.S. 15A-401 through 15A-405.

§ 15-43. House broken open to prevent felony.

All persons are authorized to break open and enter a house to prevent a felony about to be committed therein. (1868-9, c. 178, subch. 1, s. 4; Code, s. 1127; Rev., s. 3179; C.S., s. 4545.)

CASE NOTES

Cited in State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972).

§§ 15-44 through 15-47: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to arrest, see G.S. 15A-401 through 15A-405.

ARTICLE 7.

Fugitives from Justice.

§ 15-48: Repealed by Session Laws 1997-80, s. 10.

§ 15-49: Repealed by Session Laws 1975, c. 166, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15A.

§§ 15-50 through 15-52: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to extradition, see G.S. 15A-721 et seq. For North Carolina Extradition Manual and forms, see the Annotated Rules of North Carolina.

§ 15-53. Governor may employ agents, and offer rewards.

The Governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the State, and of having fled out of the jurisdiction thereof, or who conceals himself within the State to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding ten thousand dollars ($10,000), according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (1800, c. 561, P.R.; R.C., c. 35, s. 4; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; Code, s. 1169; 1891, c. 421; Rev., s. 3188; C.S., s. 4554; 1925, c. 275, s. 6; 1967, c. 165, s. 1.)

CASE NOTES

Cited in Madry v. Town of Scotland Neck, 214 N.C. 461, 199 S.E. 618 (1938).

§ 15-53.1. Governor may offer rewards for information leading to arrest and conviction.

When it shall appear to the Governor, upon satisfactory information furnished to him, that a felony or other infamous crime has been committed within the State, whether the name or names of the person or persons suspected of committing the said crime be known or unknown, the Governor may issue his proclamation and therein offer an award [reward] not exceeding ten thousand dollars ($10,000), according to the nature of the case as, in his opinion, may be sufficient for the purpose, to be paid to him who shall provide information leading to the arrest and conviction of such person or persons. The proclamation shall be upon such terms as the Governor may deem proper, but it shall identify the felony or felonies and the authority to whom the information is to be delivered and shall state such other terms as the Governor may require under which the reward is payable. (1967, c. 165, s. 2.)

Editor's Note. — The bracketed word "reward" was added by the editors, as the apparently intended term.

§ 15-54. Officer entitled to reward.

Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehension a reward has been offered is entitled to such reward, and may sue for and recover the same in any court in this State having jurisdiction: Provided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest. (1913, c. 132; 1917, c. 8; C.S., s. 4555.)

Local Modification. — Wake: C.S., s. 4555.

Legal Periodicals. — For article as to whom an offer may be made, see 13 N.C.L. Rev. 15 (1935).

CASE NOTES

Local Law Giving Reward to Sheriff Valid. — In view of this section and G.S. 15-53, Public Local Laws of 1925, c. 318, s. 2, providing that the board of commissioners should pay a reward to the sheriff or other police officers for arresting violators of the prohibition law, is a valid exercise of the police power of the State and not contrary to public policy. Hutchins v. Board of Comm'rs, 193 N.C. 659, 137 S.E. 711 (1927).

Applied in State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970).

ARTICLE 8.

Extradition.

§§ 15-55 through 15-84: Transferred to G.S. 15A-721 to 15A-750 by Session Laws 1973, c. 1286, s. 16.

Cross References. — See Editor's note following the analysis to this Chapter.

ARTICLE 9.

Preliminary Examination.

§§ 15-85 through 15-101: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to first appearance before a district court judge, see G.S. 15A-601 et seq. As to probable-cause hearing, see G.S. 15A-611 et seq.

ARTICLE 10.

Bail.

§§ 15-102, 15-103: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to bail, see G.S. 15A-531 et seq.

§ 15-103.1: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For present provisions as to bail, see G.S. 15A-531 et seq.

§ 15-103.2: Repealed by Session Laws 1975, c. 166, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15A.

§ 15-104: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-104.1: Repealed by Session Laws 1975, c. 166, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15A.

§§ 15-105 through 15-107: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-107.1: Repealed by Session Laws 1975, c. 166, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15A.

§§ 15-108, 15-109: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

ARTICLE 11.

Forfeiture of Bail.

§§ 15-110 through 15-124: Repealed by Sessions Laws 1977, c. 711, s. 33.

Cross References. — For present provisions as to bail bond forfeiture, see G.S. 15A-544.1 et seq.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 12.

Commitment to Prison.

§ 15-125: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to commitment to detention facility pending trial, see G.S. 15A-521.

§ 15-126. Commitment to county jail.

All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been committed: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction shall receive such prisoner and give a receipt for him, and be bound for his safekeeping as prescribed by law. (1868-9, c. 178, subch. 2, s. 33; Code, s. 1164; Rev., s. 3231; C.S., s. 4598; 1973, c. 1286, s. 26; 1975, c. 166, s. 25.)

Editor's Note. — Session Laws 1975, c. 166, s. 25, effective Sept. 1, 1975, reinstated this section, which had been repealed by Session Laws 1973, c. 1286, s. 26, effective Sept. 1, 1975. See Editor's note following the analysis to Chapter 15A.

§ 15-127: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

ARTICLE 13.

Venue.

§ 15-128: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to venue, see G.S. 15A-131 et seq.

§ 15-129. In offenses on waters dividing counties.

When any offense is committed on any water, or watercourse whether at high or low water, which water or watercourse, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed. (R.C., c. 35, s. 24; Code, s. 1193; Rev., s. 3234; C.S., s. 4601; 1973, c. 1286, s. 26; 1975, c. 166, s. 25.)

Editor's Note. — Session Laws 1975, c. 166, reinstated this section, which had been repealed by Session Laws 1973, c. 1286, s. 26. See Editor's note following the analysis to Chapter 15A.

CASE NOTES

Cited in State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984).

§ 15-130. Assault in one county, death in another.

In all cases of felonious homicide when the assault has been made in one county within the State, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made. (1831, c. 22, s. 1; R.C., c. 35, s. 27; Code, s. 1196; Rev., s. 3235; C.S., s. 4602.)

Cross References. — As to venue, see also G.S. 15A-131 et seq.

CASE NOTES

New Offense Not Created. — This section did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. State v. Dunkley, 25 N.C. 116 (1842); State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Meaning of "Assault". — The assault mentioned in this section means not a mere attempt, but such an injury inflicted in this State as results in death in another state. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

§ 15-131. Assault in this State, death in another.

In all cases of felonious homicide, when the assault has been made within this State, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this State. (1831, c. 22, s. 2; R.C., c. 35, s. 28; Code, s. 1197; Rev., s. 3236; C.S., s. 4603.)

Cross References. — As to venue of offenses occurring in part outside the State, see also G.S. 15A-134.

CASE NOTES

Validity of Section. — The validity of sections similar to this seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

New Offense Not Created. — This section did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. State v. Dunkley, 25 N.C. 116 (1842); State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Every part of offense, except death, must have occurred in this State. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Meaning of "Assault". — The assault mentioned in this section means not a mere attempt, but such an injury inflicted in this State as results in death in another state. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894).

Sufficient Acts or Omissions to Sustain Venue Choice. — Venue was proper because there were sufficient acts or omissions, including telephone conversations between defendant and the child victim's mother, constituting part of the offense of involuntary manslaughter within the county. State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 469 (2003).

Jurisdiction of County Grand Jury. — Under the law of determining jurisdiction as between states, jurisdiction lies in this State if any of the essential acts forming the crime take place in this State. This same rationale extends to jurisdiction of the county grand jury to indict. State v. Vines, 317 N.C. 242, 345 S.E.2d 169 (1986).

Applied in State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

§ 15-132. Person in this State injuring one in another.

If any person, being in this State, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this State as he would be if the effect had taken place within this State. (1895, c. 169; Rev., s. 3237; C.S., s. 4604.)

Cross References. — As to venue of offenses occurring in part outside the State, see also G.S. 15A-134.

CASE NOTES

Sufficient Acts or Omissions to Sustain Venue Choice. — Venue was proper because there were sufficient acts or omissions, including telephone conversations between defendant and the child victim's mother, constituting part of the offense of involuntary manslaughter within the county. State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 469 (2003).

Shooting Across State Line. — Where the defendant while in this State shot across the State line and killed a person in Tennessee, he could not be found guilty of murder absent a statute expressly conferring jurisdiction upon the courts of this State, or making the act of shooting under the circumstances a substantive murder. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894), decided prior to enactment of this section.

§ 15-133. In county where death occurs.

If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas or land, either within or without the limits of this State, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens. (1891, c. 68; Rev., s. 3238; C.S., s. 4605.)

Cross References. — As to venue of offenses occurring in part outside this state, see also G.S. 15A-134.

CASE NOTES

Section is constitutional. State v. Caldwell, 115 N.C. 794, 20 S.E. 523 (1894).

Section applies to foreigners as well as to citizens of this State who have inflicted mortal wounds elsewhere. State v. Caldwell, 115 N.C. 794, 20 S.E. 523 (1894).

Cited in State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004).

§§ 15-134 through 15-136: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to venue, see G.S. 15A-131 et seq.

Article 14.

Presentment.

§§ 15-137 through 15-139: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to indictments and related instruments, see G.S. 15A-641 et seq.

Article 15.

Indictment.

§§ 15-140 through 15-143: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to indictments and related instruments, see G.S. 15A-641 et seq.

§ 15-144. Essentials of bill for homicide.

In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be. (1887, c. 58; Rev., s. 3245; C.S., s. 4614.)

Cross References. — As to homicide generally, see G.S. 14-17 and G.S. 14-18. As to verdict in prosecution for homicide, see G.S. 15-172. As to bill of particulars, see G.S. 15A-925.

CASE NOTES

I. In General.
II. Requirements of Indictment.

I. IN GENERAL.

Constitutionality of Section. — The allowance of a short form indictment for murder violates neither the Sixth Amendment nor the due process clause of the Fourteenth Amendment to the United States Constitution. Hartman v. Lee, 283 F.3d 190, 2002 U.S. App. LEXIS 3448 (4th Cir. 2002), cert. denied, 537 U.S. 1114, 123 S. Ct. 851, 154 L. Ed. 2d 789 (2003).

Process of indictment by grand jury pursuant to G.S. 15-144 adequately safeguards a defendant's rights under the Federal and North Carolina Constitutions. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

History of Section. — See State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

N.C. Const., Art. I, § 23 and § 15A-924(a)(5) did not specifically repeal this section, nor did they repeal it by implication. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

This section does not prevail over the language of § 15-155. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Legislature is empowered to prescribe the form of indictment for murder. State v. Moore, 104 N.C. 743, 10 S.E. 183 (1889); State v. Brown, 106 N.C. 645, 10 S.E. 870 (1890); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Section is an abbreviated form for bill of indictment for murder. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Short-form indictments are constitutional, even after Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

The short-form murder indictments authorized by this section and utilized in the defendant's triple-murder case were not unconstitutional. State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 2001 N.C. LEXIS 265 (2001), cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

Short-Form Murder Indictment Complied with Statutory Requirements. — Short-form murder indictment did not violate defendant's constitutional rights as it complied with the requirements of G.S. 15-144, for a short-form murder indictment because the indictment contained the language that defendant unlawfully, willfully and feloniously and with malice aforethought killed the victim. State v. Phillips, 151 N.C. App. 185, 565 S.E.2d 697, 2002 N.C. App. LEXIS 713 (2002).

The Supreme Court of North Carolina has consistently held that the short-form indictment is sufficient to charge a defendant with first-degree murder. The short-form murder indictment authorized by G.S. 15-144 gives a defendant notice that he is charged with first-degree murder and that the maximum penalty to which he could be subject is death. State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003).

Trial court properly denied defendant's motion to dismiss, with respect to a first-degree murder charge against him based on an underlying felony of attempted rape, as the short-form indictment that was used to charge him was authorized by G.S.15-144, and accordingly, there was no constitutional infirmity; murder indictments that comply with G.S. 15-144 are sufficient to charge first-degree murder on the basis of any theory set forth in G.S. 14-17, which included the charge against defendant. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Appeals court upheld the use of a short form murder indictment under G.S. 15-144 which stated that: The jurors for North Carolina upon their oath present that on or about the (the date was stated) in (the county was stated). (the defendant's name was stated) did unlawfully, wilfully, and feloniously and of malice aforethought kill and murder (the victim's name was stated). State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

Short-form indictment in the capital murder case met the requirements of G.S. 15-144. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Defendant's attempt to have conviction for attempted first-degree murder vacated based on his claim that the use of a short-form indictment for the crime of attempted murder was not authorized in North Carolina was without merit; G.S. 15-144, when construed with G.S. 15-170, authorized use of a short-form indictment to charge attempted first-degree murder, and the indictment sufficiently alleged the offense of attempted first-degree murder using the statutory language. State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

Defendant had no right to a reversal in his murder trial, despite his claim that the indictment was insufficient for staying only that he violated G.S. 14-17. The indictment the requirements of G.S. 15-144. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Prisoner's short-form murder indictment provided constitutionally adequate notice because it cited to both the statute authorizing the short-form, pursuant to G.S. 15-144, and to the state's murder statute, pursuant to G.S. 14-17, thus notifying the prisoner that he needed to defend against a charge of first degree murder on any or all grounds, including murder by torture. Stroud v. Polk, 466 F.3d 291, 2006 U.S. App. LEXIS 26216 (4th Cir. 2006).

Use of the short-form indictment for first-degree murder met the requirements of G.S. 15-144. State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009).

Defendant's murder indictment complied with the requirements of this section and did not violate his constitutional rights. State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S. Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005).

The court rejected the defendant's contention that the use of the short-form murder indictments authorized by this section did not give him sufficient notice and violated his rights to due process, notice, fundamental fairness, and trial by jury. State v. Lytch, 142 N.C. App. 576, 544 S.E.2d 570, 2001 N.C. App. LEXIS 188 (2001), aff'd, 355 N.C. 270, 559 S.E.2d 547 (2002).

Indictment in form prescribed by this section is sufficient. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

An indictment which complies with the short form indictment authorized by this section is sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), aff'd, 95 N.C. App. 572, 383 S.E.2d 224 (1989).

Short-form murder indictment was constitutionally sufficient to charge the defendant with first-degree murder. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

The murder indictment which complied with G.S. G.S. 15-144 was sufficient and did not violate the defendant's due process and equal protection rights under the United States Constitution. State v. Barnett, 141 N.C. App. 378, 540 S.E.2d 423, 2000 N.C. App. LEXIS 1397 (2000), appeal dismissed and cert. denied, 353 N.C. 527, 549 S.E.2d 552 (2001).

Defendant was appropriately charged in a short form bill of indictment in accordance with this section. State v. Washington, 142 N.C. App. 657, 544 S.E.2d 249, 2001 N.C. App. LEXIS 174 (2001).

Short-form indictment expressly alleging murder in the first-degree met the requirements of G.S. 15-144. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

Short-form murder indictment under G.S. 15-144 was sufficient to allege first-degree murder under theories of both premeditation and deliberation and felony murder. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Defendant's "short-form" first degree murder indictment complied with the state and federal Constitutions although it failed to charge in the indictment the elements of the crime or aggravating circumstances as "facts (other than prior conviction) that increase the maximum penalty for [the] crime." State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Short form indictment was sufficient to charge defendant with first-degree murder. State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004).

Trial court did not err by trying defendant under the short form bills of indictment issued in a two count first-degree murder case because the indictment provided the defendant with sufficient notice of the charges against him. State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

Short-form indictment authorized by G.S. 15-144 was sufficient under both state and federal constitutional standards to support a conviction of first degree murder; there was no merit in defendant's argument that the trial court erred in failing to dismiss the first degree murder indictment against him because it did not specifically allege the elements of premeditation and deliberation. State v. Gladden, 168 N.C. App. 548, 608 S.E.2d 93, 2005 N.C. App. LEXIS 351 (2005), appeal dismissed, cert. denied, — N.C. —, 614 S.E.2d 312 (2005).

Use of a short-form indictment under G.S. 15-144 to charge defendant with first -degree murder complied with the North Carolina and United States Constitutions. State v. Lawson, — N.C. App. —, 669 S.E.2d 768, 2008 N.C. App. LEXIS 2259 (2008).

The court declined to find the short-form indictment authorized by this section unconstitutional in light of Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) for failing to allege all essential elements of first-degree murder. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Bill of Particulars. — If a defendant is charged with murder in the first degree by bill of indictment drawn under this section, and desires to know whether the State relies on proof the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a felony, he should apply for a bill of particulars. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. May, 292 N.C. 644, 235 S.E.2d 178, reconsideration denied, 293 N.C. 261, 247 S.E.2d 234, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Under an indictment for murder in the first degree in the usual form under this section, the State is entitled to introduce evidence that defendant committed the homicide in the perpetration of, or attempt to perpetrate a felony, it being incumbent upon defendant if he desires more definite information to request a bill of particulars. State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Reading to Jury of Indictment Closely Following Section. — An indictment closely following this section could not have prejudiced defendant by its being read in the presence of the jury, even though it is true that in some instances bills of indictment charging murder will contain the words "premeditation and deliberation," the elements that distinguish murder in the first degree from murder in the second degree. State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819, cert. denied and appeal dismissed, 289 N.C. 453, 223 S.E.2d 161 (1976).

When Instruction on Lesser Included Homicides Is Required. — In a felony murder prosecution under an indictment in the form prescribed by this section, evidence that defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

A defendant may always show by the evidence not only his innocence under the theory of prosecution chosen by the State, but also his possible guilt of some lesser offense. If this lesser offense is included in the crime charged in the indictment and if there is evidence to support it, defendant is entitled to have it submitted to the jury. These different theories of defense cannot be abrogated by the State's decision to prosecute, nor the trial court's decision to submit the case on only one prosecutorial theory, when under the indictment and the evidence adduced another is more favorable to defendant. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Trial court may not premise a second-degree murder instruction on the possibility that the jury will accept some of the State's evidence while rejecting other portions of the State's case. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Indictment Barred by Collateral Estoppel. — State's first indictment of defendant charging manslaughter of "a natureless living female fetus . . ." was dismissed for failure to allege a material element of manslaughter, (that is, that defendant did kill another living human being), and State did not appeal; therefore, collateral estoppel barred State's second indictment for manslaughter alleging defendant did "kill and slay a living human being . . .," which referred to the same victim and incident. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Felony Murder or Lying in Wait. — For all murder cases prosecuted under G.S. 14-17, when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment pursuant to this section and supported by the evidence must be submitted to the jury. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

Instruction on Second-Degree Murder Where Evidence Shows Lying in Wait. — The trial court may not give an instruction on second-degree murder when the State's evidence supports a jury finding of each element of lying in wait and when there is no conflict with respect to such evidence. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

When the evidence supports a finding that the murder was perpetrated by means of lying in wait and there is no conflict in the evidence, the trial court is not required to instruct the jury on second-degree murder. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Applied in State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899); State v. Kirkman, 208 N.C. 719, 182 S.E. 498 (1935); State v. Dills, 210 N.C. 178, 185 S.E. 677 (1936); State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940); State v. Horner, 248 N.C. 342, 103 S.E.2d 694 (1958); State v. Bailey, 254 N.C. 380, 119 S.E.2d 165 (1961); State v. Johnson, 256 N.C. 449, 124 S.E.2d 126 (1962); State v. McGirt, 263 N.C. 527, 139 S.E.2d 640 (1965); State v. Davis, 266 N.C. 633, 146 S.E.2d 646 (1966); State v. White, 271 N.C. 391, 156 S.E.2d 721 (1967); State v. Godwin, 271 N.C. 571, 157 S.E.2d 6 (1967); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971); State v. Roberts, 279 N.C. 500, 183 S.E.2d 647 (1971); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Tart, 280 N.C. 172, 184 S.E.2d 842 (1971); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); State v. McLamb, 20 N.C. App. 164, 200 S.E.2d 838 (1973); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. Glenn, 22 N.C. App. 6, 205 S.E.2d 352 (1974); State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976); State v. Johnson, 28 N.C. App. 265, 220 S.E.2d 834 (1976); State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001); State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002); State v. Dudley, 151 N.C. App. 711, 566 S.E.2d 843, 2002 N.C. App. LEXIS 888 (2002); State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003); State v. Byrd, 164 N.C. App. 522, 596 S.E.2d 860, 2004 N.C. App. LEXIS 972 (2004).

Cited in State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937); State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959); State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961); State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965); State v. Swann, 272 N.C. 215, 158 S.E.2d 80 (1967); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); State v. Patterson, 284 N.C. 190, 200 S.E.2d 16 (1973); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Davis, 284 N.C. 701, 202 S.E.2d 770 (1974); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974); State v. Peterson, 24 N.C. App. 404, 210 S.E.2d 883 (1975); State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976); State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Chavis, 30 N.C. App. 74, 226 S.E.2d 398 (1976); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977); State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977); State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978); State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978); State v. Connley, 295 N.C. 327, 245 S.E.2d 663 (1978); State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Norwood, 303 N.C. 473, 279 S.E.2d 550 (1981); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982); State v. McGee, 60 N.C. App. 658, 299 S.E.2d 796 (1983); Burrow v. Randolph County Bd. of Educ., 61 N.C. App. 619, 301 S.E.2d 704 (1983); State v. Hinson, 310 N.C. 245, 311 S.E.2d 256 (1984); State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986); State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987); State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Richmond, 347 N.C. App. 412, 495 S.E.2d 677 (1998); State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000); State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); State v. Reynolds, 160 N.C. App. 579, 586 S.E.2d 798, 2003 N.C. App. LEXIS 1835 (2003); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. McNeill, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006); State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007); State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

II. REQUIREMENTS OF INDICTMENT.

This section contains no requirement that the indictment specify the degree of murder sought. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Indictment must be sufficient in form to allege murder and support a conviction of murder in the first degree under this section. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

Indictment Under Section Fully Informs Defendant. — Where an indictment is drawn according to this section the defendant is given full information of the crime on which he is being tried. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Section Does Not State What Is Necessary. — This section declares an indictment containing certain words "sufficient," but it does not make those words essential, nor by any reasonable construction can it be held to make technical and "sacramental" words which were not theretofore necessary in indictments for murder. State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

The indictment satisfied the requirements of this section where it stated: 'The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder [the victim]. State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000).

Indictment for Murder Need Not Allege All Elements of Crimes Charged. — Short-form indictments which complied with this section were constitutional although they failed to allege all of the elements of the crimes charged, specifically, those elements which differentiate first-degree murder, rape, and sexual offense from second-degree murder, rape, and sexual offense. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

The defendant's indictments were valid although they did not allege premeditation, deliberation, and specific intent to kill. State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

Indictment Need Not Allege That Murder Was Punishable by Death. — Premeditation and deliberation did not have to be separately alleged in the defendant's short-form indictment which charged him with first-degree murder and, since the death penalty is the prescribed statutory maximum punishment for first-degree murder in North Carolina, no additional facts needed to be charged in the indictment to provide the defendant with notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected was death. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Indictment for murder need not allege deliberation and premeditation. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Failure to Allege Premeditation and Deliberation Not a Constitutional Violation. — The court rejected the defendant's argument that because the indictment failed to allege two essential elements of first degree murder, i.e., premeditation and deliberation, his conviction of first degree murder based thereon violated Article I, G.S. 19, 22 and 23 of the North Carolina Constitution. The court found that the defendant had adequate notice of the charge against him, as North Carolina has for nearly 100 years authorized the use of the short form murder indictment as sufficient to allege the elements of premeditation and deliberation, and the jury was properly required to find those elements beyond a reasonable doubt. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

An indictment of murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by this section being sufficient. State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947).

By virtue of this section premeditation and deliberation do not have to be alleged in an indictment for first degree murder. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Nor That Murder was Committed in Course of Felony. — A bill of indictment, drawn in the statutory from as required by this section, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943).

It is not required that an indictment allege that a murder was committed in the perpetration of a robbery or other felony in order that it be sufficient to support a verdict of murder in the first degree. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

It is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the adoption of the section. State v. Covington, 117 N.C. 834, 23 S.E. 337 (1895).

Short-form murder indictment which did not allege premeditation nor the elements of felony murder was held not defective.

State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Indictment Need Not State Victim's Sex. — An indictment is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by poisoning, stabbing or shooting. State v. Pate, 121 N.C. 659, 28 S.E. 354 (1897).

Nor Defendant's County of Residence. — Defendant's county of residence is not an element of murder and not required to be proved at trial. Therefore, it need not be alleged. State v. Carswell, 40 N.C. App. 752, 253 S.E.2d 635, cert. denied, 297 N.C. 613, 257 S.E.2d 220 (1979).

Omission of the county of defendant's residence from murder indictment did not make the indictment fatally defective, since the county of defendant's residence did not have to be proved. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Word "willfully" is not essential to validity of an indictment for murder, neither at common law nor under this section. State v. Kirkman, 104 N.C. 911, 10 S.E. 312 (1889); State v. Harris, 106 N.C. 682, 11 S.E. 377 (1890); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Omission of Word "Wound" Not Fatal. — The omission of the word "wound" in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under this section. State v. Rinehart, 75 N.C. 52 (1876); State v. Ratliff, 170 N.C. 707, 86 S.E. 997 (1915).

Malice Is Necessary Allegation. — A murder indictment should not fail to charge malice, as it is a necessary allegation in a murder indictment. State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974).

Failure to Allege Malice Aforethought. — Where defendant's indictment for attempted first degree murder was deficient, under N.C. Const. art. I, § 22 and G.S. 15-144, as it omitted the phrase "and of his malice aforethought," the appellate court, after defendant was convicted by a jury of attempted first degree murder, arrested the judgment and remanded the matter for sentencing and the entry of judgment for attempted voluntary manslaughter, which the indictment supported. State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002), appeal dismissed, 357 N.C. 64, 579 S.E.2d 396 (2003), cert. denied, 540 U.S. 928, 124 S. Ct. 338, 157 L. Ed. 2d 231 (2003).

Meaning of "Malice Aforethought.". — The term "malice aforethought," which is used in an indictment conforming to this section cannot be held to import into the definition of first degree murder the element of premeditation or deliberation. Indeed, it is rather definitely indicated that it relates rather to the prior existence of the malice which motivates the murder than to a previously entertained purpose. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Omission of the phrase "with force and arms" does not render a defendant's indictment for murder fatally defective. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Indictment need not include aggravating circumstances or differentiate first-degree murder from second-degree murder. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Essentials Make No Distinction Between First and Second Degree Murder. — The essentials for bills of indictment charging homicide make no distinction between an indictment charging murder in the first degree from one charging murder in the second degree. State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819, cert. denied and appeal dismissed, 289 N.C. 453, 223 S.E.2d 161 (1976).

An indictment which meets the requirements of this section will support a plea of guilty to or a conviction of either first or second degree murder. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

A prosecutor is not required to determine, before the return of the indictment, whether he will ultimately prosecute a defendant for murder in the first or second degree. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

The State is not required at any time to elect a theory upon which it will proceed against defendant on a charge of first degree murder, and it is proper for the trial court to submit the issue of defendant's guilt of that charge to the jury on each of the theories of first degree murder supported by substantial evidence presented at trial; rather than have the jury render a general verdict if it finds defendant guilty of first degree murder, the better practice is for the trial court to have the jury specify the theory or theories upon which it finds first degree murder to have been established beyond a reasonable doubt. State v. Clark, 325 N.C. 677, 386 S.E.2d 191 (1989).

Effect of State's Election of Felony Murder Theory. — The State's election to try a homicide case, and the trial judge's submission of it to the jury, only on a felony murder theory did not in effect acquit defendant of murder on a theory of premeditation and deliberation and all of its lesser included homicide offenses. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989), holding that the jury should have been instructed on involuntary murder under the circumstances.

Short-Form Indictments Did Not Have to Allege Aggravating Factors. — Where defendant pled guilty to second-degree murder, the trial court did not err in finding the fact that the victim was eight months pregnant to be an aggravating factor and in sentencing him in the aggravated range; as defendant was indicted using a short-form murder indictment, the aggravating factors were not required to be alleged. State v. Hasty, 181 N.C. App. 144, 639 S.E.2d 94, 2007 N.C. App. LEXIS 33 (2007).

Offenses Which Indictment Will Support. — An indictment for homicide in the words of this section will support a verdict of murder in the first degree, murder in the second degree, or manslaughter. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

A bill of indictment drawn in the words of this section is sufficient to support a conviction of murder in the first degree. State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976).

An indictment in the form declared by this section to be sufficient to charge the offense of murder is also sufficient to sustain judgment entered upon defendant's plea of nolo contendere to the lesser included offense of voluntary manslaughter. State v. Young, 18 N.C. App. 576, 197 S.E.2d 237, cert. denied, 283 N.C. 758, 198 S.E.2d 729 (1973).

An indictment drawn in accordance with this section is sufficient to sustain a verdict of guilty of murder in the first degree based upon a finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony. State v. May, 292 N.C. 644, 235 S.E.2d 178, reconsideration denied, 293 N.C. 261, 247 S.E.2d 234, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

An indictment for murder in the form prescribed by this section is sufficient to support a verdict of guilty of murder in the first degree if the jury finds from the evidence beyond a reasonable doubt that defendant killed the deceased with malice and after premeditation and deliberation or in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

A bill is sufficient to sustain a verdict of murder in the first degree if the jury should find from the evidence, beyond a reasonable doubt, that the killing was done with malice and after premeditation and deliberation; or in the perpetration or attempt to perpetrate a robbery. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

An indictment under this section will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

A bill of indictment meeting the requirements of this section concerning murder will support a conviction or plea of guilty to murder in the first degree as well as to murder in the second degree. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

The short-form indictment drawn in accordance with this section is sufficient to charge murder in the first degree under a theory of lying in wait, just as it is sufficient to charge murder in the first degree on the theory of felony murder or premeditation and deliberation. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

An indictment in the form prescribed by this section will support a verdict finding the defendant guilty of first-degree murder upon any of the theories set forth in G.S. 14-17 or guilty of any lesser offense included within any of those theories. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Where the indictment was insufficient to allege attempted first degree murder because the indictment failed to include the essential element of malice aforethought, but was sufficient to allege voluntary manslaughter, the case could be remanded for sentencing and entry of judgment for attempted voluntary manslaughter based on the jury's verdict. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

G.S. 15-144, when construed alongside N.C. G.S. 15-170, implicitly authorizes the State to utilize a short-form indictment to charge attempted first-degree murder; when drafting such a indictment, it is sufficient for statutory purposes for the State to allege that the accused person feloniously, willfully, and of his malice aforethought, did (attempt to) kill and murder the named victim. State v. Jones, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

Indictment Sufficient to Charge Conspiracy to Murder. — See State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

Use of Short-Form Indictment Insufficient to Charge Attempted Murder. — The application of G.S. 15-144 to indictments for attempted murder goes beyond the plain language of the statute, and absent statutory authority for a short-form indictment, the State must allege all essential elements of the crime charged; nothing in G.S. 15-153 or G.S. 15-155, which dealt with certain informalities and defects that did not vitiate a warrant or indictment, dispensed with the requirement that the essential elements of the offense had to be charged. State v. Watkins, 169 N.C. App. 518, 610 S.E.2d 746, 2005 N.C. App. LEXIS 683 (2005), cert. denied, appeal dismissed, — N.C. —, 624 S.E.2d 632 (2005).

Felony murder may be proven although murder is charged in the language of this section. State v. Lee, 277 N.C. 216, 176 S.E.2d 765 (1970); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

An indictment charging the essential facts of murder as required by this section is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. State v. Fogleman, 204 N.C. 401, 168 S.E. 536 (1933).

Proof of Felony Murder Under Indictment for Different Offense. — An indictment for homicide in the language of this section is sufficient and proof that the murder was committed in the perpetration of a felony constitutes no variance. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Where indictment charged capital felony of murder in the language of this section and contained every necessary averment, proof that murder was committed in the perpetration of felony constituted no variance between allegata and probata. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Variance in Time Held Not Fatal. — Where an indictment for murder charged the killing to have taken place December 5 and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found, the variance was not fatal. State v. Pate, 121 N.C. 659, 28 S.E. 354 (1897).

§ 15-144.1. Essentials of bill for rape.

(a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

(b) If the victim is a female child under the age of 13 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a child under 13, naming her, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a female child under the age of 13 years and all lesser included offenses.

(c) If the victim is a person who is mentally disabled, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who was mentally disabled, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for the rape of a mentally disabled, mentally incapacitated or physically helpless person and all lesser included offenses. (1977, c. 861, s. 1; 1979, c. 682, s. 10; 1983, c. 720, s. 1; 2002-159, s. 2(d).)

Editor's Note. — Session Laws 1979, c. 682 deleted "assault with intent to commit rape" in subsection (a), deleted "virtuous" preceding "female child" and preceding "child under 13" in subsection (b), and added subsection (c). Session Laws 1979, c. 682, ss. 13 and 14, provided:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14, which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Legal Periodicals. — For survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Section Eliminates Requirement That Every Element Be Alleged. — Prior to the enactment of this section it was necessary that an indictment for rape contain allegations of every element of the offense. This section, in which the legislature explicitly states that "[i]n indictments for rape it is not necessary to allege every matter required to be proved on the trial," eliminates that requirement. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

In enacting this section, the legislature eliminated the requirement that every element to be proven at trial must be alleged in the indictment. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

And Differs from Federal Equivalent. — The defendant's short-form indictment for rape which failed to specifically allege all the elements of each offense was not defective in spite of the United States Supreme Court's holding, in United States v. Jones, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), that all indictments must so allege. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

But Is Constitutional. — This section complies with constitutional requirement that the defendant be informed of the accusation against him even though it eliminates the requirement that the indictment contain allegations of every element of the offense. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Eight indictments against defendant for first-degree rape comported with federal and state constitutional requirements although they did not contain each element and fact which might increase the maximum punishment for the crime charged. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Defendant's short-form indictment charging attempted first-degree rape was proper because North Carolina had consistently upheld the constitutionality of the use of the short-form indictment in rape cases as prescribed by the statute. State v. Owen, 159 N.C. App. 204, 582 S.E.2d 689, 2003 N.C. App. LEXIS 1443 (2003).

Due Process Concerns. — G.S. 15-144.1 cannot reasonably be read to provide that a short-form rape indictment is sufficient to support a conviction based on events not directly relating to an alleged rape. It would raise serious notice concerns if the State, unable to prove rape or attempted rape, could nonetheless obtain a conviction for an uncharged assault occurring before or after the sexual encounter. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

In enacting this section the legislature prescribed a new form of indictment for rape. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Section Modeled upon § 15-144. — The short-form indictment for homicide in G.S. 15-144 is the model upon which this section was drafted. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

When Indictment Under This Section Is Constitutional. — An indictment under this section is constitutional if it permits the defendant to prepare a defense and to be protected from subsequent prosecution for the same offense. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

A short form indictment is constitutionally sufficient to charge a defendant with first degree rape. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Allegation as to Age of Victim. — An allegation that the victim was "a female child eight (8) years old" sufficiently alleged that she was "a child under 12" and satisfied the requirement of subsection (b) of this section as it existed on June 6, 1983. State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986).

State's failure to set forth the marital status of the parties involved is not fatal to an indictment for rape. State v. Getward, 89

N.C. App. 26, 365 S.E.2d 209 (1988).

Unnecessary Averments. — This section authorizes an indictment for first degree rape which omits averments (1) that the offense was perpetrated with a deadly weapon or by inflicting serious bodily injury, or (2) as to the defendant's age, two elements the proof of which were essential to a conviction for first degree rape. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Where the indictments for attempted rape fully complied with the requirements set forth in this section, the indictments were not insufficient merely because neither indictment alleged that the victims of the crimes were females. State v. Bell, 311 N.C. 131, 316 S.E.2d 611 (1984).

Sufficiency of Indictment Under This Section and § 15-144.2. — The short form indictments set out in this section and G.S. 15-144.2 for first-degree rape and first-degree sexual offense provide adequate notice of the charges. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

By enacting G.S. 15-144.1(a) and G.S. 15-144.2(a), the statutes for short-form indictments, the General Assembly provided a method by which indictments can be certain to be sufficient to withstand constitutional challenges. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

The provisions of this section do not prevail over § 15-155. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Construction with § 15-155 as to "with Force and Arms". — Section 15-155 does not either require the averment "with force and arms" or express a legislative intent that the language in subsection (a) of this section prevail over the express language in G.S. 15-155, which states in effect that no judgment shall be stayed or reversed because of the omission of the words "with force and arms" from the indictment. State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984).

An indictment in a rape case under this section need not contain the phrase "with force and arms." State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983).

Construction With Offense of Assault on Female. — G.S. 15-144.1 did not provide that a short-form rape indictment was sufficient to support a conviction based on events not directly relating to the alleged rape; therefore, defendant was not entitled to a jury instruction regarding assault on a female. Evidence of assault on a female — threatening the victim with a rifle if she left the car, macing her, and dragging her back to the car after an escape attempt — was unrelated to the conduct that gave rise to the first degree rape charge; the assault conduct occurred during the kidnapping, not during the "carnal knowing." State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

In a rape prosecution, the fact that a lesser charge of assault on a female would not be available when a defendant asserts that the intercourse was consensual does not nullify the reference in G.S. 15-144.1 to assault on a female. A jury could find a defendant not guilty of rape under G.S. 14-27.2 or G.S. 14-27.3 based on evidence that defendant's penis had not vaginally penetrated the victim. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

Pursuant to G.S. 15-144.1, trial court properly declined to instruct a jury regarding assault on a female. Conduct that defendant relied on as supporting assault charge was unrelated to conduct supporting first degree rape under G.S. 14-27.2; however, that conduct supported G.S. 14-39 kidnapping conviction. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

Bill of Particulars. — The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Election by State. — By unequivocally arraigning defendant on second-degree rape and by failing thereafter to give any notice whatsoever, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape as arguably supported by the short-form indictment, the state made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape. State v. Jones, 317 N.C. 487, 346 S.E.2d 657 (1986).

Election of Trial Court Not to Submit Lesser Included Offenses. — Although the trial court elected not to submit the lesser included offense of attempted second degree rape and the offense of assault on a female to the jury, defendant was not acquitted of those charges, where there was a mistrial because of a hung jury, and defendant had been indicted only on second degree rape. State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (1994).

Indictment Upheld. — Indictment for second-degree rape, which met the criteria specified in this section for a proper indictment for rape, was sufficient to allow defendant to prepare a defense and to be protected from double jeopardy, and was thus not fatally defective. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Rape indictment drawn in accordance with this section was sufficient enough to let defendant know that he was charged with the rape of his estranged wife and to allow him to prepare his defense. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Trial court did not err by entering judgment on short form indictments because short form indictments were specifically approved for the offense of first-degree rape of a child under the age of 13 under G.S. 15-144.1(b). State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Use of Words "And/Or" in Indictment Acceptable. — Use of the words "and/or" did not render a short form indictment for rape facially invalid because a person of common understanding would know that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent. In turn, this language was sufficient to notify defendant of the charges against him in order to prepare an adequate defense and to protect him from being punished a second time for the same act. State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Applied in State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980); State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984); State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657, 2002 N.C. App. LEXIS 1126 (2002).

Cited in State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986); State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988); State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000); State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003); State v. Randle, 167 N.C. App. 547, 605 S.E.2d 692, 2004 N.C. App. LEXIS 2381 (2004); State v. Jones, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

§ 15-144.2. Essentials of bill for sex offense.

(a) In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

(c) If the victim is a person who is mentally disabled, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a person who was mentally disabled, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for a sex offense against a mentally disabled, mentally incapacitated or physically helpless person and all lesser included offenses. (1979, c. 682, s. 11; 1983, c. 720, ss. 2, 3; 2002-159, s. 2(e).)

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provided: "Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

CASE NOTES

Short-Form Indictments Constitutionally Valid. — Defendant's argument that short-form indictments that alleged first-degree sexual offense were insufficient was without merit, given the Supreme Court of North Carolina's holding in State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000), that such indictments were constitutional. State v. Shepherd, 156 N.C. App. 69, 575 S.E.2d 776, 2003 N.C. App. LEXIS 31 (2003).

Requirements of a State Short-Form Indictment Are Less Stringent than Its Federal Equivalent. — The defendant's short-form indictment for sex offense which failed to specifically allege all the elements of each offense was not defective in spite of the United States Supreme Court's holding, in United States v. Jones, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), that all indictments must so allege. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

Omission of Elements Distinguishing First and Second Degree Offenses. — Subsection (a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. State v. Berkley, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

Specification of Sexual Act Unnecessary. — An indictment drafted pursuant to subsection (b) of this section without specifying which sexual act was committed is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation. Should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a bill of particulars. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

An indictment which charges first degree sexual offense in accordance with this section without specifying which sexual act was committed is sufficient to charge the crime of first degree sexual offense and to put defendant on notice of the accusation. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Indictment charging defendant with statutory sexual offense under G.S. 14-27.2, statutory sexual offense of a person who was 13, 14, or 15 years of age under G.S. 14-27.7A, taking indecent liberties with a child under G.S. 14-202.1, and forcible sexual offense under G.S. 14-27.5 that did not list the specific underlying sexual acts was valid, as the jury was instructed on the specific sexual acts that were to serve as the underlying act for each charged offense; when a short form indictment properly alleged the essential elements of the offense, it did not have to allege every matter required to be proved on the trial under G.S. 15-144.2(a), and indictments charging indecent liberties with a child or a sexual offense were valid even when they did not contain a specific allegation regarding which specific sexual act was committed. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Indictment was not insufficient to support defendant's conviction for felonious child abuse, as the State was not required to specifically allege the particular sexual act that defendant committed. State v. Lark, — N.C. App. —, 678 S.E.2d 693, 2009 N.C. App. LEXIS 1101 (July 7, 2009).

For an indictment to be legally valid under this statute, it must contain only the following: the name of the accused, the date of the offense, the county in which the offense was allegedly committed, the averment "with force and arms," the allegation that the accused unlawfully, willfully and feloniously engaged in a sex offense with the victim by force and against the victim's will, and the victim's name. An indictment including such information is sufficient to charge first-degree sexual offense, second-degree sexual offense, attempt to commit a sexual offense or assault. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

The indictments against the defendant

for first-degree sexual offense and for indecent liberties with a child were upheld in spite of his allegations that they were defective as a matter of law in not setting out each element of the offenses. State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000).

Indictment Under Subsection (b) Need Not Specify Sexual Act. — An indictment drafted pursuant to subsection (b) of this section without specifying which sexual act was committed is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation. Should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a bill of particulars. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

While it is essential that the State prove a "sexual act," as defined by G.S. 14-27.1(4), in order to convict a defendant under G.S. 14-27.4, an indictment which is drafted pursuant to the provisions of subsection (b) of this section without specifying which "sexual act" was committed is sufficient to charge the crime of first-degree sexual offense and to inform a defendant of such accusation. If a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. State v. Edwards, 305 N.C. 378, 289 S.E.2d 360 (1982).

But Defendant May Demand to Know Specific "Sexual Act" Charged. — When the State does not specify at the outset which "sexual act" was committed by a defendant, it can be required to do so before trial on the indictment is had. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

State Bound by Allegation of Specific Sexual Act. — While the State was not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Evidence Must Correspond to Allegations. — The evidence in a criminal prosecution must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Defendant's convictions on six counts of first-degree sexual offense had to be vacated, as a fatal variance existed between the offense charged, which the State said in the indictment was by force and against the victim's will, and the fact that the State did not present any evidence that the alleged offenses were forcible and the trial court's instruction to the jury that the offense was based on the victim being under 13-years-old. State v. Lawrence, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005), rev'd in part, 360 N.C. 368, 627 S.E.2d 609 (2006).

Sufficiency of Indictment Under § 15-144.1 and This Section. — The short form indictments set out in G.S. 15-144.1 and this section for first-degree rape and first-degree sexual offense provide adequate notice of the charges. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

By enacting G.S. 15-144.1(a) and G.S. 15-144.2(a), the statutes for short-form indictments, the General Assembly provided a method by which indictments can be certain to be sufficient to withstand constitutional challenges. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

Indictment Sufficient to Charge First-Degree Sexual Offense. — This statute provides that if the indictment contains the averment that the victim was under age 13, the indictment is sufficient to charge first-degree sexual offense and all lesser included offenses. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Indictment charging first degree sexual offense which used the words "by force and against the victim's will[.]" was sufficient. State v. Smith, 110 N.C. App. 119, 429 S.E.2d 425, aff'd, 335 N.C. 162, 435 S.E.2d 770 (1993).

Because the indictment charging a first-degree sexual offense included the terms "feloniously" and "against the victim's will," the charge was sufficient to charge first-degree sexual offense and was not substantially altered by the addition of the term by force; thus, the trial court did not err in allowing the amendment pursuant to G.S. 15A-923(e). State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Indictment for first-degree sex offense that matched the form required by G.S. 15-144.2 was sufficient to inform defendant of the charges against him. State v. Massey, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005), rev'd in part on other grounds, 361 N.C. 406, 646 S.E.2d 362 (2007).

Short-form indictment charging violation of G.S. 14-27.7A(a) was sufficient when it alleged that defendant unlawfully, willfully, and feloniously engaged in a sexual act with a person of the age of 13 years, that defendant was at least six years older than the victim, and that he was not lawfully married to the victim; the indictment complied with the requirements of G.S. 15-144.2(a) and was sufficient to put him on notice of the crime of which he was accused. State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

Defendant's claim that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments opened the door to defendant being subjected to double jeopardy for the same acts on the same dates, was rejected because: (1) defendant's indictments for statutory sexual offense, statutory sexual offense against a person who was 13, 14, or 15 years of age, and sexual offense were in compliance with the requirements of G.S. 15-144.2, and the indictments matched the wording of G.S. 14-27.4(a)(1), G.S. 14-27.7A(a), and G.S. 14-27.5(a)(1); (2) defendant's indictments for the charges of taking indecent liberties with a child matched the wording of G.S.14-202.1(a)(2); and (3) defendant's assault on a female indictments matched the wording of G.S. 14-33(c)(2); each of the indictments was sufficient to inform defendant of the charges against defendant, and defendant failed to show any deprivation of defendant's ability to prepare a defense due to a lack of specificity in the indictments. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Indictment Insufficient to Charge First-Degree Sexual Offense. — Sexual offense indictments were fatally defective because they cited one statute, but defendant was tried, convicted, and sentenced under another statute, and the averments were insufficient to satisfy all of the elements contained in either statute; while the indictments (1) alleged that each victim was a child under age 13, (2) named each child, and (3) averred that defendant "did engage in a sex act" with each, under the very narrow circumstances presented, the use of "short-form" language authorized under G.S. 15-144.2(b) was not sufficient to cure the fatal defects. State v. Miller, 159 N.C. App. 608, 583 S.E.2d 620, 2003 N.C. App. LEXIS 1538 (2003), aff'd, 358 N.C. 133, 591 S.E.2d 520 (2004).

Short Form Constitutionally Valid. — Short-form indictment for the crime of first-degree sexual offense is constitutionally valid even though it fails to allege one of the elements of sex offense. State v. Love, 152 N.C. App. 608, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 66 (2003).

Bill of Particulars. — A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Multiple Short-Form Indictments Did Not Create a Danger of Ununanimous Verdicts. — Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. Art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

Cited in State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981); State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003); State v. Randle, 167 N.C. App. 547, 605 S.E.2d 692, 2004 N.C. App. LEXIS 2381 (2004); State v. Jones, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005); State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006).

§ 15-145. Form of bill for perjury.

In every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

The jurors for the State, on their oath, present, that A.B., of ________ County, did unlawfully commit perjury upon the trial of an action in ________ court, in ________ County, wherein ________ was plaintiff and ________ was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true. (1842, c. 49, s. 1; R.C., c. 35, s. 16; Code, s. 1185; 1889, c. 83; Rev., ss. 3246, 3247; C.S., s. 4615.)

Cross References. — As to perjury generally, see G.S. 14-209 et seq.

CASE NOTES

Constitutionality. — The form of indictment for perjury prescribed by this section is sufficient and constitutional. State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890); State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

Purpose. — The purpose of this section is to render unnecessary useless details and niceties, in charging the offense of perjury, that one time prevailed to the prejudice of the administration of criminal justice. State v. Robertson, 98 N.C. 751, 4 S.E. 511 (1887).

Effect of this section is not to change in any respect the constituent elements of perjury nor the nature or mode of proof. It only relieves the State from charging in the indictment the details, or rather the definition of the offense, and makes it sufficient to allege that the defendant unlawfully committed perjury, charging the name of the action and of the court in which committed, setting out the matter alleged to have been falsely sworn and averring further that the defendant knew such to be false, or that he was ignorant whether or not it was true. State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956).

This section dispenses with the necessity of setting forth the record of the indictment, on the trial of which the false oath is alleged to have been taken, and only requires that the substance would be set forth, but it did not dispense with the necessity of making all the averments in an indictment for perjury which were all necessary to be proved, and it is necessary to prove in what court, or before whom, the oath was taken. State v. Lewis, 93 N.C. 581 (1885).

Defendant Would Not Benefit from Inclusion of Minutiae. — A defendant certainly can derive no just benefit from the insertion in the charge of the minutiae of what would constitute perjury. It would serve not so much to enlighten the defendant as to the charge he was to meet, as to present a network of technicalities which hindered the trial of the cause upon its merits and very often caused a miscarriage of justice. State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

Elements of Proof Not Changed by Section. — This section has merely simplified the form of the indictment for perjury, and the constituent elements of the offense remain unchanged and require the same proof to establish the commission of the crime. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908).

Construction with § 15-146. — Since the commission of perjury by another is the basic element in the crime of subornation of perjury, it is appropriate to read this section and G.S. 15-146 together. State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Indictment Required for Perjury. — A person charged with perjury must be indicted by the grand jury as the offense is a felony. A trial without an indictment is contrary to N.C. Const., Art. I, § 22. State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913).

Sufficient Averment of Jurisdiction. — The jurisdiction of the justice of the peace of the complaint upon the examination whereof the alleged perjury was committed is sufficiently averred, where it is averred that the justice had power to administer the oath. State v. Davis, 69 N.C. 495 (1873).

Failure to Allege Knowledge of Falsity. — Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had. State v. Flowers, 109 N.C. 841, 13 S.E. 718 (1891).

Materiality of False Testimony Need Not Be Charged. — Prior to the adoption of this section, in indictments for perjury the indictment was required to charge that the alleged false testimony was material to the issue. Since this section was passed, however, it has been repeatedly held that this need not appear in the indictment. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923), overruling State v. Cline, 150 N.C. 854, 64 S.E. 591 (1909).

Since Averment of Perjury Includes It. — The averment in a bill that defendant committed perjury involves necessarily the charge that the false testimony was material to the issue. State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908).

Word "Feloniously" Not Required. — This section does not make the word "feloniously" a part of the bill, and it does not appear in the form set out, and the same is, therefore, no longer required. State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907), overruling State v. Shaw, 117 N.C. 764, 23 S.E. 246 (1895) and State v. Bunting, 118 N.C. 1120, 118 N.C. 1200, 24 S.E. 118, 24 S.E. 118 (1896); State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

Variance as to Term of Court Held Fatal. — Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B and the records of that court showed that at that term there was no trial between these parties, but the record showed that at a term other than the one alleged in the indictment there was such a trial, and the judge allowed this record to be introduced, this was held error, and the variance was fatal. State v. Lewis, 93 N.C. 581 (1885).

Use of "Suit, Controversy, or Investigation" to Describe Proceeding. — Where perjury was alleged to have been committed in the trial of a "suit, controversy, or investigation," without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923).

Style of Court. — The style of the court before which the perjury is alleged to have been committed must be legally set forth. State v. Street, 5 N.C. 156, 3 Am. Dec. 682 (1807), decided prior to enactment of this section.

Name of Justice of the Peace. — An indictment for perjury, alleged to have been committed upon a trial in the court of a justice of the peace, is not defective because it sets out the name of the justice before whom the case was tried. Addition of the justice's name does not harm the defendant. At most its inclusion is mere surplusage. State v. Flowers, 109 N.C. 841, 13 S.E. 718 (1891), decided prior to abolition of justices of the peace.

Applied in State v. Rhinehart, 209 N.C. 150, 183 S.E. 388 (1936); State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Cited in State v. Watkins, 256 N.C. 606, 124 S.E.2d 570 (1962).

§ 15-146. Bill for subornation of perjury.

In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed. (1842, c. 49, s. 2; R.C., c. 35, s. 17; Code, s. 1186; Rev., s. 3248; C.S., s. 4616.)

CASE NOTES

Allegations Required Generally. — This section requires that an indictment for subornation of perjury should charge that the defendant did unlawfully, willfully, and feloniously procure another to willfully and corruptly commit perjury. State v. Watkins, 256 N.C. 606, 124 S.E.2d 570 (1962).

An indictment under this section should designate the court and the nature of the case wherein the alleged perjury occurred, and set out either the false statement or statements defendant is alleged to have procured another to make, or that the defendant knew said statement or statements to be false, or that he was ignorant as to whether or not such statement or statements were true. State v. Watkins, 256 N.C. 606, 124 S.E.2d 570 (1962).

Indictment Required to Set Forth Underlying Perjury. — Since the commission of the crime of perjury is the basic element in the crime of subornation of perjury, it is appropriate to read this section and G.S. 15-145 in reference to each other. And if it be essential to charge the offense of perjury in conformity to the form of indictment prescribed in G.S. 15-145, it would seem equally clear that in an indictment charging subornation of perjury the crime of perjury constituting the basis therefor is required to be set forth in conformity to the form of indictment so prescribed. State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

§ 15-147: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to allegations and proof of previous convictions, see G.S. 15A-645 and 15A-928.

§ 15-148. Manner of alleging joint ownership of property.

In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint-stock companies and trustees. (R.C., c. 35, s. 19; Code, s. 1188; Rev., s. 3250; C.S., s. 4618.)

CASE NOTES

Apparent Variance Cured. — Where property is charged in an indictment for larceny as belonging to A and another, and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by this section. State v. Capps, 71 N.C. 93 (1874).

Where A makes a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, in an indictment for larceny the cotton was properly charged to be the property of A and another. State v. Patterson, 68 N.C. 292 (1873).

Variance Not Cured. — Upon the trial of an indictment for injury to livestock, it was a variance where the property was laid in "L.S. and others," and the proof was that L.S. was the exclusive owner. State v. Hill, 79 N.C. 656 (1878).

Words "and Another or Others" Invalidates Indictment. — An indictment for larceny, which charges the thing taken to be the property of J.R.D. "and another or others" is fatally defective under this section. State v. Harper, 64 N.C. 129 (1870).

Cited in State v. Gallimore, 272 N.C. 528, 158 S.E.2d 505 (1968); State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-149. Description in bill for larceny of money.

In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven. (1876-7, c. 68; Code, s. 1190; Rev., s. 3251; C.S., s. 4619.)

CASE NOTES

Purpose of Section. — An indictment, before 1877, for stealing "money" without further description could not have been sustained, and the Legislature, to remedy the difficulty of describing and identifying bank bills, treasury notes, etc., which may be stolen, passed this section. State v. Reese, 83 N.C. 637 (1880).

Amount Should Be Charged. — The term "money," without anything added to make it more definite, is too loose in indictments, and it should be described at least by the amount, as to how many dollars and cents. State v. Reese, 83 N.C. 637 (1880).

Charge Sufficient. — The charge of the theft of "five dollars in money of the value of five dollars" is good under this section, and is sustained by the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank notes. State v. Carter, 113 N.C. 639, 18 S.E. 517 (1893).

Inasmuch as money is the measure of values, a charge in an indictment of taking "ten dollars in money" is an allegation of taking "the value of ten dollars." State v. Brown, 113 N.C. 645, 18 S.E. 51 (1893).

Variance Not Found. — Where an indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten-dollar bills" it was not a variance. State v. Freeman, 89 N.C. 469 (1883).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-150. Description in bill for embezzlement.

In indictments for embezzlement, except when the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved. (1871-2, c. 145, s. 2; Code, s. 1020; Rev., s. 3252; C.S., s. 4620.)

Cross References. — As to embezzlement in general, see G.S. 14-90 et seq. and G.S. 53-129.

CASE NOTES

Proof of Embezzlement of Less Than Amount Charged. — In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. State v. Dula, 206 N.C. 745, 175 S.E. 80 (1934).

Description of Property Sufficient. — The description of the property embezzled, as "one note for five dollars in money of the value of five dollars," is sufficiently specific. State v. Fain, 106 N.C. 760, 11 S.E. 593 (1890).

"Did Steal, Take, Carry Away" Is Surplusage. — An allegation in an indictment for embezzlement that the defendant "did steal, take, carry away" the property alleged to have been embezzled, is surplusage, and will not vitiate an indictment otherwise sufficient. State v. Fain, 106 N.C. 760, 11 S.E. 593 (1890).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-151. Intent to defraud; larceny and receiving.

In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (1852, c. 87, s. 2; R.C., c. 35, ss. 21, 23; 1874-5, c. 62; Code, s. 1191; Rev., s. 3253; C.S., s. 4621.)

Cross References. — As to larceny and receiving stolen goods generally, see G.S. 14-70 et seq.

CASE NOTES

Section modifies the common law. It is not now necessary to name the injured party where prosecution is based on forgery or other fraud. It is, however, necessary to allege and prove the evil intent when fraud is the foundation for the prosecution. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

Uttering a Forged Check. — A bill of indictment charging the uttering of a forged check which charges all the essential elements of the offense but not specifying to whom checks were uttered is sufficient. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

Making Fraudulent Entries in Bank Records. — An indictment charging the employee with the indictable offense of making a false entry on the books of a bank in which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

Election Between Counts of Larceny and Receiving Not Required. — On trial of an indictment for larceny and receiving, etc., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the solicitor (now district attorney) to elect upon which count he will proceed. State v. Morrison, 85 N.C. 561 (1881).

General Verdict Correct. — A general verdict of guilty upon an indictment of two counts — one for stealing and the other for receiving stolen goods of a value less than five dollars — is correct and one count is defective the verdict will be taken upon the good count, and there may be judgment. State v. Bailey, 73 N.C. 70 (1875); State v. Leak, 80 N.C. 403 (1879).

Cited in State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-152: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to joinder of offenses and consolidation of indictments, see G.S. 15A-643.

§ 15-153. Bill or warrant not quashed for informality.

Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment. (37 Hen. VIII, c. 8; 1784, c. 210, s. 2, P.R.; 1811, c. 809, P.R.; R.C., c. 35, s. 14; Code, s. 1183; Rev., s. 3254; C.S., s. 4623.)

Cross References. — As to particular defects which do not vitiate, see G.S. 15-155. For examples of sufficient indictments, see also the notes under the various sections in Chapter 14 dealing with particular crimes.

Legal Periodicals. — For note on the sufficiency of indictments in statutory language, see 35 N.C.L. Rev. 118 (1956).

CASE NOTES

I. General Consideration.
II. Form and Sufficiency of Indictments and Warrants.
  A. In General.
  B. Use of Language of Statute.
  C. Remedies for Insufficiency.

III. Defects.
  A. In General.
  B. Omissions and Errors.
  C. Allegations Differing from Proof.
  D. Pleading in the Alternative.
IV. Particular Offenses.

I. GENERAL CONSIDERATION.

Purpose of Section. — This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the stages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. The Legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked that the act directs the court to proceed to judgment, without regard to two things — one of the form, the other refinement. State v. Moses, 13 N.C. 452 (1830); State v. Hester, 122 N.C. 1047, 29 S.E. 380 (1898); State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923); State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

This section and G.S. 15-155 were passed to forbid refinements and technicalities which, without being any aid to the innocent, brought the administration of justice into disrepute. State v. Leeper, 146 N.C. 655, 61 S.E. 585 (1908), overruled on other grounds, In re Alamance County Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

This section was designed to free the courts from the fetters of form, technicality and refinement not concerned with the substance of the charge. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

This section was enacted to simplify forms of indictment. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Liberal Construction. — This section has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as in the form of indictment. State v. Smith, 63 N.C. 234 (1869); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917).

This section has received a very liberal construction. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

Rule Also Applied in Defendant's Favor. — Although the rule prohibiting reliance upon technicalities applies only against defendants, it is in accordance with the spirit of the section that it should be invoked in their favor also, for example as to the form of defendant's objection to the indictment. State v. Wood, 175 N.C. 809, 95 S.E. 1050 (1918).

Purpose of the warrant or indictment is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction. State v. Dorsett, 272 N.C. 227, 158 S.E.2d 15 (1967).

Purposes of Requirements as to Form of Indictments. — An indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) to provide such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of nolo contendere or guilty, to pronounce sentence according to the rights of the case. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Two Theories Alleged in Single Count. — Where, in a single count of an indictment, the State alleged two factual underpinnings for, or factual theories of, conviction for a violation of G.S. 14-230, it was not required that the State prove both; proof of only one factual theory was legally sufficient and at most placed the State at risk of failing to persuade the jury of defendant's guilt. State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989).

Indictment Under Private Statute. — Upon an indictment under a private statute, it is sufficient if the same is set forth by chapter and date and its material provisions incorporated in the indictment. State v. Heaton, 77 N.C. 505 (1877).

Holding Prisoner Where Indictment Is Defective. — Where the indictment should have been quashed because it was defective in form, the prisoner could still be held for a proper bill under this section. State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937).

Applied in State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935); State v. Dale, 218 N.C. 625, 12 S.E.2d 556 (1940); State v. Blanton, 227 N.C. 517, 42 S.E.2d 663 (1947); State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954); State v. Nugent, 243 N.C. 100, 89 S.E.2d 781 (1955); State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Bowden, 272 N.C. 481, 158 S.E.2d 493 (1968); State v. Shipman, 14 N.C. App. 577, 188 S.E.2d 741 (1972); State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974); State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Hill, 31 N.C. App. 248, 229 S.E.2d 810 (1976).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930); State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937); State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Miller, 231 N.C. 419, 57 S.E.2d 392 (1950); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959); State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963); Klopfer v. North Carolina, 385 U.S. 916, 87 S. Ct. 226, 17 L. Ed. 2d 141 (1966); State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969); State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Frinks, 19 N.C. App. 271, 198 S.E.2d 570 (1973); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996); State v. Hall, 131 N.C. App. 427, 508 S.E.2d 8 (1998); State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007); State v. McCallum, 187 N.C. App. 628, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007); State v. Tollison, 190 N.C. App. 552, 660 S.E.2d 647, 2008 N.C. App. LEXIS 1002 (2008).

II. FORM AND SUFFICIENCY OF INDICTMENTS AND WARRANTS.

A. In General.

Plain, intelligible and explicit charge is all that is now required in any criminal proceeding. State v. Smith, 63 N.C. 234 (1869); State v. Caylor, 178 N.C. 807, 101 S.E. 627 (1919). See also State v. Everhardt, 203 N.C. 610, 166 S.E. 738 (1932); State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941).

If a warrant is sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment, it meets the requirements of this section. State v. Sumner, 232 N.C. 386, 61 S.E.2d 84 (1950).

A bill is sufficient if it charges the offense in a plain, intelligible and explicit manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972); State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

The requirements of this section are met where the indictment sets forth in a plain, intelligible and explicit manner all elements of the crime charged. State v. Page, 32 N.C. App. 478, 232 S.E.2d 460, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

This section provides against quashal for informality if the charge be plain, intelligible, and explicit and sufficient matter appear in the bill to enable the court to proceed to judgment. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

All that is required in a warrant or bill of indictment, since the adoption of this section, is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. State v. Hammonds, 241 N.C. 226, 85 S.E.2d 133 (1954); State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963); State v. Hunt, 265 N.C. 714, 144 S.E.2d 890 (1965); Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966); State v. Pinyatello, 272 N.C. 312, 158 S.E.2d 596 (1968); State v. Clontz, 4 N.C. App. 667, 167 S.E.2d 520 (1969); State v. Hawkins, 19 N.C. App. 674, 199 S.E.2d 746 (1973).

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense in a plain, intelligible, and explicit manner. If the statutory words fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Plain, Intelligible, and Explicit Indictment Is Constitutional. — A bill of indictment that charges "in a plain, intelligible and explicit manner," under this section, the criminal offense the accused is "put to answer," affords the protection guaranteed by N.C. Const., Art. I, § 22, 23. State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958).

Requirements for a valid indictment are (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of nolo contendere or guilty to pronounce sentence according to the rights of the case. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Hinson, 17 N.C. App. 25, 193 S.E.2d 415 (1972), cert. denied, 282 N.C. 583, 194 S.E.2d 151, 412 U.S. 931, 93 S. Ct. 2762, 37 L. Ed. 2d 159 (1973); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

Indictment Sufficient. — Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State, pursuant to G.S. 15-153, adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

Aggravators Not Required to Be Alleged in Short-Form Indictment. — State-court murder indictments are not required to allege the aggravating circumstances to be presented against capital defendants. State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003).

Order of Arrest and Affidavit Constitute Warrant. — The order of arrest and the attached affidavit on which it is based are to be read and considered as a single document and together constitute a warrant. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Requirements for Valid Warrant. — A warrant meets minimum standards for validity if it (1) informed the defendant of the charge against him, (2) enabled him to prepare his defense, and (3) enabled the court to proceed to judgment and thereby barred another prosecution for the same offense. State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

A valid warrant must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense, and to enable the court to proceed to judgment. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A charge must be sufficiently definite to enable the defendant to prepare his defense, to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. This is the test of the sufficiency of a warrant as to the definiteness of its allegations. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

A warrant sufficient to inform a person of the offense with which he is charged and adequate to protect him against further prosecution for that offense is sufficient. State v. Daniel, 255 N.C. 717, 122 S.E.2d 704 (1961).

A warrant and the affidavit upon which it is based will be construed together and will be tested by rules less strict than those applicable to indictments, but, nevertheless, the warrant and the affidavit together must charge facts sufficient to constitute an offense. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Effect of Defects in Warrant. — Defects in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Essential Elements Must Be Set Forth. — In order to constitute a valid charge under a statute, the essential elements of the offense must be set forth in the warrant. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in the indictment. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

Section does not dispense with requirement that essential elements of offense must be charged. State v. Gibbs, 234 N.C. 259, 66 S.E.2d 883 (1951); State v. Nugent, 243 N.C. 100, 89 S.E.2d 781 (1955); State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973); State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Section Does Not Supply Essential Averments or Remedy Omission. — By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged. State v. Cole, 202 N.C. 592, 163 S.E. 594 (1932); State v. Tarlton, 208 N.C. 734, 182 S.E. 481 (1935).

Trend Is Not to Consider Objections Founded on Mere Matter of Form. — The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Nonessential and Minor Defects Do Not Affect Judgment. — This section provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for nonessential or minor defects. State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

Approved Forms Should Be Followed. — This section was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors (now district attorneys) will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Marsh, 132 N.C. 1000, 43 S.E. 828 (1903); State v. Hammonds, 241 N.C. 226, 85 S.E.2d 133 (1954); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Prosecuting officers should ordinarily follow approved forms in drafting bills of indictment so as to avoid raising questions unnecessarily as to what are refinements and what are essential allegations. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

Incorporation of Essential Information by Reference. — Reference in the second count of an indictment for forgery and for uttering a bad check to the first count, wherein the check was fully described, was sufficient to incorporate by reference essential information necessary to sustain the second count. State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Identity of Accused. — For an indictment to be valid, the name of the accused must be alleged in a manner sufficient to identify him with certainty. State v. Bagnard, 24 N.C. App. 566, 211 S.E.2d 471 (1975).

Indictments and warrants need only allege the ultimate facts constituting each element of the criminal offense. Evidentiary matters need not be alleged. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Evidentiary matters are not required to be alleged in a bill of indictment. State v. Rankin, 55 N.C. App. 478, 286 S.E.2d 119, cert. denied and appeal dismissed, 305 N.C. 590, 292 S.E.2d 11 (1982).

Use of abbreviations in warrants and indictments is not to be encouraged. State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

Means by Which Accused Aided and Abetted. — An indictment need not set forth the specific facts or means by which an accused aided and abetted in the commission of a crime. State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

Use of uniform traffic ticket as a warrant should not be encouraged. This form lacks that degree of clarity desirable in a warrant which should "express the charge against the defendant in a plain, intelligible, and explicit manner." State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

Endorsement by Grand Jury Unnecessary. — No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906), overruling State v. McBroom, 127 N.C. 528, 37 S.E. 193 (1900); State v. Long, 143 N.C. 670, 57 S.E. 349 (1907).

B. Use of Language of Statute.

Indictment in Language of Statute. — An indictment following substantially the language of the statute is sufficient only when it thereby charges the essential elements of the offense in a plain, intelligible and explicit manner. If the statutory words fail to do this, they must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Jordan, 247 N.C. 253, 100 S.E.2d 497 (1957); State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967); State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968).

The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. This rule does not apply where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if and when it follows the language of the statute or ordinance and thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner." If the words of the statute fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. Dorsett, 272 N.C. 227, 158 S.E.2d 15 (1967).

Where an indictment follows the words of a statute it is sufficient under this section. State v. Harrison, 145 N.C. 408, 59 S.E. 867 (1907); State v. Lepeer, 146 N.C. 655, 61 S.E. 585 (1908), overruled on other grounds, In re Alamance County Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991). See also State v. Davis, 203 N.C. 47, 164 S.E. 732, cert. denied, 203 N.C. 327, 166 S.E. 297, 287 U.S. 645, 53 S. Ct. 91, 77 L. Ed. 558 (1932).

Ordinarily, an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Indictment for offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act or specifically set forth the facts constituting the same. State v. Gibbs, 234 N.C. 259, 66 S.E.2d 883 (1951).

But it is not necessary to charge in the precise words of a statute. Under this section, every criminal proceeding by warrant is sufficient for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner. State v. Bigelow, 19 N.C. App. 570, 199 S.E.2d 494 (1973).

Indictment need not refer to a particular statute. Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966).

Reference to a specific statute upon which the charge in a warrant is laid is not necessary to its validity. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963); State v. Hunt, 265 N.C. 714, 144 S.E.2d 890 (1965).

Where Warrant Avers Facts Constituting Every Element of Offense. — If a warrant avers facts which constitute every element of an offense, it is not necessary that it be couched in the language of the statute. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963); State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

Charge in General Terms of Breach of Statute Not Sufficient. — Merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient. State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969).

Reference to Statute That Is Not Pertinent. — Where a warrant charges a criminal offense but refers to a statute that is not pertinent, such reference does not invalidate the warrant. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963).

C. Remedies for Insufficiency.

Substance of Indictment May Not Be Amended. — The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor (now district attorney) after it has been returned by the grand jury as a true bill. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Fatal Defect Cannot Be Cured by Amendment. — Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Motion to Quash Tests Sufficiency of Warrant. — A motion to quash is a proper method of testing the sufficiency of the warrant to charge a criminal offense; it is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

It Lies Only for Defect Appearing on Face. — While a motion to quash is an appropriate method of testing the sufficiency of the bill of indictment to charge a criminal offense, it lies only for a defect appearing on the face of the warrant or indictment. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

And Defect Cannot Be Established by Evidence Outside the Record. — The court, in ruling on a motion to quash an indictment is not permitted to consider extraneous evidence; therefore, when the defect must be established by evidence outside the record, the motion must be denied. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Quashing indictments is not favored. It releases recognizances and sets the defendant at large where, it may be, he ought to be held to answer upon a better indictment, though allowable, where it will put an end to the prosecution altogether, and advisable where it appears that the court has not jurisdiction, or where the matter charged is not indictable in any form. It is, therefore, a general rule that no indictment which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with. The example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form. State v. Colbert, 75 N.C. 368 (1876); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972). See State v. Flowers, 109 N.C. 841, 13 S.E. 718 (1891).

Quashing of indictments and warrants is not favored. State v. Abernathy, 265 N.C. 724, 145 S.E.2d 2 (1965).

Quashing of indictments is not favored where they do not affect the merits of the case. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Motion to Quash Denied Where Essential Elements Present. — Where the bills of indictment contained allegations sufficient to set forth fully and clearly all essential elements of the offense charged, denial of defendant's motion to quash on the ground that the bills were "too vague and insufficient, too broad and general" was proper. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

A warrant which, stripped of nonessential words, charges defendant with a crime, is sufficient to survive a motion to quash. State v. Camel, 230 N.C. 426, 53 S.E.2d 313 (1949).

Indictment Not Quashed for Mere Informality or Minor Defects. — In light of the provisions of this section, it is the practice of the Supreme Court not to sustain motions to quash bills of indictment for mere informality or minor defects which do not affect the merits of the case. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953).

Motion to quash for redundancy in the affidavit portion of a warrant upon which the order of arrest portion is based is addressed to the sound discretion of the trial judge. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Motion to Quash Addressed to Court's Discretion. — A motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. State v. Davis, 203 N.C. 13, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

Grounds for Motion in Arrest of Judgment. — A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. State v. Francis, 157 N.C. 612, 72 S.E. 1041 (1911); State v. Ratliff, 170 N.C. 707, 86 S.E. 997 (1915); State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

Not Granted Where Court Enabled to Proceed to Judgment. — Where sufficient matter appears on the face of a bill of indictment to enable the court to proceed to judgment, an arrest of judgment is forbidden by this section. State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895).

Error or Defect Must Appear on Face of Record. — A judgment may be arrested only for some error or defect appearing on the face of the record. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Motion for Bill of Particulars as Prerequisite to Arrest of Judgment. — Where the defendant thinks an indictment fails to impart information sufficiently specific as to the nature of the charge he may, before trial, move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

III. DEFECTS.

A. In General.

Superfluous Words Disregarded. — The use of superfluous words in a bill of indictment will be disregarded. State v. Guest, 100 N.C. 410, 6 S.E. 253 (1888); State v. Arnold, 107 N.C. 861, 11 S.E.2d 990 (1890); State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895); State v. Piner, 141 N.C. 760, 53 S.E. 305 (1906); State v. Wynne, 151 N.C. 644, 65 S.E. 459 (1909); State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

Nonessential Allegations May Be Treated as Surplusage. — Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972).

B. Omissions and Errors.

Inadvertent Omissions. — The inadvertent omission of words not affecting the substance of the charge or prejudicing the defendant is not fatal. State v. Burke, 108 N.C. 750, 12 S.E. 1000 (1891), and cases there cited; State v. Ratliff, 170 N.C. 707, 86 S.E. 997 (1915).

Omission in Complaint of Name of Person Charged. — The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. State v. Poythress, 174 N.C. 809, 93 S.E. 919 (1917).

Omission of Defendant's Name from Affidavit. — Where defendant's name appears in the warrant which refers to the affidavit, forming a part thereof, the omission of defendant's name from the affidavit is not a fatal defect. However, an affidavit form which fails to name the person charged is disapproved. State v. St. Clair, 246 N.C. 183, 97 S.E.2d 840, modified, 247 N.C. 228, 100 S.E.2d 493 (1957).

Omission of Caption. — The omission of the caption of a bill of indictment does not constitute ground for arrest of judgment. State v. Davis, 225 N.C. 117, 33 S.E.2d 623 (1945).

Omission in Describing a Lease. — In describing a lease the omission of the word "year" after the word "one," is one of the informalities cured by this section. State v. Walker, 87 N.C. 541 (1882).

Failure to Repeat Names in Charging Scienter. — Where defendants contended that a court in the indictment charging receiving stolen goods was fatally defective in that the names of defendants were not repeated in charging scienter, the defect was merely an informality or refinement not sufficient to support a quashal of the indictment, the charge being plain, explicit and sufficient to enable the court to proceed to judgment. State v. Whitley, 208 N.C. 661, 182 S.E. 338 (1935).

Foreman's Failure to Sign Bill. — The report of the grand jury, signed by the foreman, in which was listed the bill against defendant as having been returned a true bill charging a noncapital felony, rendered the foreman's failure to sign the bill itself amendable, and defendant's motion to quash the indictment was properly denied. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

The omission of a signature on one of the bills of indictment did not affect the substance of the bill where the other four bills were properly signed on the same day; therefore, the trial court did not err in amending the bill of indictment by adding the signature of the grand jury foreman. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

Name of Court Incorrect. — Describing the court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a justice of the peace, in and for said county," instead of as "a court of a justice of the peace for township A, of Chowan County," is not a substantial variance from the true description and is cured by this section. State v. Davis, 69 N.C. 495 (1873).

Error in Name of Accused. — Where, in the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell," the instrument did not meet the requirement that it be directed to a lawful officer commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Bill of indictment identifying the accused in the body thereof as "John Doe AKA 'Varne'" was insufficient to charge a defendant named "Vaughn Bagnard" with any offense. State v. Bagnard, 24 N.C. App. 566, 211 S.E.2d 471 (1975).

Wrong County in Caption. — A misrecital of the proper county in the caption of an indictment furnishes no ground for arrest of judgment, and it seems that such an indictment would have been sufficient even before this section was adopted. State v. Sprinkle, 65 N.C. 463 (1871); State v. Davis, 225 N.C. 117, 33 S.E.2d 623 (1945).

Incorrect Spelling. — Charging that one committed a crime in the "count aforesaid" instead of "county aforesaid" is an informality which is cured by this section. State v. Smith, 63 N.C. 234 (1869); State v. Evans, 69 N.C. 40 (1873).

Use of Singular Rather Than Plural in Joint Indictment. — In a joint indictment of two defendants for murder which charged that defendants "of his malice aforethought" committed the act, the use of the word "his" instead of "their" is insufficient ground for arresting the judgment, informalities and refinements being disregarded if the indictment is sufficient to inform defendants of the charge against them and to enable them to prepare their defense, and to protect them from another prosecution. State v. Linney, 212 N.C. 739, 194 S.E. 470 (1938).

C. Allegations Differing from Proof.

Purpose of the rule as to variance in an indictment is to avoid surprise and to protect the accused from another prosecution for the same offense. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

Variance Must Be Material to Be Fatal. — Under this section, a variance, to be fatal, must be substantial and material. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899).

Names of Parties. — Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, the variance is immaterial. State v. Drakeford, 162 N.C. 667, 78 S.E. 308 (1913).

Where indictment alleged that Thomas R. Robertson was defendant, and the proof was that "Thomas Robertson" was the defendant in said action and there was evidence of the identity of Thomas Robertson and Thomas R. Robertson, this is an informality cured by the section. State v. Hester, 122 N.C. 1047, 29 S.E. 380 (1898).

Where, in an indictment for murder, the assault is charged to have been made on one "N.S. Jarrett," and in subsequent parts of the indictment he is described as "Nimrod S. Jarrett," there is no variance. State v. Henderson, 68 N.C. 348 (1873).

Where the bill of indictment alleges a sale of narcotics to one person and the proof tends to show only a sale to a different person, the variance is fatal. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974).

Name of Article Stolen. — In an indictment for larceny, when the article stolen is described as a "calf" skin and is proven on the trial to be a "kip" skin, there is no variance between the allegation and the proof. State v. Campbell, 76 N.C. 261 (1877).

Object Used in Commission of Assault. — Evidence that defendant committed the assault with a "brick or a rock or what" was not fatal variance with a warrant charging that the assault was committed with a brick, the evidence being sufficient to justify the jury in inferring that the assault was committed with a brick as charged, and there being no element of surprise in the evidence, especially where defendant's defense was that of an alibi. State v. Hobbs, 216 N.C. 14, 3 S.E.2d 431 (1939).

Number of Victims. — In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

D. Pleading in the Alternative.

When Use of Disjunctive Constitutes Fatal Defect. — Whether the improper use of the disjunctive constitutes a fatal defect in an indictment, or simply poor pleading, depends upon whether such use renders the indictment uncertain. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Waiver of Duplicity in Indictment. — By going to trial without making a motion to quash, defendant waived any duplicity that might have existed in the bill of indictment. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Alternative Allegation of Offenses. — Two or more offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Alternative Pleading as to How Offense Committed. — Where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term "and" not with the word "or." State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

In an indictment it is always the better practice to use the conjunctive "and" rather than the disjunctive "or" where a statute sets forth disjunctively several means or ways by which an offense may be committed. State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631, rev'd on other grounds, 281 N.C. 618, 189 S.E.2d 163 (1972).

Offense Not Charged in Alternative. — An indictment charging that defendant did unlawfully and willfully build or install a septic tank, without procuring a permit and having the tank inspected as required by law, should not be quashed on the ground that the offense charged is alleged in the alternative, since the words "build" and "install" in the sense in which they were used in the ordinance, the violation of which is alleged in the indictment, are synonymous. State v. Jones, 242 N.C. 563, 89 S.E.2d 129 (1955).

IV. PARTICULAR OFFENSES.

Description of Property in Indictment for Larceny. — The description in an indictment must be in the common and ordinary acceptation of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant in any subsequent prosecution for the same offense. State v. Campbell, 76 N.C. 261 (1877); State v. Martin, 82 N.C. 672 (1880); State v. Caylor, 178 N.C. 807, 101 S.E. 627 (1919).

The description of the property alleged to have been stolen must be of sufficient certainty to enable the jury to say that the article proved to be stolen is the same. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. State v. Fuller, 13 N.C. App. 193, 185 S.E.2d 312 (1971).

The description of property alleged to have been stolen must be plain and intelligible, and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other forms, etc., when stolen, it must be described by the name by which it is generally known. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Object of describing property stolen by its usual name, ownership, etc., is to enable the defendant to make his defense, and to protect himself against a second conviction. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Object of describing property stolen by its quality and quantity is that it may appear to the court to be of value. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Indictment for burglary need not describe the property stolen by the burglar. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

But Felony Intended Need Not Be Set Out as Specifically. — In an indictment for burglary, the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In specifying the felony intended in an indictment for burglary it is enough to state the offense generally and to designate it by name. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Identifying Premises Entered in Burglary Indictment. — An indictment for burglary is fatally defective if it fails to identify the premises broken into and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Ownership of Property in Indictment for Arson. — In a prosecution under G.S. 14-65, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or quashal. State v. McKeithan, 203 N.C. 494, 166 S.E. 336 (1932).

Prerequisites of affidavit portion of warrant charging the offense of resisting arrest are set forth in State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967) and State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

One of the prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest is that the affidavit upon which the order of arrest is based shall identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Indictment for Resisting Arrest. — A motion in arrest of judgment should have been granted where indictment for resisting a public officer failed to identify the public officer and did not point out even in a general way the manner in which the defendant resisted. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Use of Deadly Weapon. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Driving While License Suspended or Revoked. — Where a warrant does not charge that defendant operated a motor vehicle on a public highway, such warrant fails to allege an essential element of the offense as defined in G.S. 20-28(a). State v. Cook, 272 N.C. 728, 158 S.E.2d 820 (1968).

Public Drunkenness. — A warrant charging that defendant did "unlawfully and willfully appear off of his premises in a drunken condition" is insufficient to charge the offense of public drunkenness proscribed by former G.S. 14-335 (see now G.S. 14-444), since it fails to charge that defendant was in a public place. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Receipt of Official Ballots. — A charge of the receipt by defendant of official ballots, knowing that he had no legal right to them, amounts to a charge of interference with the duty of the county board of elections to safely keep the ballots until time for delivery to the registrars (now chief judge), within the provisions of this section, and the bill of indictment should not have been quashed because it failed to charge the manner in which the election officials were interfered with. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).

§ 15-154: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-155. Defects which do not vitiate.

No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute" or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense. (7 Hen. VIII, c. 8; R.C., c. 35, s. 20; Code, s. 1189; Rev., s. 3255; C.S., s. 4625.)

Cross References. — As to other defects which do not vitiate an indictment, see G.S. 15-153 and the notes under the various sections in Chapter 14 dealing with particular crimes.

CASE NOTES

I. General Consideration.
II. Time of Offense.

I. GENERAL CONSIDERATION.

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Section Cures Formal Defects. — This section is intended to cure only formal defects in the indictment after judgment, and not omissions of averments necessary to enable the court to give judgment intelligently. State v. Wise, 66 N.C. 120 (1872).

Effect on Common Law Technicalities. — The refined technicalities of the procedure at common law, in both civil and criminal cases, have almost entirely, if not quite, been abolished by the statute. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

Modern tendency is against technical objections which do not affect the merits of the case. Hence judgments are not to be stayed or reversed for nonessential or minor defects. State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935).

Essential Elements Must Still Be Charged. — Nothing in G.S. 15-153 or in this section dispenses with the requirement that the essential elements of the offense must be charged. State v. Sossamon, 259 N.C. 374, 130 S.E.2d 638 (1963); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Purpose of the rule as to variance in an indictment is to avoid surprise and to protect the accused from another prosecution for the same offense. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

Variance Raised by Motion for Judgment of Nonsuit. — A fatal variance between the indictment and the proof is properly raised by motion for judgment of nonsuit. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

The provisions of § **15-144.1** do not prevail over this section. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Charge in Warrant Different from That in Indictment. — Where an arrest warrant listed a different charge from that subsequently returned in the indictment did not require that the judge dismiss the latter. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

Substance of Indictment May Not Be Amended. — The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor (now district attorney) after it has been returned by the grand jury as a true bill. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Words "with force and arms" constitute a formal phrase traditionally included in bills of indictment, but have no significance as an element of the specific crime charged in the bill of indictment. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964); State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Section 15-144 does not prevail over the language of this section, and the omission of the phrase "with force and arms" does not, therefore, render a defendant's indictment for murder fatally defective. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Construction with § 15-144.1 as to "with Force and Arms". — This section does not either require the averment "with force and arms" or express a legislative intent that the language in G.S. 15-144.1(a) prevail over the express language in this section, which states in effect that no judgment shall be stayed or reversed because of the omission of the words "with force and arms" from the indictment. State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982).

An indictment in a rape case under G.S. 15-144.1 need not contain the phrase "with force and arms." State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983).

Indictment concluding against the "force" instead of the "form" of the statute is sufficient under this section. State v. Davis, 80 N.C. 385 (1879).

Indictment concluding against the form of the "statue" instead of "statute" is not ground for an arrest of judgment. State v. Smith, 63 N.C. 234 (1869).

Omissions Held Not Fatal. — Omitting the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State," are not fatal defects. State v. Howard, 92 N.C. 772 (1885).

Conclusion Simplified. — The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are not necessary in an indictment for any offense whatever, but are mere surplusage. State v. Sykes, 104 N.C. 694, 10 S.E. 191 (1889); State v. Kirkman, 104 N.C. 911, 10 S.E. 312 (1889), overruling State v. Joyner, 81 N.C. 534 (1879); State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Dudley, 182 N.C. 822, 109 S.E. 63 (1921).

Locality May Be Omitted. — Formerly failure to allege and prove the locality, appropriate to the forum, was fatal, because essential to the jurisdiction, both in civil and criminal actions, but this has been wisely reversed by this section. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907).

Variance in Description of Locality. — Where an indictment alleges the particular place where an act took place, and such allegation is not descriptive of the offense, and is not required to be proved as laid in order to show the court's jurisdiction, a variance which does not mislead accused or expose him to double jeopardy is not material. State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390, cert. denied, 301 N.C. 237, 283 S.E.2d 134 (1980), overruled on other grounds, State v. Randolph, 312 N.C. 198, 321 S.E.2d 871 (1984).

Challenge to Jurisdiction in Plea in Abatement. — Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement. State v. Davis, 203 N.C. 13, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932).

Incorrect Venue. — Even if trafficking indictment failed to name Wake County as a county in which the offense occurred, and venue was therefore technically incorrect in Wake County, the Superior Court of Wake County nevertheless had jurisdiction to try the offense, as under G.S. 15A-631 the return of an indictment is a matter of venue, not jurisdiction. State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620 (1989), cert. denied, 326 N.C. 365, 389 S.E.2d 817 (1990).

Later Indictment for Same Offense Where Time Not of the Essence. — While an appeal from conviction in a recorder's court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the superior court, that court had jurisdiction to try defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. State v. Suddreth, 223 N.C. 610, 27 S.E.2d 623 (1943).

Variance as to Identity of Victim of Armed Robbery. — In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

Amendment of Description of Stolen Property Did Not Invalidate Breaking and Entering Count. — An amendment by the solicitor (now district attorney) of the description of the stolen property in felonious larceny and receiving counts of an indictment, if error, did not invalidate a count charging felonious breaking and entering, and was not prejudicial where the only sentence imposed was for breaking and entering. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Variance as to Whom Narcotics Were Sold. — Where the bill of indictment alleges a sale of narcotics to one person and the proof tends to show only a sale to a different person, the variance is fatal. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974).

Lack of Evidence as to Alleged Serial Number of Stolen Goods. — Where a larceny indictment describes the stolen property as "a 1970 Plymouth, Serial # PM14360F239110, the personal property of George Edison Biggs," and the evidence shows the taking by defendant of a 1970 Plymouth which was owned by George Edison Biggs but there is no evidence as to the serial number, the variance is not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Variance as to Custody from Which Defendant Escaped. — Where bill of indictment charges that defendant escaped while lawfully confined in the North Carolina State Prison System in the lawful custody of the North Carolina Department of Correction, and the evidence shows he escaped while assigned by an official of the Department of Correction to work under an employee of the State Highway Commission, the variance is not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Short-form Indictment Held Sufficient. — Short-form indictment expressly alleging murder in the first-degree met the requirements of G.S. 15-155. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

Applied in State v. Gore, 207 N.C. 618, 178 S.E. 209 (1935); State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978); State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136 (1990); State v. Everett, 328 N.C. 72, 399 S.E.2d 305 (1991); State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

Cited in State v. Dale, 218 N.C. 625, 12 S.E.2d 556 (1940); State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Hall, 251 N.C. 211, 110 S.E.2d 868 (1959); State v. Whitley, 264 N.C. 742, 142 S.E.2d 600 (1965); Klopfer v. North Carolina, 385 U.S. 916, 87 S. Ct. 226, 17 L. Ed. 2d 141 (1966); State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968); State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Raynor, 19 N.C. App. 191, 198 S.E.2d 198 (1973); State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979); State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981); State v. Ellers, 56 N.C. App. 683, 289 S.E.2d 924 (1982); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986); State v. Booth, 92 N.C. App. 729, 376 S.E.2d 242 (1989); State v. Smith, 110 N.C. App. 119, 429 S.E.2d 425 (1993).

II. TIME OF OFFENSE.

Failure to Charge Any Date. — Where time is not of the essence of a crime, the omission to charge any date is immaterial by this section, though the allegation of time can do no harm. State v. Taylor, 83 N.C. 601 (1880); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890); State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890); State v. Williams, 117 N.C. 753, 23 S.E. 250 (1895).

When time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed. State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984).

Failure to accurately state the date or time an offense is alleged to have occurred does not invalidate a bill of indictment, nor does it justify reversal of a conviction obtained thereon. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

A judgment for burglary was not arrested because the indictment imperfectly referred to the hour of midnight as 12:00 a.m. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

A child's uncertainty as to the time or particular day when the offense charged was committed shall not be grounds for nonsuit where there is sufficient evidence that the defendant committed each essential act of the offense. State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987).

Variance as to time is not material where no statute of limitations is involved. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Variance Between Date on Indictment and Date Proved Not Prejudicial. — Where defendant's evidence showed that he did not participate in the crimes and, had this evidence been believed by the jury, would have entitled defendant to acquittal, the variance between the date listed on the indictment and the time of the offense as proved at trial was not prejudicial to defendant, and did not deprive him of an opportunity to present his defense. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

Variance Between Time Alleged and Time Proved Not Usually Fatal. — Where time is not of the essence of the offense and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal. State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971); State v. Locklear, 33 N.C. App. 647, 236 S.E.2d 376, cert. denied, 293 N.C. 363, 237 S.E.2d 851 (1977); State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390, cert. denied, 301 N.C. 237, 283 S.E.2d 134 (1980); State v. Christopher, 58 N.C. App. 788, 295 S.E.2d 487, rev'd on other grounds, 307 N.C. 645, 300 S.E.2d 381 (1983).

The time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984).

Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

But May Not Be Used to Deprive Defendant of His Defense. — This salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971); State v. Locklear, 33 N.C. App. 647, 236 S.E.2d 376, cert. denied, 293 N.C. 363, 237 S.E.2d 851 (1977); State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390, cert. denied, 301 N.C. 237, 283 S.E.2d 134 (1980); State v. Christopher, 58 N.C. App. 788, 295 S.E.2d 487, rev'd on other grounds, 307 N.C. 645, 300 S.E.2d 381 (1983).

As Where He Relies upon Alibi. State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Where a defendant relies upon a defense of alibi, time becomes essential. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Time is not of the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N.C. 765, 117 S.E. 803 (1923).

Nor Felonious Assault. — There was no fatal variance between an indictment charging that the date of a felonious assault was April 17, 1979, and evidence that the assault occurred on February 17, 1979, where the variance was caused by a clerical mistake in the indictment; the statute of limitations was not involved; all of the evidence at trial concerned an incident on February 17; defense counsel's questioning of the witnesses clearly indicates that he was aware of the clerical error before trial; and defendant was not prejudiced in his preparation of an adequate defense by the variance. State v. Bailey, 49 N.C. App. 377, 271 S.E.2d 752 (1980), cert. denied, 301 N.C. 723, 276 S.E.2d 288 (1981).

Nor Receiving Stolen Goods. — When time is not of the essence of the offense, leaving out the date does not make the bill of indictment defective, and the crime of receiving stolen goods is not one of the offenses in which time is of the essence. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Nor Breaking or Entering. — Indictment alleging violation of G.S. 14-54 "on or about the ... day of June, A.D. 1956" was not fatally defective. Time not being of the essence of the offense charged, it was not necessary that the exact date be specified. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

Nor Rape. — It is to the girl's first act of intercourse with a man when she is under 16 (now 13) years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. State v. Trippe, 222 N.C. 600, 24 S.E.2d 340 (1943).

Nor Unlawfully Withholding Credit Card. — The date upon which an allegedly stolen credit card was issued is not necessary to describe the card, is not an essential element of the offense charged, and therefore is not a material fact which the State must allege and prove. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Nor Abandonment. — Failure to specify a particular day in an indictment for abandonment is not fatal especially in view of an instruction that the jury should consider only such evidence as tends to show that the defendant violated the statute after a particular date. State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

Nor Habitual Driving While Intoxicated. — Defendant's conviction of driving while intoxicated under G.S. 20-138.5 was affirmed; all of the requirements of the charge were met, as a disputed prior conviction occurred within the statutory seven year period, and the trial court properly allowed the State to amend the indictment to state the date of the conviction, as time was not of the essence pursuant to G.S. 15-155. State v. Winslow, 169 N.C. App. 137, 609 S.E.2d 463, 2005 N.C. App. LEXIS 533 (2005), review denied, in part, 359 N.C. 642, 617 S.E.2d 660 (2005).

In cases of sexual assaults on children, temporal specificity requisites diminish. Thus, where the child victim testified that defendant perpetrated rape and other sexual offenses against her on several occasions over a period of six years, and specifically recalled offenses occurring on September 27 and September 29, 1988, for both of which dates the defendant presented an alibi, and where the difference between the testimony of the victim as to which offense occurred on which date did not prevent the defendant from presenting his alibi, there was no error in letting the case go to the jury. State v. Young, 103 N.C. App. 415, 406 S.E.2d 3, cert. denied, 330 N.C. 201, 412 S.E.2d 65 (1991).

Time of Birth in Bastardy Proceeding. — Indictment, in a bastardy proceeding, which states that the child was born on August 13, 1941, whereas the evidence was that the birth occurred on November 13, 1940, is not fatally defective. State v. Moore, 222 N.C. 356, 23 S.E.2d 31 (1942).

Reversal of Dates of Offenses. — Variance between indictments which charged the defendant with purchasing heroin on July 8 and marijuana on July 11 and evidence which showed that the dates of purchase were reversed was not such a fatal variance as to require a new trial. State v. Knight, 9 N.C. App. 62, 175 S.E.2d 332 (1970).

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Failure to Include Year in Alleged Date of Offense. — Where the warrant upon which defendant was tried place the time of the offense as "on or about the 19 day of June, 19…," the failure to insert the year being defendant's only assignment of error, the warrant was not fatally defective. State v. Hawkins, 19 N.C. App. 674, 199 S.E.2d 746 (1973).

Change of Date on Indictment Permitted. — In prosecution for incest, where although the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which a certain individual visited the defendant's residence, the change on the indictment of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

It was the fact that another felony was committed, not its specific date, which was the essential question in habitual felon indictment; therefore, because date alleged in indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the state to change the date in the habitual felon indictment. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

Fatal Variance Not Shown. — There was no fatal variance between the allegations contained in the indictment and the actual proof presented by the State with regard to the date of the offense, where although the warrant and bill of indictment showed the date of the offense as March 13, 1985, the defendant was put on notice as to the child victim's uncertainty as to the date during a probable cause hearing, and where, additionally, the defendant did not in fact rely on the date stated in the indictment. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

Article 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

§ 15-155.1. Reports to district attorneys of Work First Family Assistance and out-of-wedlock births.

The Department of Health and Human Services by and through the

Secretary of Health and Human Services shall promptly after June 19, 1959, make a report to each district attorney, setting out the names and addresses of all mothers who reside in his prosecutorial district as defined in G.S. 7A-60 and are recipients of assistance under the provisions of Part 2, Article 2, Chapter 108A of the General Statutes. Such report shall in some manner show the identity of the unwed mothers and shall set forth the number of children born to each said mother. Such a report shall also be made monthly thereafter setting out the names and addresses of all such mothers who reside in the district and who may have become recipients of assistance under the provisions of Part 2, Article 2, Chapter 108A of the General Statutes since the date of the last report. (1959, c. 1210, s. 1; 1973, c. 47, s. 2; c. 476, s. 138; 1987 (Reg. Sess., 1988), c. 1037, s. 50; 1997-443, ss. 11A.118(a), 12.23.)

Local Modification. — (As to Article 15A) Gaston and Mecklenburg: 1959, c. 1210.

§ 15-155.2. District attorney to take action on report of aid to dependent child [Work First Family Assistance] or illegitimate [out-of-wedlock] birth.

(a) Upon receipt of such reports as are provided for in G.S. 15-155.1, the district attorney of superior court may make an investigation to determine whether the mother of an out-of-wedlock child or who is a recipient of Work First Family Assistance, has abandoned, is willfully neglecting or is refusing to support and maintain the child within the meaning of G.S. 14-326 or 49-2 or is diverting any part of the funds received as Work First Family Assistance to any purpose other than for the support and maintenance of a child in violation of G.S. 108-76.1. In making this investigation the district attorney is authorized to call upon:

(1) Any county board of social services or the Department of Health and Human Services for personal, clerical or investigative assistance and for access to any records kept by either such board and relating to the matter under investigation and such boards are hereby directed to assist in all investigations hereunder and to furnish all records relating thereto when so requested by the district attorney;

(2) The board of county commissioners of any county within his district for legal or clerical assistance in making any investigation or investigations in such county and such boards are hereby authorized to furnish such assistance in their discretion; and

(3) The district attorney of any inferior court in his district for personal assistance in making any investigation or investigations in the county in which the court is located and any district attorney so called upon is hereby authorized to furnish such assistance by and with the consent of the board of county commissioners of the county in which the court is located, which board shall provide and fix his compensation for assistance furnished.

(b) If following the investigation the district attorney has reasonable grounds to believe that a violation of G.S. 49-2, 14-326, 108-76.1 or any other criminal offense is being or has been committed, he shall send to the grand jury of the county in which he believes the offense is being or has been committed a bill of indictment charging the commission of the offense. Sole and exclusive jurisdiction of offenses discovered as a result of investigations under this section shall be vested in the superior court notwithstanding any other provisions of law, whether general, special or local. Provided nothing in this Article shall be construed to take from the inferior courts any authority or responsibility now vested in them by existing law or to compel the district attorney to again prosecute a crime that has been disposed of in the inferior courts.

(c) Repealed by Session Laws 1985, c. 589, s. 8. (1959, c. 1210, s. 1; 1969, c. 982; 1973, c. 47, s. 2; c. 476, s. 138; 1985, c. 589, s. 8; 1997-443, ss. 11A.118(a), 12.24.)

Editor's Note. — Section 14-326, referred to in subsections (a) and (b) of this section, was repealed by Session Laws 1981, c. 683, s. 3. The subject matter of former G.S. 14-326 is covered in G.S. 14-322.

Section 108-76.1, referred to in subsections (a) and (b) of this section, was not retained in the 1969 revision of Chapter 108.

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

§ 15-155.3. Disclosure of information by district attorney or agent.

No such district attorney, assistant district attorney, or any attorney-at-law especially appointed to assist said district attorney, or any agent or employee of such district attorney's office shall disclose any information, record, report, case history or any memorandum or document or any information contained therein, which may relate to or be connected with the mother or father of any illegitimate child, or any illegitimate child, unless in the opinion of such district attorney it is necessary or is required in the prosecution and performance of such district attorney's duties as set forth in the provisions of this Article. (1959, c. 1210, s. 4; 1973, c. 47, s. 2.)

ARTICLE 15B.

Pretrial Examination of Witnesses and Exhibits of the State.

§§ 15-155.4, 15-155.5: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter. For present provisions as to discovery in criminal cases, see G.S. 15A-901 et seq.

ARTICLE 16.

Trial before Justice.

§§ 15-156 through 15-158: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-159: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For provisions as to commitment to Department of Correction or local confinement facility, see G.S. 15A-1352, 15A-1353. For provisions as to post-trial relief, see G.S. 15A-1411 through 15A-1422.

See also the Editor's note following the analysis to Chapter 15A.

Editor's Note. — Session Laws, 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the general statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§§ 15-160, 15-161: Repealed by Session Laws 1973, c. 1286, s. 26.

ARTICLE 17.

Trial in Superior Court.

§ 15-162: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-162.1: Repealed by Session Laws 1971, c. 1225.

§§ 15-163 through 15-165: Repealed by Session Laws 1967, c. 218, s. 4.

Cross References. — As to challenge to special venire, see G.S. 9-11. For present provisions as to peremptory challenges in criminal cases, see G.S. 9-21.

§ 15-166. Exclusion of bystanders in trial for rape and sex offenses.

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case. (1907, c. 21; C.S., s. 4636; 1973, c. 1141, s. 14; 1979, c. 682, s. 3; 1981, c. 682, s. 5.)

CASE NOTES

Exclusion of Bystanders Does Not Deny Right to Public Trial. — There was no merit in the contention of the defendants that the exclusion of bystanders during the testimony of the prosecutrix in a prosecution for rape denied them the right to a public trial. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to this section that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the state's witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

Factors Considered. — In determining whether to close a courtroom, trial courts must consider the factors enunciated in Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L.Ed. 31 (1984) and may not rely solely on this section; however, a court need only articulate its fundamental reasons for closing a courtroom and is not required to exhaustively articulate every observation and inference underlying its decision. Bell v. Jarvis, 7 F. Supp. 2d 699 (E.D.N.C. 1998).

Failure to Object Waived Right to Challenge. — Defendant was not entitled to reversal due to the trial court's closure of the courtroom where defense counsel had an opportunity to object but did not. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Sufficiency of Findings. — Trial court's finding that the minor victim's testimony was of a "delicate nature" was sufficient to justify a partial closure of the courtroom, even though that finding was contained in a memorandum the trial court prepared three years after the petitioner's conviction. Bell v. Jarvis, 7 F. Supp. 2d 699 (E.D.N.C. 1998).

The trial court erred in granting the State's motion to clear the courtroom during the victim's testimony because it did not determine if the party seeking closure had advanced an overriding interest that was likely to be prejudiced, ordered closure no broader than necessary to protect that interest, considered reasonable alternatives to closing the procedure, and made findings adequate to support the closure. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Alleged rapist was entitled to habeas corpus where appellate counsel provided ineffective assistance resulting in prejudice by failing to appeal the trial court's decision to close the court. Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999).

Applied in Bell v. Jarvis, 236 F.3d 149, 2000 U.S. App. LEXIS 33947 (4th Cir. 2000).

Cited in In re Stradford, 119 N.C. App. 654, 460 S.E.2d 173 (1995); State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

§ 15-167. Extension of session of court by trial judge.

Whenever a trial for a felony is in progress on the last Friday of any session of court and it appears to the trial judge that it is unlikely that such trial can be completed before 5:00 P.M. on such Friday, the trial judge may extend the session as long as in his opinion it shall be necessary for the purposes of the case, but he may recess court on Friday or Saturday of such week to such time on the succeeding Sunday or Monday as, in his discretion, he deems wise. The trial judge, in his discretion, may exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week. The length of time such court shall remain in session each day shall be in the discretion of the trial judge. Whenever a trial judge continues a session pursuant to this section, he shall cause an order to such effect to be entered in the minutes, which order may be entered at such time as the judge directs, either before or after he has extended the session. (1830, c. 22; R.C., c. 31, s. 16; C.C.P., s. 397; Code, s. 1229; 1893, c. 226; Rev., s. 3266; C.S., s. 4637; 1961, c. 181; 1973, c. 1141, s. 15.)

CASE NOTES

Section Constitutional. — This section is constitutional. State v. Adair, 66 N.C. 298 (1872); State v. Jefferson, 66 N.C. 309 (1872); State v. Taylor, 76 N.C. 64 (1877); State v. Monroe, 80 N.C. 373 (1879). See also National Bank v. Gilmer, 116 N.C. 684, 22 S.E. 2, rehearing denied, 117 N.C. 416, 23 S.E. 333 (1895).

Expiration of Session No Ground for Discharging Jury. — The expiration of a term (now session) of court is no ground for discharging a jury before verdict, for the term (now session) may be continued for the purposes of the trial. State v. McGimsey, 80 N.C. 377 (1879).

Special Term Extended. — Where a trial began on Wednesday of the last week of a special term and the jury had not agreed upon a verdict on Saturday night, it was not improper for the trial judge to open and conduct the regular term on Monday following to continue the special term into that week for the purpose of receiving the verdict of the jury, since the rights of the parties were not prejudiced thereby. National Bank v. Gilmer, 116 N.C. 684, 22 S.E. 2, rehearing denied, 117 N.C. 416, 23 S.E. 333 (1895).

Entry in Minutes Held in Compliance with Section. — Daily entries on the journal during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 A.M. tomorrow," and the entry next day "court convened at 9:30 A.M. pursuant to recess," etc., in regular form, constitute a sufficient compliance with this section. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

Open Court Announcements Sufficient. — Trial court, in making repeated announcements in open court concerning continuing the trial without objection from defendant, satisfied G. S. 15-167. State v. Locklear, 174 N.C. App. 547, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

Cited in Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289; State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d

862 (1994); State v. Smith, 138 N.C. App. 605, 532 S.E.2d 235, 2000 N.C. App. LEXIS 778 (2000).

§ 15-168. Justification as defense to libel.

Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (R.C., c. 35, s. 26; Code, s. 1195; Rev., s. 3267; C.S., s. 4638.)

Cross References. — As to effect of publication in good faith and retraction by a newspaper, see G.S. 99-2.

CASE NOTES

Truth of Entire Charge Must Be Proved. — Where the matter set out in the indictment is libelous, in order for the defendant to justify he must show that the entire charge imputed to the prosecutor is true. State v. Lyon, 89 N.C. 568 (1883).

General Report of Truth Insufficient. — In an indictment for a libel, it is not competent for the defendant to justify by proving that there was, and long had been, a general report in the neighborhood, of the truth of his charge. State v. White, 29 N.C. 180 (1847).

General Bad Character Insufficient. — Proof of the general bad character of an officer in other matters of which he had taken cognizance will not be received to establish the truth of libelous charge in reference to a particular matter. State v. Lyon, 89 N.C. 568 (1883).

Cited in Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).

§ 15-169. Conviction of assault, when included in charge.

On the trial of any person for any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (1885, c. 68; Rev., s. 3268; C.S., s. 4639; 1979, c. 682, s. 4.)

Cross References. — As to conviction of defendant of lesser degree of the crime charged generally, see G.S. 15-170.

CASE NOTES

Section Refers to Assault Generally. — This section does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

When Section Applicable. — This section and G.S. 15-170 are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Sawyer, 224 N.C. 61, 29 S.E.2d 34 (1944); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Stalnaker, 1 N.C. App. 524, 162 S.E.2d 76 (1968); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

This section and G.S. 15-170 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense. State v. Carnes, 279 N.C. 549, 184

S.E.2d 235 (1971); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated and remanded, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

When Inapplicable. — This section is not applicable where all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, were guilty of a crime of less degree. State v. Cox, 201 N.C. 357, 160 S.E. 358 (1931); State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

This section is not applicable where all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein. State v. LeGrande, 1 N.C. App. 25, 159 S.E.2d 265 (1968).

What Indictment Includes. — An indictment for any offense against the criminal law includes all lesser degrees of the same crime known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both. State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

Same — Murder. — Under an indictment for murder, the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault, if the evidence shall warrant such finding when he is not acquitted entirely. State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

Notwithstanding the provisions of this section, when it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon in case the greater offense of murder or manslaughter is not made out, the indictment for murder should be drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect. State v. Rorie, 252 N.C. 579, 114 S.E.2d 233 (1960).

A bill of indictment charging that defendant "unlawfully, willfully, and feloniously and of malice aforethought did kill and murder the victim" is insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Same — Robbery. — The crime of robbery ex vi termini includes an assault on the person, and in a prosecution for robbery, the court must submit the question of defendant's guilt of assault in those instances where the evidence warrants such finding, even in the absence of a request, and even though the State contends solely for conviction of robbery and the defendant contends solely for complete acquittal. State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954).

Same — Rape. — An indictment for rape, as this section declares, includes an assault against the person; and where there is evidence sufficient to warrant such finding, the jury may acquit of the felony of rape and return a verdict of guilty of a lesser criminal assault. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958).

An assault with intent to commit rape under former G.S. 14-22 is a lesser degree of the crime of rape. Therefore, a conviction or acquittal of the former bars a subsequent prosecution of the latter based on the same act or transaction. State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962).

Same — Attempted First-Degree Rape. — In deciding whether trial court erred in submitting assault on a female as a lesser included offense of charge of attempted first-degree rape, the appellate court must consider (1) whether the charge of attempted first-degree rape includes all the essential elements of assault on a female and (2) whether there was some evidence to support a finding of assault on a female. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

Same — Assault with Intent to Rape. — Under a bill of indictment charging an assault with an intent to commit rape, under former G.S. 14-22 the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

Assault is not a less degree of the crime of larceny from the person, and therefore, in a prosecution for larceny, the court is not required to submit the question of defendant's guilt of assault, even though there be evidence thereof. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

Duty to Instruct as to Assault. — Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor has not been aptly tendered in writing. State v. Holt, 192 N.C. 490, 135 S.E. 324 (1926); State v. Davis, 242 N.C. 476, 87 S.E.2d 906 (1955).

Where the State's evidence in a prosecution under an indictment for rape, if believed to its fullest extent, established the crime of rape but the defendant testified the intercourse was with the girl's consent and the evidence was conflicting in other respects, it would have been error for the court not to have charged the jury on the lesser offenses. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

When Duty Arises. — The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976); State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. LeGrande, 1 N.C. App. 25, 159 S.E.2d 265 (1968); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

No Duty to Instruct Where Evidence Supports Greater Offense. — The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

The court is not required to submit to the jury a lesser included offense when there is no evidence of such lesser included offense. State v. LeGrande, 1 N.C. App. 25, 159 S.E.2d 265 (1968); State v. Alexander, 13 N.C. App. 216, 185 S.E.2d 302 (1971).

If the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of this offense, the court is not required to submit the question of defendant's guilt of assault, notwithstanding the jury's right to accept the State's evidence in part and reject it in part. State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954).

The trial court in a prosecution for common-law robbery did not err in refusing to instruct on the lesser included offense of misdemeanor assault where the State's evidence tended to show that defendant took the victim's money by violent means, and defendant admitted taking the victim's money but denied assaulting him. State v. Thompson, 49 N.C. App. 690, 272 S.E.2d 160 (1980).

In a prosecution for armed robbery, where the evidence tends to show that the defendant had committed the armed robbery as alleged in the indictment or that the defendant was innocent, the trial court is not required to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault. State v. Martin, 6 N.C. App. 616, 170 S.E.2d 539 (1969).

In a rape case, the trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape under former G.S. 14-22 and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape under former G.S. 14-22 and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972).

Verdict Does Not Cure Failure to Charge upon Lesser Degree. — The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923).

It is a well recognized principle that where one is indicted for a crime, and under the same bill he may be convicted of a lesser degree of the same crime, and there is evidence tending to support the milder verdict, the prisoner is entitled to have this view presented to the jury under a correct charge, and an error in this respect is not cured by a verdict convicting the prisoner of a higher offense, for in such case it cannot be determined that the jury would not have convicted of the lesser crime if the view had been correctly presented by the judge, upon evidence. State v. Bass, 249 N.C. 209, 105 S.E.2d 645 (1958).

Conviction of Lesser Offense Where Evidence Supports Greater Offense. — Where all the evidence points to a graver crime and the jury's verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed, since it is favorable to

accused. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980).

Effect of Simple Verdict of Guilty. — While this section permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of "guilty," and not specifying a lower offense, is a verdict of guilty of the offense charged in the indictment. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926).

Effect of Nonsuit or Dismissal as to Greater Offense. — Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under G.S. 15-173 was properly refused where there was sufficient evidence to convict of an assault. State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942).

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault but is insufficient to prove the intent necessary for a conviction of this offense, defendant is entitled to nonsuit on the offense charged, but is not entitled to his discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill. State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947).

In a prosecution of a defendant for assault with intent to commit rape, under former G.S. 14-22 nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963).

Applied in State v. Hardee, 192 N.C. 533, 135 S.E. 345 (1926); State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947); State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948); State v. Matthews, 231 N.C. 617, 58 S.E.2d 625 (1950); State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966); State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Hamm, 1 N.C. App. 444, 161 S.E.2d 758 (1968); State v. Silas, 168 N.C. App. 627, 609 S.E.2d 400, 2005 N.C. App. LEXIS 456 (2005).

Cited in State v. Hairston, 222 N.C. 455, 23 S.E.2d 885 (1943); State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944); State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948); State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950); State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-170. Conviction for a less degree or an attempt.

Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (1891, c. 205, s. 2; Rev., s. 3269; C.S., s. 4640.)

Legal Periodicals. — For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For comment on the defense of legal impossibility in light of State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982), see 19 Wake Forest L. Rev. 605 (1983).

For note, "Looking at Lesser Included Offenses on an 'All or Nothing' Basis: State v. Bullard and the Sporting Approach to Criminal Justice," see 69 N.C.L. Rev. 1470 (1991).

CASE NOTES

I. General Consideration.
II. Jury Instructions.
III. Lesser and Included Offenses.

I. GENERAL CONSIDERATION.

Constitutionality. — This section is not unconstitutional. State v. Young, 305 N.C. 391, 289 S.E.2d 374 (1982).

When Applicable. — This section and G.S. 15-169 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958), commented on

in 41 N.C.L. Rev. 118 (1962); State v. Stalnaker, 1 N.C. App. 524, 162 S.E.2d 76 (1968); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated and remanded, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976); State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

When a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974); State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Williams, 51 N.C. App. 397, 276 S.E.2d 715, cert. denied, 303 N.C. 319, 281 S.E.2d 658 (1981).

Section 15-169 and this section are applicable only when there is evidence tending to show the defendant may be guilty of an included crime of lesser degree. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

An indictment or information is insufficient to charge the accused with the commission of a minor offense, or one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense. State v. Chavis, 9 N.C. App. 430, 176 S.E.2d 388 (1970); State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

An indictment or information is insufficient to charge the accused with the commission of a minor offense or one of less degree unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense, or sufficiently sets them forth by separate allegations in an added count; but when the indictment or information contains all the essential constituents of the minor offense, it sufficiently alleges that offense. State v. Rorie, 252 N.C. 579, 114 S.E.2d 233 (1960).

Construction With Other Statutes. — G.S. 15-144, when construed alongside G.S. 15-170, implicitly authorizes the State to utilize a short-form indictment to charge attempted first-degree murder; when drafting such a indictment, it is sufficient for statutory purposes for the State to allege that the accused person feloniously, willfully, and of his malice aforethought, did (attempt to) kill and murder the named victim. State v. Jones, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

Use of Short-form Attempted Murder Indictment. — Defendant's attempt to have conviction for attempted first-degree murder vacated based on his claim that the use of a short-form indictment for the crime of attempted murder was not authorized in North Carolina was without merit; the indictment sufficiently alleged the offense of attempted first-degree murder using the language from G.S. 15-144 and G.S. 15-170 providing that defendant could be convicted of the crime charged therein, or of an attempt to commit the crime so charged, or of a less degree of the same crime. State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

Lesser included offense is one in which the greater offense contains all of the essential elements of the lesser offense. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

Conviction for attempted sexual statutory offense was upheld in action charging the completed crime since the evidence showed that defendant demanded that victim perform fellatio, but the victim refused; thus, evidence was sufficient to support a conviction for the attempted, but not the completed, crime. State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003).

Conviction on lesser offense renders any error in submission of greater offense harmless. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Offense Not Included If It Contains Element Not in Other Crime. — A crime is not a lesser included offense of another crime if the former contains any element that the latter does not. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Crime of "less degree" is not exclusively one which carries a less severe sanction than the crime formally charged in the indictment. State v. Young, 305 N.C. 391, 289 S.E.2d 374 (1982).

Facts of particular case should not determine whether one crime is a lesser included offense of another. Rather, the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements are included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a definitional, not a factual basis. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

The determination of whether one crime is a lesser included offense of another is made on a definitional, not a factual, basis. All essential elements of the lesser offense must be completely covered by the essential elements of the greater offense. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), modified, 318 N.C. 669, 351 S.E.2d 294 (1987).

Defendant may plead guilty to less degrees of the same crimes charged in the indictments against him, and the State may accept such pleas. State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967).

Discretion of Court. — It is not within the trial judge's province to negotiate a plea or enter judgment on a plea to a charge which is not a lesser included offense of the charge at issue. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

Evidence Required to Support Conviction of Lesser Degree. — When the solicitor (now district attorney) announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the bill of indictment charged only the lesser degree of the offense. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Jury Not to Arbitrarily Convict of Lesser Degree. — This section and G.S. 15-169 were not intended to give to the jury the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged, if the uncontradicted evidence shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment. State v. Brown, 227 N.C. 383, 42 S.E.2d 402 (1947).

Silence of Verdict as to All But One Count Distinguished. — Where there are several counts in a bill, if the jury find the defendant guilty on one count and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty as to them. This principle should not be confused with the practice, authorized by this section, which permits the conviction of a less degree of the same crime, when included in a single count. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

Joinder Mere Surplusage. — Since this section was adopted, the joinder in an indictment of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage. State v. Brown, 113 N.C. 645, 18 S.E. 51 (1893).

Election by District Attorney to Try Lesser Degrees and Included Offenses. — Upon the return of an indictment sufficient in form to support a conviction of the defendant of either the maximum degree of the offense charged, a lesser degree thereof or a lesser offense, all of the elements of which are included in the crime charged, the solicitor (now district attorney) has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein. The effect of such election by the solicitor (now district attorney), announced in open court, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the solicitor (now district attorney) announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated and included lesser offense embraced in the bill, and the announcement is entered in the minutes of the court, the announcements is the equivalent of a verdict of not guilty on the charge or charges the solicitor (now district attorney) has elected to abandon. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

The defendant was charged with burglary in the first degree in the bill of indictment. And when the solicitor (now district attorney) stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nolle prosequi with leave on the capital charge. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Uncontradicted Evidence of Greater Offense May Support Lesser Verdict. — When the State, either through a bill of indictment as returned by the grand jury or through the election of its solicitor (now district attorney) to seek a lesser verdict, brings the defendant to trial on a lesser degree of the offense charged, the case can be submitted to the jury if the uncontradicted evidence, as thereafter developed, shows the defendant is guilty of the more serious degree of the crime. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Conviction of Greater Offense Than Charged. — It would be without precedent to try defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

Elements of Attempt. — The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense. State v. Gray, 58 N.C. App. 102, 293 S.E.2d 274, cert. denied, 306 N.C. 746, 295 S.E.2d 482 (1982).

An attempt is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. State v. McAlister, 59 N.C. App. 58, 295 S.E.2d 501 (1982), cert. denied, 307 N.C. 471, 299 S.E.2d 226 (1983).

Intent Alone Not Sufficient for Attempt Conviction. — The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless it is connected with some overt act or acts toward the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. State v. Addor, 183 N.C. 687, 110 S.E. 650 (1922).

When Motion for Nonsuit Denied. — A motion for judgment as of nonsuit addressed to the entire bill is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included crime. State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964).

New Trial Must Be on Full Charge. — Upon an appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906).

Effect of State's Election of Felony Murder Theory. — The State's election to try a homicide case, and the trial judge's submission of it to the jury, only on a felony murder theory did not in effect acquit defendant of murder on a theory of premeditation and deliberation and all of its lesser included homicide offenses. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989), holding that the jury should have been instructed on involuntary murder under the circumstances.

A defendant may always show by the evidence not only his innocence under the theory of prosecution chosen by the State, but also his possible guilt of some lesser offense. If this lesser offense is included in the crime charged in the indictment and if there is evidence to support it, defendant is entitled to have it submitted to the jury. These different theories of defense cannot be abrogated by the State's decision to prosecute, nor the trial court's decision to submit the case on only one prosecutorial theory, when under the indictment and the evidence adduced another is more favorable to defendant. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Trial court erred in allowing the State to amend the indictment because the allegations in the original felonious breaking and entering indictment did not encompass the elements of assault with a deadly weapon with the intent to kill or assault with a deadly weapon inflicting serious injury. State v. Silas, 168 N.C. App. 627, 609 S.E.2d 400, 2005 N.C. App. LEXIS 456 (2005), aff'd in part, modified in part, 360 N.C. 377, 627 S.E.2d 604 (2006).

Applied in State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917); State v. Lutterloh, 188 N.C. 412, 124 S.E. 752 (1924); State v. Lee, 206 N.C. 472, 174 S.E. 288 (1934); State v. Feyd, 213 N.C. 617, 197 S.E. 171 (1938); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939); State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942); State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944); State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947); State v. Jones, 229 N.C. 276, 49 S.E.2d 463 (1948); State v. Matthews, 231 N.C. 617, 58 S.E.2d 625 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. McNeely, 244 N.C. 737, 94 S.E.2d 853 (1956); State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966); State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Martin, 6 N.C. App. 616, 170 S.E.2d 539 (1969); Richardson v. Ross, 310 F. Supp. 134 (E.D.N.C. 1970); State v. Accor, 281 N.C. 287, 188 S.E.2d 332 (1972); State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977); State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982); State v. Hageman, 56 N.C. App. 274, 289 S.E.2d 89 (1982); State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982); State v. Robinson, 310 N.C. 530, 313 S.E.2d 571 (1984); State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (2000).

Cited in State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. Ratcliff, 199 N.C. 9, 153 S.E. 605 (1930); State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937); State v. Hobbs, 216 N.C. 14, 3 S.E.2d 431 (1939); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940); State v. Hairston, 222 N.C. 455, 23 S.E.2d 885 (1943); State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944); State v. Grimes, 226 N.C. 523, 39 S.E.2d 394 (1946); State v. Fowler, 230 N.C. 470, 53 S.E.2d 853 (1949); State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961); State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968); State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972); State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159

(1981); State v. Bullard, 82 N.C. App. 718, 347 S.E.2d 874 (1986); State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989); Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993); State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993); State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994); State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

II. JURY INSTRUCTIONS.

Defendant Entitled to Complete Charge. — Under the provisions of this section when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, and he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment. State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924). See also State v. Keaton, 206 N.C. 682, 175 S.E. 296 (1934).

When there is evidence tending to support a milder verdict than the one charged in the bill of indictment the defendant is entitled to have the different views presented to the jury under a proper charge. State v. Burnette, 213 N.C. 153, 195 S.E. 356 (1938); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130 (1943). See also State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1940).

Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit defendant's guilt of the lesser included offense to the jury. State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975).

The general rule of practice is, that when it is permissible under the indictment to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions. State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947); State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, cert. denied and appeal dismissed, 301 N.C. 403, 273 S.E.2d 449 (1980).

And Conviction of Offense Charged Does Not Cure Error. — A verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Davis, 242 N.C. 476, 87 S.E.2d 906 (1955); State v. Lang, 58 N.C. App. 117, 293 S.E.2d 255, cert. denied, 306 N.C. 747, 295 S.E.2d 761 (1982).

An error in failing to submit lesser offenses is not cured by a verdict convicting him of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence, had been correctly presented by the trial court. State v. Burnette, 213 N.C. 153, 195 S.E. 356 (1938); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130 (1943). See also State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1940); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, cert. denied and appeal dismissed, 301 N.C. 403, 273 S.E.2d 449 (1980).

Error in failing to submit defendant's guilt of the lesser included offense to the jury is not cured by a verdict convicting defendant of the offense charged. State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969); State v. Holloway, 7 N.C. App. 147, 171 S.E.2d 475 (1970); State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975).

An error in failing to charge upon the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree. State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924). See also State v. Keaton, 206 N.C. 682, 175 S.E. 296 (1934).

But Evidence Must Support Conviction of Lesser Offense. — This section does not make mandatory the submission to the jury of a lesser included offense where the indictment does not charge such offense and where there is no evidence of such offense. State v. McLean, 2 N.C. App. 460, 163 S.E.2d 125 (1968); State v. Stevenson, 3 N.C. App. 46, 164 S.E.2d 24 (1968).

A court is not required to submit a lesser included offense to the jury when there is no evidence to support such a charge. State v. Carriker, 24 N.C. App. 91, 210 S.E.2d 98 (1974), rev'd on other grounds, 287 N.C. 530, 215 S.E.2d 134 (1975); State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

In order to justify submission of a lesser included offense there must be some evidence to support submission of the lesser offenses to the jury. State v. Thompson, 306 N.C. 526, 294 S.E.2d 314 (1982).

Necessity for instructing jury as to included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968); State v. Stevenson, 3 N.C. App. 46, 164 S.E.2d 24 (1968); State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969); State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1970);

State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976); State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975); State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978); State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980); State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Williams, 51 N.C. App. 397, 276 S.E.2d 715, cert. denied, 303 N.C. 319, 281 S.E.2d 658 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981), cert. denied, 305 N.C. 591, 292 S.E.2d 16 (1982); State v. Gray, 58 N.C. App. 102, 293 S.E.2d 274, cert. denied, 306 N.C. 746, 295 S.E.2d 482 (1982).

Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. State v. Cox, 201 N.C. 357, 160 S.E. 358 (1931); State v. Manning, 221 N.C. 70, 18 S.E.2d 821 (1942); State v. Sawyer, 224 N.C. 61, 29 S.E.2d 34 (1944).

The provisions of this section in regard to conviction of a less degree of the crime charged in a bill of indictment applies only where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error. State v. Smith, 201 N.C. 494, 160 S.E. 577 (1931).

Where one is indicted for a crime and under the same bill it is permissible to convict the defendant of a less degree of the same crime and there is evidence tending to support a milder verdict the prisoner is entitled to have the different views presented to the jury under a proper charge, but where there is no evidence to support such milder verdict the court is not required to submit the question of such verdict to the jury. State v. Thacker, 13 N.C. App. 299, 185 S.E.2d 455 (1971), rev'd on other grounds, 281 N.C. 447, 189 S.E.2d 145 (1972).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show completion of the offense as charged and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. McLean, 2 N.C. App. 460, 163 S.E.2d 125 (1968).

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried, when there is evidence to support the milder verdict. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

In a proper case where it is permissible under the indictment to convict defendant of a lesser included offense, the court must still determine that there is evidence tending to support the lesser offense in order to submit it for the jury's consideration. Upon a favorable determination of both issues, that is, that the crime is a lesser included offense and that there is evidence to support it, defendant is entitled to have the instruction on the lesser offense submitted to the jury. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

When Instruction on Lesser Included Homicides Required. — In a felony murder prosecution under an indictment in the form prescribed by G.S. 15-144, evidence that defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Instructions Not Required Where State's Evidence Is Positive as to Each Element. — Where the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime, the court is not required to submit an issue as to defendant's guilt or innocence of a lesser included offense. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982); State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape under former G.S. 14-22 and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972).

And Uncontradicted. — It is not necessary to submit the lesser included offense if the evidence discloses no conflicting evidence relating to the essential elements of the greater crime. State v. Gray, 58 N.C. App. 102, 293 S.E.2d 274, cert. denied, 306 N.C. 746, 295 S.E.2d 482 (1982).

Where the uncontradicted evidence is that the deceased was murdered by poison, there is no basis for a verdict of second-degree murder or manslaughter. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error under this section. State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934).

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting court in submitting the question of defendant's guilt of less degrees of the crime. State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948).

In a rape case, the trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape under former G.S. 14-22 and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Absence of Specific Request for Instruction. — When there is evidence of guilt of a lesser offense, a defendant is entitled to have the trial court instruct the jury with respect to that lesser included offense even though the defendant makes no request for such an instruction. State v. Lang, 58 N.C. App. 117, 293 S.E.2d 255, cert. denied, 306 N.C. 747, 295 S.E.2d 761 (1982); State v. Gray, 58 N.C. App. 102, 293 S.E.2d 274, cert. denied, 306 N.C. 746, 295 S.E.2d 482 (1982).

If the defendant is entitled to an instruction on the lesser offense, based on the presence of such evidence, it is of no legal significance that defendant's counsel did not make a specific request for the instruction nor that the defendant was subsequently convicted of the greater offense. State v. Williams, 51 N.C. App. 397, 276 S.E.2d 715, cert. denied, 303 N.C. 319, 281 S.E.2d 658 (1981).

Where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense not positively supported by the evidence. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Defendant Not Entitled to Instruction. — Defendant's testimony was that he knew nothing of any of the controlled substances found in the house, there was no basis on which a jury could find that a lesser offense was committed, and at trial the defendant denied knowledge of all of the controlled substances, not just those not in "plain view;" therefore, the trial court did not err in refusing to instruct the jury on a lesser included offense of felonious possession of heroin. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

In a trafficking by possession case, the trial judge properly refused to instruct on attempt where the State's uncontroverted evidence showed that defendant gave officer a tube sock full of cash and discussed the exchange before the officer placed cocaine in the back seat of his vehicle and left the car. State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, 543 S.E.2d 136 (2000).

Error to Charge on Unsupported Lesser Degree. — Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show the commission of a crime of lesser degree, the principle of lesser included offenses does not apply and it would be erroneous for the court to charge on the unsupported lesser degree. State v. Gray, 58 N.C. App. 102, 293 S.E.2d 274, cert. denied, 306 N.C. 746, 295 S.E.2d 482 (1982).

But Such Error Not Prejudicial. — Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950).

In a prosecution for armed robbery, defendant was not prejudiced by error, if any, in the trial court's submission to the jury of the lesser included offense of common-law robbery. State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

Instruction as to Lesser Offense Absent Evidence. — If there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second-degree murder. State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980).

Instructions as to Lesser Degree May Invite Compromise Verdict. — Upon a trial under an indictment for first-degree burglary, there being no announcement by the solicitor (now district attorney) of his intent to seek a milder verdict, the prosecuting witness testified that the defendant broke and entered her dwelling house in the nighttime and assaulted and raped her therein and the defense is alibi, to instruct the jury that it might return a verdict of second-degree burglary is simply to invite a compromise verdict. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

III. LESSER AND INCLUDED OFFENSES.

Crime of accessory after the fact is not included in the charge of the principal crime. State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961), commented on in 41 N.C.L. Rev. 118 (1962).

An indictment charging a completed offense is sufficient to support a conviction for attempt to commit the crime charged. This statute applies even though the completed crime and the attempt are not in the same statute. State v. Slade, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986); State v. Bennett, 132 N.C. App. 187, 510 S.E.2d 698 (1999).

Indictment charging defendant with the completed offense of giving a controlled substance to an inmate was sufficient to enable him to adequately prepare for trial and to protect him from being twice put in jeopardy for the same offense, so as to support his conviction of attempt to give a controlled substance to an inmate. State v. Slade, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Indictment for statutory sexual offense was sufficient to support defendant's conviction for attempted statutory sexual offense. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Murder. — In a prosecution for murder, where the evidence raises a question as to whether or not the killing was intentional, this section requires that the question of the defendant's guilt of manslaughter be submitted to the jury with proper instructions. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948).

Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter, this section requires that the less degree of the same crime be submitted to the jury with proper instructions. State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947).

Where the evidence in a first-degree murder prosecution is susceptible to the interpretation that defendant killed in self-defense, the court must submit the question of defendant's guilt of manslaughter. State v. Holloway, 7 N.C. App. 147, 171 S.E.2d 475 (1970).

Rape. — An indictment for rape includes an assault with intent to commit rape under former G.S. 14-22. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962).

Rape of Child Under Age 12. — The offense of assault on a female by a male over the age of 18, G.S. 14-33(b)(2), is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under G.S. 14-27.2(a)(1). State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

The offense of assaulting a child under the age of 12, G.S. 14-33(b)(3), is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under G.S. 14-27.2(a)(1). State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

The offense of taking indecent liberties with a child under the age of 16, G.S. 14-202.1, is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under G.S. 14-27.2(a)(1). State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977).

Larceny Pursuant to Breaking or Entering. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, an indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and this section provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Felony Murder While Discharging Firearm into Occupied Building. — In felony murder trial for murder committed during the act of discharging a firearm into an occupied building, a felony under G.S. 14-34.1, where defendant's sole and unequivocal defense was that he was nowhere near the area on the night in question, an instruction on the offense of involuntary manslaughter was not warranted by the evidence. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Assault with Intent to Commit Rape. — Where the evidence was sufficient to carry the case to the jury upon the charge of assault with intent to commit rape under former G.S. 14-22 but the jury returned a verdict of guilty of an assault upon a female, the defendant being a male person over 18 years of age, such verdict was authorized by this section. State v. Morgan, 225 N.C. 549, 35 S.E.2d 621 (1945).

Crimes Against Nature. — In a prosecution for the crime against nature, the accused may be convicted of the offense charged therein or the attempt to commit the offense. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Sodomy. — An assault upon a woman is not a less degree of the crime of sodomy. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Assault with a Deadly Weapon. — Where a warrant charges a criminal assault with a deadly weapon, specifying the weapon, the jury is empowered to convict of simple assault, a less degree of the same crime, where the evidence warrants the verdict. State v. Gooding, 251 N.C. 175, 110 S.E.2d 865 (1959).

Assault with a deadly weapon is an essential element of the felony created and defined by G.S. 14-32, being an included less degree of the same crime. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

Assault with a Deadly Weapon with Intent to Kill. — In prosecution for assault with a deadly weapon with intent to kill, the court's instruction that the jury might find defendant guilty of a less degree of the crime, including assault with a deadly weapon, if they so found beyond a reasonable doubt, is without error. State v. Elmore, 212 N.C. 531, 193 S.E. 713 (1937); State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949).

An indictment sufficiently charging defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, includes the offense of assault with a deadly weapon. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

Aggravated Assault. — Simple assault is a lesser degree of the crime of aggravated assault. State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

Burglary in the First Degree. — In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

A violation of G.S. 14-54 is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967); State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Where the bill of indictment returned by the grand jury charged all elements of burglary in the first degree, the bill of indictment would have supported a verdict of guilty of either first-degree burglary or second-degree burglary as the evidence might warrant. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, State v. Hickey, 317 N.C. 451, 346 S.E.2d 646 (1986).

Breaking and Entering. — Any person who breaks or enters any building described in G.S. 14-54, with intent to commit any felony or larceny therein, is guilty of a felony. A wrongful breaking or entering into such building, without the intent to commit any felony therein, is a misdemeanor, a lesser included offense within the meaning of this section. State v. Dozier, 19 N.C. App. 740, 200 S.E.2d 348 (1973), cert. denied, 284 N.C. 618, 201 S.E.2d 690 (1974).

Arson. — The felony created by G.S. 14-67 is a lesser included offense of the crime of arson. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Armed Robbery. — An indictment for armed robbery under G.S. 14-87 will support a verdict of guilty of common-law robbery. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

In a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. State v. McLean, 2 N.C. App. 460, 163 S.E.2d 125 (1968); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

Defendant's conviction of armed robbery, pursuant to G.S. 14-87, had to be reversed because defendant used only his hands in the robbery and, thus, the evidence was not sufficient to support the conviction of armed robbery; however, pursuant to G.S. 15-170, there was sufficient evidence for a conviction of the lesser included offense of common law robbery, as defendant stole a car from the victim with the use of force. State v. Staten, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005), cert. denied, — U.S. —, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Robbery. — Where the evidence was not sufficient to make out a case of common-law robbery, the court properly submitted the case on larceny from the person. State v. Kirk, 17 N.C. App. 68, 193 S.E.2d 377 (1972).

Larceny from the person is a lesser included offense of common-law robbery, and an indictment for common-law robbery will support a conviction for larceny from the person. State v. Young, 54 N.C. App. 366, 283 S.E.2d 812 (1981), aff'd, 305 N.C. 391, 289 S.E.2d 374 (1982).

Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948).

Misdemeanor of larceny is a less degree of the felony of larceny within the meaning of this section. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, appeal dismissed, 288 N.C. 733, 220 S.E.2d 352 (1975); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

Larceny from the Person. — Assault is not a less degree of the crime of larceny from the person. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

Possession of Marijuana. — To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other. State v. Gooch, 58 N.C. App. 582, 294 S.E.2d 13, rev'd on other grounds, 307 N.C. 253, 297 S.E.2d 599 (1982).

Barratry. — An attempt to commit barratry is an offense in this State and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common-law offense of barratry. State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 139 A.L.R. 614 (1941).

§ 15-171: Repealed by Session Laws 1953, c. 100.

§ 15-172. Verdict for murder in first or second degree.

Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree. (1893, c. 85, s. 3; Rev., s. 3271; C.S., s. 4642.)

Cross References. — As to definitions of first and second-degree murder, see G.S. 14-17. As to guilty pleas in capital cases, see G.S. 15A-2001.

CASE NOTES

History of Section. — See State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947); State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Section Codifies Rule That Verdict Specify Degree. — In requiring the jury to determine the degree of homicide of which defendant is guilty, this section merely codified the well-established rule that a verdict which leaves the matter in conjecture will not support a judgment. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

Object of Section. — The object of this section is, of course, to place it beyond doubt in what degree of murder the prisoner was convicted. State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916).

The purpose of the requirement that the jury determine whether one charged under the statutory form is guilty of murder in the first or second degree was merely to eliminate that uncertainty when the defendant's plea was not guilty. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Section Applies to All Indictments for Murder. — This section applies to all indictments for murder, whether perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture, or otherwise. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952).

Section Only Incidentally Related to Death Penalty. — The statutory requirement that the jury determine the degree of murder of which a defendant is guilty is only incidentally related to the death penalty. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Duty Imposed by Section. — By this section it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895); State v. Murphy, 157 N.C. 614, 72 S.E. 1075 (1911); State v. Bagley, 158 N.C. 608, 73 S.E. 995 (1912).

What Record Must Show. — The record must show that the jurors have determined in their verdict where the crime is murder in the first or second degree, in order that there may be a proper judgment. State v. Lucas, 124 N.C. 825, 32 S.E. 962 (1899); State v. Truesdale, 125 N.C. 696, 34 S.E. 646 (1899).

Evidence at Trial Determines Charge to Jury. — Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946).

When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. State v. Spevey, 151 N.C. 676, 65 S.E. 995 (1909); State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916).

Verdict must be construed according to the charge and the evidence and when these make it certain beyond question, the law has been complied with. State v. Gilchrist, 113 N.C. 673, 18 S.E. 319 (1893); State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916).

Procedure upon Failure to Determine Degree. — Where the degree of murder is not expressed in the verdict, the judge should tell the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict is properly recorded accordingly. State v. Bagley, 158 N.C. 608, 73 S.E. 995 (1912).

Verdict of "guilty as charged" in prosecution under § 15-144 is sufficient to support the judgment when the judge has instructed the jury to return a verdict of murder in the first degree or not guilty and there was no evidence to warrant a verdict of guilty of murder in the second degree or manslaughter. In such a situation the verdict will be taken with reference to the charge and the evidence in the case and interpreted as a verdict of guilty of the only charge submitted. This is an application of the general rule that a verdict apparently ambiguous may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

When, in a prosecution for homicide upon an indictment drawn under G.S. 15-144, the judge accepts a verdict of "guilty as charged" after having instructed the jury that it might return a verdict of guilty of murder in the first or second degree, or guilty of murder in either degree or manslaughter, such a verdict on such an indictment cannot be sustained. In such case the verdict is a general one without a response as to what grade of homicide the defendant was guilty, and a new trial must be ordered. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

Applied in State v. Matthews, 66 N.C. 106 (1872); State v. Hicks, 125 N.C. 636, 34 S.E. 247 (1899); State v. Lane, 166 N.C. 333, 81 S.E. 620 (1914); State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927); State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941).

Cited in State v. Gooding, 196 N.C. 710, 146 S.E. 806 (1929); State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937); State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Goodwin, 211 N.C. 419, 190 S.E. 761 (1937); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977); State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

§ 15-173. Demurrer to the evidence.

When on the trial of any criminal action in the superior or district court, the State has introduced its evidence and rested its case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of "not guilty" as to such defendant. If the motion is refused and the defendant does not choose to introduce evidence, the case shall be submitted to the jury as in other cases, and the defendant may on appeal urge as ground for reversal, the trial court's denial of his motion without the necessity of the defendant's having taken exception to such denial.

If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. The defendant, however, may make such motion at the conclusion of all the evidence in the case, irrespective of whether or not he made a motion for dismissal or judgment as in case of nonsuit theretofore. If the motion is allowed, or shall be sustained on appeal, it shall in all cases have the force and effect of a verdict of "not guilty." If the motion is refused, the defendant may on appeal, after the jury has rendered its verdict, urge as ground for reversal the trial court's denial of his motion made at the close of all the evidence without the necessity of the defendant's having taken exception to such denial. (1913, c. 73; Ex. Sess. 1913, c. 32; C.S., s. 4643; 1951, c. 1086, s. 1; 1973, c. 1141, s. 16.)

Cross References. — As to motion for dismissal, see G.S. 15A-1227.

Legal Periodicals. — For brief comment on 1951 amendment, see 29 N.C.L. Rev. 374 (1951).

CASE NOTES

I. General Consideration.
II. Other Motions Compared.
III. Question Presented by Motion.
IV. Allowance of Motion.
V. Denial of Motion.
  A. In General.
  B. Appeal from Denial of Motion.
VI. Evidence.
VII. Introduction of Testimony by Defendant at Trial.

I. GENERAL CONSIDERATION.

Necessity of Moving for Judgment or Dismissal at Trial. — Although G.S. 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, this statute is negated by N.C.R.A.P., Rule 10(b)(3), which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action or for judgment as in case of nonsuit at trial. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Means of Raising Objection That Evidence Is Insufficient for Jury. — Objection that the evidence is not sufficient to carry the case to the jury must be raised by motion to nonsuit under this section, or by prayer for instructions to the jury, and may not be raised after verdict by motion for new trial or motion in arrest of judgment. State v. Gaston, 236 N.C. 499, 73 S.E.2d 311 (1952); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

The objection that the evidence is not sufficient to carry the case to the jury must be raised during the trial by a motion for a compulsory nonsuit under this section or by a prayer for instruction to the jury. State v. Glover, 270 N.C. 319, 154 S.E.2d 305 (1967); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

In a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in case of nonsuit. State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971); State v. Everette, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

A motion to dismiss under § 15A-1227 is substantively identical to a motion for nonsuit under this section. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Motion for Nonsuit Challenges Sufficiency of Evidence. — A motion for judgment as in case of nonsuit challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the criminal offense charged in the warrant or indictment on which the prosecution is based. State v. Vaughan, 268 N.C. 105, 150 S.E.2d 31 (1966).

Defendant's motion for nonsuit at the close of all the evidence draws into question the sufficiency of all of the evidence to go to the jury. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

Defendant's later motion for nonsuit, made at the close of all the evidence, draws into question the sufficiency of all the evidence to go to the jury. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Whether correct or erroneous, a judgment of nonsuit has the force and effect of a verdict of "not guilty." State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Where indictments contain two separate charges and State takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, under this section, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Submission of Lesser Degree upon Nonsuit on Offense Charged. — An instruction that the court grants a nonsuit on the offense charged in the indictment, followed by submission of the case on the question of defendants' guilt of a lesser degree of the offense charged, does not amount to a nonsuit on the indictment. State v. Matthews, 231 N.C. 617, 58 S.E.2d 625, cert. denied, 340 U.S. 838, 71 S. Ct. 24, 95 L. Ed. 615 (1950).

Effect of Judgment of Nonsuit on Subsequent Prosecution. — The granting of a motion under this section for judgment of nonsuit, or verdict of not guilty in a criminal prosecution charging defendant with willful neglect or refusal to support and maintain his illegitimate child, does not constitute an adjudication on the issue of paternity, and will not support a plea of former acquittal in a subsequent prosecution under G.S. 49-2. State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952).

Raising Question of Variance. — The defendant in a criminal action may raise the question of a variance between the indictment and the proof by a motion to dismiss the prosecution as in case of nonsuit. This is clearly set forth in State v. Gibson, 170 N.C. 697, 86 S.E. 774 (1915); State v. Harbert, 185 N.C. 760, 118 S.E. 6 (1923); State v. Harris, 195 N.C. 306, 141 S.E. 883 (1928); State v. Grace, 196 N.C. 280, 145 S.E. 399 (1928); State v. Hicks, 233 N.C. 511, 64 S.E.2d 871, cert. denied, 342 U.S. 831, 72 S. Ct. 56, 96 L. Ed. 629 (1951); State v. Overman, 257 N.C. 464, 125 S.E.2d 920 (1962); State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967).

Motion Sustained Where Variance Fatal. — Where there is a fatal variance between the indictment and the proof, it is proper to sustain the demurrer to the evidence, or to dismiss the action as in case of nonsuit. State v. Franklin, 204 N.C. 157, 167 S.E. 569 (1933). See also State v. Martin, 199 N.C. 636, 155 S.E. 447 (1930).

Even in child sexual abuse cases, a variance as to time becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense; while time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved, when the defendant relies on the date set forth in the indictment, but the State's evidence substantially varies to the prejudice of defendant's alibi defense, the interests of justice and fair play require that the defendant's motion for dismissal be granted. In a child abuse case where the State's proof failed to show that alleged abuse occurred on the dates in the indictment, where the defendant had relied on those dates in building his alibi defense, and where all the evidence presented at trial went to sexual encounters over a period of years that ended a significant period of time prior to the dates listed in the indictment, defendant's motion to dismiss should have been granted, and defendant's conviction was reversed on appeal. State v. Custis, 162 N.C. App. 715, 591 S.E.2d 895, 2004 N.C. App. LEXIS 245 (2004).

Applied in State v. Tankersley, 172 N.C. 955, 90 S.E. 781 (1916); State v. Jenkins, 182 N.C. 818, 108 S.E. 767 (1921); State v. Fulcher, 184 N.C. 663, 113 S.E. 769 (1922); State v. Williams, 187 N.C. 492, 122 S.E. 13 (1924); State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925); State v. Pace, 192 N.C. 780, 136 S.E. 11 (1926); State v. Everett, 194 N.C. 442, 140 S.E. 22 (1927); State v. Leonard, 195 N.C. 242, 141 S.E. 736 (1928); State v. Swinson, 196 N.C. 100, 144 S.E. 555 (1928); State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929); State v. McLamb, 203 N.C. 442, 166 S.E. 507 (1932); State v. Brown, 204 N.C. 392, 168 S.E. 532 (1933); State v. Fogleman, 204 N.C. 401, 168 S.E. 536 (1933); State v. Anthony, 206 N.C. 120, 173 S.E. 47 (1934); State v. Bittings, 206 N.C. 798, 175 S.E. 299 (1934); State v. Yates, 208 N.C. 194, 179 S.E. 756 (1935); State v. Sims, 208 N.C. 459, 181 S.E. 269 (1935); State v. White, 208 N.C. 537, 181 S.E. 558 (1935); State v. Landin, 209 N.C. 20, 182 S.E. 689 (1935); State v. Webber, 210 N.C. 137, 185 S.E. 659 (1936); State v. Creech, 210 N.C. 700, 188 S.E. 316 (1936); State v. Smith, 211 N.C. 93, 189 S.E. 175 (1937); State v. Ormond, 211 N.C. 437, 191 S.E. 22 (1937); State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937); State v. McDonald, 211 N.C. 672, 191 S.E. 733 (1937); State v. Brewington, 212 N.C. 244, 193 S.E. 24 (1937); State v. Delk, 212 N.C. 631, 194 S.E. 94 (1937); State v. Lockey, 214 N.C. 525, 199 S.E. 715 (1938); State v. Myers, 214 N.C. 652, 200 S.E. 443 (1939); State v. Goodman, 220 N.C. 250, 17 S.E.2d 8 (1941); State v. Johnson, 220 N.C. 252, 17 S.E.2d 7 (1941); State v. Jones, 222 N.C. 37, 21

S.E.2d 812 (1942); State v. Reynolds, 222 N.C. 40, 21 S.E.2d 813 (1942); State v. King, 222 N.C. 239, 22 S.E.2d 445 (1942); State v. Todd, 222 N.C. 346, 23 S.E.2d 47 (1942); State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943); State v. Vincent, 222 N.C. 543, 23 S.E.2d 832 (1943); State v. Smith, 223 N.C. 199, 25 S.E.2d 619 (1943); State v. Vicks, 223 N.C. 384, 26 S.E.2d 873 (1943); State v. Dilliard, 223 N.C. 446, 27 S.E.2d 85 (1943); State v. Cameron, 223 N.C. 449, 27 S.E.2d 81 (1943); State v. Suddreth, 223 N.C. 610, 27 S.E.2d 623 (1943); State v. Oxendine, 223 N.C. 659, 27 S.E.2d 814 (1943); State v. Dill, 224 N.C. 57, 29 S.E.2d 145 (1944); State v. Nunley, 224 N.C. 96, 29 S.E.2d 17 (1944); State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944); State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944); State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944); State v. Rivers, 224 N.C. 419, 30 S.E.2d 322 (1944); State v. Parker, 224 N.C. 524, 31 S.E.2d 531 (1944); State v. Stewart, 224 N.C. 528, 31 S.E.2d 534 (1944); State v. Edwards, 224 N.C. 577, 31 S.E.2d 762 (1944); State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944); State v. Kirkman, 224 N.C. 778, 32 S.E.2d 328 (1944); State v. Oxendine, 224 N.C. 825, 32 S.E.2d 648 (1945); State v. Stone, 224 N.C. 848, 32 S.E.2d 651 (1945); State v. Cody, 225 N.C. 38, 33 S.E.2d 71 (1945); State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945); State v. Matheson, 225 N.C. 109, 33 S.E.2d 590 (1945); State v. Williams, 225 N.C. 182, 33 S.E.2d 880 (1945); State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945); State v. Murdock, 225 N.C. 224, 34 S.E.2d 69 (1945); State v. Peterson, 225 N.C. 540, 35 S.E.2d 645 (1945); State v. Stutts, 225 N.C. 647, 35 S.E.2d 881 (1945); State v. Robinson, 226 N.C. 95, 36 S.E.2d 655 (1946); State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946); State v. Perry, 226 N.C. 530, 39 S.E.2d 460 (1946); State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947); State v. Weaver, 228 N.C. 39, 44 S.E.2d 360 (1947); State v. Harvey, 228 N.C. 62, 44 S.E.2d 472 (1947); State v. Brooks, 228 N.C. 68, 44 S.E.2d 482 (1947); State v. Coffey, 228 N.C. 119, 44 S.E.2d 886 (1947); State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947); State v. Ray, 229 N.C. 40, 47 S.E.2d 494 (1948); State v. Minton, 228 N.C. 518, 46 S.E.2d 296 (1948); State v. Wooten, 228 N.C. 628, 46 S.E.2d 868 (1948); State v. Palmer, 230 N.C. 205, 52 S.E.2d 908 (1949); State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949); State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949); State v. Cranford, 231 N.C. 211, 56 S.E.2d 423 (1949); State v. Hill, 233 N.C. 61, 62 S.E.2d 532 (1950); State v. Goins, 233 N.C. 460, 64 S.E.2d 289 (1951); State v. Hicks, 233 N.C. 511, 64 S.E.2d 871 (1951); State v. Fuqua, 234 N.C. 168, 66 S.E.2d 667 (1951); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Minton, 234 N.C. 716, 68 S.E.2d 844 (1951); State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952); State v. Birchfield, 235 N.C. 410, 70 S.E.2d 5 (1952); State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952); State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952); State v. Murphy, 235 N.C. 503, 70 S.E.2d 498 (1952); State v. Needham, 235 N.C. 555, 71 S.E.2d 29 (1952); State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952); State v. Griffin, 236 N.C. 219, 72 S.E.2d 427 (1952); State v. Bryant, 236 N.C. 745, 73 S.E.2d 791 (1953); State v. Ham, 238 N.C. 94, 76 S.E.2d 346 (1953); State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953); State v. Myers, 240 N.C. 462, 82 S.E.2d 213 (1954); State v. Simpson, 244 N.C. 325, 93 S.E.2d 425 (1956); State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956); State v. Bass, 249 N.C. 209, 105 S.E.2d 645 (1958); State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959); State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960); State v. Paschal, 253 N.C. 795, 117 S.E.2d 749 (1961); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Duncan, 264 N.C. 123, 141 S.E.2d 23 (1965); State v. Hill, 266 N.C. 103, 145 S.E.2d 346 (1965); State v. Burgess, 266 N.C. 363, 145 S.E.2d 905 (1966); State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966); State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967); State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970); State v. Stevens, 9 N.C. App. 665, 177 S.E.2d 339 (1970); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Pitts, 10 N.C. App. 355, 178 S.E.2d 632 (1971); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Barr, 15 N.C. App. 116, 189 S.E.2d 638 (1972); State v. Alexander, 16 N.C. App. 95, 191 S.E.2d 395 (1972); State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973); State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973); State v. Wright, 18 N.C. App. 76, 195 S.E.2d 801 (1973); State v. Foust, 18 N.C. App. 138, 196 S.E.2d 375 (1973); State v. Rankin, 18 N.C. App. 252, 196 S.E.2d 621 (1973); State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975); State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975); State v. Burch, 24 N.C. App. 514, 211 S.E.2d 511 (1975); State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805 (1975); State v. Wallace, 25 N.C. App. 360, 213 S.E.2d 420 (1975); State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976); State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976);

State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976); State v. Millsaps, 29 N.C. App. 176, 223 S.E.2d 559 (1976); State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Hill, 32 N.C. App. 261, 231 S.E.2d 682 (1977); State v. Lilly, 32 N.C. App. 467, 232 S.E.2d 495 (1977); State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601 (1977); State v. Correll, 38 N.C. App. 451, 248 S.E.2d 451 (1978); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980); State v. Horton, 299 N.C. 690, 263 S.E.2d 745 (1980); State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980); State v. Bailey, 49 N.C. App. 377, 271 S.E.2d 752 (1980); State v. Summitt, 301 N.C. 591, 273 S.E.2d 425 (1981); State v. Fletcher, 301 N.C. 709, 272 S.E.2d 859 (1981); State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981); State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981); State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981); State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981); State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981); State v. Murrell, 54 N.C. App. 342, 283 S.E.2d 173 (1981); State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984); State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984); State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984); State v. Wilson, 73 N.C. App. 398, 326 S.E.2d 360 (1985); State v. Blankenship, 89 N.C. App. 465, 366 S.E.2d 509 (1988); State v. Woodard, 324 N.C. 227, 376 S.E.2d 753 (1989); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989); State v. Ray, 97 N.C. App. 621, 389 S.E.2d 422 (1990); State v. Vanhoy, 343 N.C. 476, 471 S.E.2d 404 (1996); State v. Jones, 140 N.C. App. 691, 538 S.E.2d 228, 2000 N.C. App. LEXIS 1257 (2000); State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439, 2004 N.C. App. LEXIS 581 (2004); State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646, 2007 N.C. App. LEXIS 1947 (2007).

Cited in State v. Eubanks, 194 N.C. 319, 139 S.E. 451 (1927); State v. Pridgen, 194 N.C. 795, 139 S.E. 601 (1927); State v. Mickle, 194 N.C. 808, 140 S.E. 150 (1927); State v. Dowell, 195 N.C. 523, 143 S.E. 13 (1928); State v. Golden, 196 N.C. 246, 145 S.E. 236 (1928); State v. Weston, 197 N.C. 25, 147 S.E. 618 (1929); State v. McKinnon, 197 N.C. 576, 150 S.E. 25 (1929); State v. Hickey, 198 N.C. 45, 150 S.E. 615 (1929); State v. Burleson, 198 N.C. 61, 150 S.E. 628 (1929); State v. Wrenn, 198 N.C. 260, 151 S.E. 261 (1930); State v. McLeod, 198 N.C. 649, 152 S.E. 895 (1930); State v. Spivey, 198 N.C. 655, 153 S.E. 255 (1930); State v. Ritter, 199 N.C. 116, 154 S.E. 62 (1930); State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930); State v. Johnson, 199 N.C. 429, 154 S.E. 730 (1930); State v. Baker, 199 N.C. 578, 155 S.E. 249 (1930); State v. Sizemore, 199 N.C. 687, 155 S.E. 724 (1930); State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933); State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934); State v. Mansfield, 207 N.C. 233, 176 S.E. 761 (1934); State v. Mozingo, 207 N.C. 247, 176 S.E. 582 (1934); State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934); State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935); State v. Jones, 209 N.C. 49, 182 S.E. 699 (1935); State v. Camby, 209 N.C. 50, 182 S.E. 715 (1935); State v. Langley, 209 N.C. 178, 183 S.E. 526 (1936); State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936); State v. Lewis, 209 N.C. 191, 183 S.E. 357 (1936); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Gallman, 210 N.C. 288, 186 S.E. 236 (1936); State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937); State v. Caldwell, 212 N.C. 484, 193 S.E. 716 (1937); State v. Perry, 212 N.C. 533, 193 S.E. 727 (1937); State v. Hanford, 212 N.C. 746, 194 S.E. 481 (1938); State v. Libby, 213 N.C. 662, 197 S.E. 154 (1938); State v. Epps, 213 N.C. 709, 197 S.E. 580 (1938); State v. Stiers, 214 N.C. 126, 198 S.E. 601 (1938); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Jones, 215 N.C. 660, 2 S.E.2d 867 (1939); State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940); State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Hunt, 223 N.C. 173, 25 S.E.2d 598 (1943); State v. Graham, 224 N.C. 351, 30 S.E.2d 154 (1944); State v. Ogle, 224 N.C. 468, 31 S.E.2d 444 (1944); State v. Curling, 225 N.C. 769, 35 S.E.2d 179 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Tilley, 231 N.C. 734, 58 S.E.2d 720 (1950); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Buchanan, 233 N.C. 477, 64 S.E.2d 549 (1951); State v. Wilson, 234 N.C. 552, 67 S.E.2d 748 (1951); State v. Dunn, 245 N.C. 102, 95 S.E.2d 274 (1956); State v. Revis, 253 N.C. 50, 116 S.E.2d 171 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961); State v. Aldridge, 254 N.C. 297, 118 S.E.2d 766 (1961); State v. Carter, 254 N.C. 475, 119 S.E.2d 461 (1961); State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962); State v. Thompson, 257 N.C.

452, 126 S.E.2d 58 (1962); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Howard, 274 N.C. 186, 162 S.E.2d 495 (1968); State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Collins, 5 N.C. App. 516, 168 S.E.2d 514 (1969); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); State v. Williams, 13 N.C. App. 233, 185 S.E.2d 27 (1971); State v. Black, 14 N.C. App. 373, 188 S.E.2d 634 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977); State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979); State v. Brackett, 55 N.C. App. 410, 285 S.E.2d 852 (1982); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Nelson, 69 N.C. App. 455, 317 S.E.2d 70 (1984); State v. Ausley, 78 N.C. App. 791, 338 S.E.2d 547 (1986); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988); State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988); In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989); State v. Franklin, 327 N.C. 162, 393 S.E.2d 781 (1990).

II. OTHER MOTIONS COMPARED.

Section 15A-1227 Compared. — Both this section and G.S. 15A-1227 allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. This section provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in G.S. 15A-1227, its enactment did not create a new type of motion to challenge the sufficiency of the evidence. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. Both motions were known to the law for many years prior to the enactment of G.S. 15A-1227. The motion for dismissal referred to in G.S. 15A-1227 is the same motion for dismissal referred to in this section. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both this section and G.S. 15A-1227. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Cases Under This Section Applicable to § 15A-1227. — A motion for dismissal under G.S. 15A-1227 is identical to a motion to dismiss the action, or for judgment as in the case of nonsuit, under this section in this respect: both statutes allow counsel to make a motion challenging the sufficiency of the evidence at the close of the State's evidence or at the close of all the evidence. Hence, cases dealing with the sufficiency of the evidence to withstand the latter motion made under the older statute, this section, are applicable when ruling on motions made under the more recent statute, G.S. 15A-1227. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Motion to dismiss under § 15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under this section. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985); State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987); State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987).

No Difference in Motions to Dismiss and for Judgment as in Case of Nonsuit. — As used in this section, there is no difference in legal significance between a motion "to dismiss the action" and a motion "for judgment as in case of nonsuit." State v. Cooper, 275 N.C. 283, 167 S.E.2d 266 (1969); State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977); State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980).

A motion to dismiss will be treated the same as a motion for judgment of nonsuit. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

Motion for directed verdict of not guilty treated as motion for judgment of nonsuit under this section. State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973).

The motion for judgment of nonsuit and the motion for a directed verdict of not guilty have the same legal effect. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

And Test for Granting Them Is the Same. — The standard governing the granting or not of a motion as of nonsuit is the same with regard to a motion for a directed verdict. State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

The test of the sufficiency of the evidence to withstand motions for a directed verdict and for judgment of nonsuit is the same. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Arrest of Judgment and Judgment of Nonsuit Compared. — An order for arrest of judgment is based upon the insufficiency of the indictment or other defect appearing on the face of the record and it is appealable by the State; a judgment of nonsuit, on the other hand, has the force and effect of verdict of not guilty, and the State may not appeal. State v.

Pinkney, 25 N.C. App. 316, 212 S.E.2d 907 (1975).

Civil and Criminal Actions Compared. — This section serves, and was intended to serve, the same purpose in criminal prosecutions as was accomplished by former G.S. 1-183, in civil actions. State v. Fulcher, 184 N.C. 663, 113 S.E. 769 (1922); State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925); State v. Norris, 206 N.C. 191, 173 S.E. 14 (1934); State v. Ormond, 211 N.C. 437, 191 S.E. 22 (1937); State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945); State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952); State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953).

Former G.S. 1-183 was the statute setting forth the procedure to make a motion for judgment of compulsory nonsuit in civil actions and this section is the statute setting forth the procedure to make a motion for judgment of compulsory nonsuit in criminal actions. Jenkins v. Hawthorne, 269 N.C. 672, 153 S.E.2d 339 (1967).

III. QUESTION PRESENTED BY MOTION.

Question Presented. — The question for the court in considering a motion for judgment of nonsuit is whether there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the perpetrator, or one of the perpetrators, of it. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Thomas, 292 N.C. 527, 234 S.E.2d 615 (1977); State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649, cert. denied, 292 N.C. 733, 235 S.E.2d 786 (1977); State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

A motion for nonsuit presents only the question of the sufficiency of the evidence to carry the case to the jury. State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Thompson, 256 N.C. 593, 124 S.E.2d 728, cert. denied, 371 U.S. 820, 83 S. Ct. 36, 9 L. Ed. 2d 60 (1962).

The test on a motion to dismiss is whether sufficient evidence has been presented to support a finding by the jury that defendant committed an offense with which he is charged. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

Motion for nonsuit brings in question the sufficiency of all the evidence to take the case to the jury. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972).

On a motion to nonsuit the question is whether, when all of the evidence is considered, there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that the defendant committed it. State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976); State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978); State v. Riddle, 300 N.C. 744, 268 S.E.2d 80 (1980).

Upon motion for judgment as of nonsuit in a criminal prosecution, the questions before the court are whether there is substantial evidence of each essential element of the crime charged, and whether the accused was the perpetrator of the charged offense. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980), rev'd on other grounds, 306 N.C. 62, 291 S.E.2d 607 (1982).

Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. State v. Hill, 32 N.C. App. 261, 231 S.E.2d 682 (1977); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Upon motion for nonsuit, the question is whether there is substantial evidence — direct, circumstantial or both — to support a finding that the offense charged has been committed and that the accused committed it. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

Question for the trial court on a motion to dismiss is whether, upon consideration of the evidence in the light most favorable to the State, there is a reasonable basis upon which the jury might find that the crime charged has been committed and that defendant was a perpetrator of the crime. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982); State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

On a motion for nonsuit the sole question for decision is whether upon a consideration of all the evidence admitted — whether competent or incompetent — in the light most favorable to the State, there is substantial evidence to support the finding that the offenses charged in the bills of indictment were committed by defendant. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971).

When the court is to rule upon a demurrer to the evidence in a criminal case, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the State. State v. Murdock, 225 N.C. 224, 34 S.E.2d 69 (1945).

When ruling on a defendant's motion to dismiss, the question for the court is whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. In deciding this question, the trial court must consider the evidence in the light most favorable to the State. State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, cert. denied, 305 N.C. 591, 292 S.E.2d 16 (1982).

When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. State v. Landin, 209 N.C. 20, 182 S.E. 689 (1935). See also State v. Lefevers, 216 N.C. 494, 5 S.E.2d 552 (1939); State v. Alston, 233 N.C. 341, 64 S.E.2d 3 (1951).

In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

On a motion for nonsuit or dismissal, the court must determine whether there is substantial evidence of all the material elements of the offense charged. State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

When a defendant moves under G.S. 15A-1227(a)(2) or under this section for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Same — Circumstantial Evidence. — When the motion questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982).

When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is substantial evidence of every essential element of the offense, and it is immaterial whether the substantial evidence is circumstantial, or direct, or both. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

Motion Presents Question of Law for Court. — On motion for nonsuit, it is a question of law for the court to determine, in the first instance, whether the evidence adduced, when considered in its light most favorable to the State, is of sufficient probative force to justify the jury in drawing the affirmative inference of guilt. State v. Needham, 235 N.C. 555, 71 S.E.2d 29 (1952).

Whether the State has offered substantial evidence presents a question of law for the trial court. State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

To withstand defendant's motion for judgment as of nonsuit, there must be substantial evidence against the accused of every essential element that goes to make up the crime charged and whether the State has offered such substantial evidence presents a question of law for the court. State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971).

When Jury Question Presented. — If there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. State v. Marion, 200 N.C. 715, 158 S.E. 406 (1931); State v. Rhodes, 252 N.C. 438, 113 S.E.2d 917 (1960); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960).

Weight and Credibility of Evidence Are Jury Questions. — A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

When considering a motion for nonsuit the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment. State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971).

Upon motion to dismiss under this section, it is required that the court ascertain merely where there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it. State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929).

The trial court in considering motions under this section is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. The trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

In ruling on a motion for nonsuit the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true, are matters for the jury. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952).

In considering a motion for judgment as of nonsuit, the court is not concerned with the weight of the testimony, or with its truth or falsity, but only with the question of whether there is sufficient evidence for the jury to find that the offense charged has been committed and that defendant committed it. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976), further review denied, 303 N.C. 712, 283 S.E.2d 138 (1981); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

The reconciliation of any apparent discrepancy in the testimony, the weight of the evidence, and the credibility of the witnesses are all matters for the jury and not the court. State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952).

The credibility of witnesses and the weight to be given to their testimony is exclusively a matter for the jury. State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741, appeal dismissed, 302 N.C. 400, 279 S.E.2d 354 (1981).

IV. ALLOWANCE OF MOTION.

When Motion Allowed. — When all the evidence, that of the State and that of the defendant, is to the same effect and tends only exculpate the defendant, his motion for judgment as of nonsuit should be allowed. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

When the evidence most favorable to the State is sufficient only to raise a suspicion or conjecture that the accused was the perpetrator of the crime charged in the indictment, the motion for judgment as in case of nonsuit should be allowed. State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974).

If, when the evidence is considered in the light most favorable to the State, it is sufficient only to raise a suspicion or conjecture as to the commission of the offense, the motion for nonsuit should be allowed. State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

If, when the evidence is considered in the light most favorable to the State, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed, and this is true even though the suspicion aroused by the evidence is strong. State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Mere Suspicion of Guilt Warrants Dismissal. — When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); State v. Fletcher, 301 N.C. 515, 271 S.E.2d 913 (1980).

On a motion to dismiss for insufficient evidence, the court must find that there is substantial evidence, whether direct, circumstantial, or both, that the offense charged has been committed and that defendant committed it, in order to properly deny the motion; if, on the other hand, the evidence raises merely a suspicion or conjecture as to either the commission of the offense or defendant's identity as the perpetrator, the motion should be allowed. State v. Collins, 50 N.C. App. 155, 272 S.E.2d 603 (1980).

When a motion for judgment as of nonsuit or a motion to dismiss is lodged in a criminal action, the court must consider all the evidence actually admitted, whether competent or incompetent, in the light most favorable to the State. All contradictions or discrepancies must be resolved in its favor, and it must be given the benefit of every reasonable inference to be drawn from the evidence. When all the evidence is so considered, it is for the court to decide whether there is sufficient evidence to support a finding that the charged offense has been committed and that the defendant was the perpetrator of the offense. If, when so considered, the evidence is only sufficient to raise a suspicion or conjecture that the offense has been committed or that the defendant committed the charged offense, then the motion for judgment as of nonsuit or the motion to dismiss should be allowed. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Where a complete defense is established

by the State's case, on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943); State v. Watts, 224 N.C. 771, 32 S.E.2d 348 (1944); State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951).

When the State's evidence presents a complete defense, a defendant's motion for nonsuit should be allowed. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

V. DENIAL OF MOTION.

A. In General.

When Motion Denied. — A motion to dismiss or as of nonsuit upon the evidence in a criminal case will be denied if the evidence is sufficient, considered in the light most favorable to the State, to prove guilty of the defendant beyond a reasonable doubt. State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

The rule to be applied when considering whether the State has introduced sufficient evidence to withstand a motion for nonsuit is well settled in this jurisdiction. A motion for nonsuit is properly denied when there is any evidence, whether introduced by the State or defendant, which will support the charges contained in the bill of indictment or warrant, considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State. State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977).

On a motion for judgment of nonsuit the evidence must be considered in the light most favorable for the State, and if there be any competent evidence to support the charge contained in the bill of indictment the case is one for the jury. State v. Scoggins, 225 N.C. 71, 33 S.E.2d 473 (1945); State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957); State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977).

If, when the evidence is viewed in the light most favorable to the State, there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Motion for directed verdict or for judgment of nonsuit should be denied when, upon such consideration of the evidence, there is substantial evidence to support a finding that an offense charged in the bill of indictment has been committed and the defendant committed it. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

If there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. State v. Coble, 24 N.C. App. 79, 210 S.E.2d 118 (1974); State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979).

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged. This rule applies whether the evidence is direct or circumstantial, or a combination of both. State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956); State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

Defendant's motion must be denied if the State has offered substantial evidence against defendant of every element of the crime charged. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980).

When there is sufficient evidence, direct or circumstantial, from which the jury could find that the charged offense has been committed and that defendant was the person who committed it, the motion should be denied. State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971); State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976); State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981), cert. denied, 305 N.C. 154, 289 S.E.2d 382 (1982).

Motion challenging the sufficiency of circumstantial evidence to go to the jury should be denied if there is evidence, considered in the light most favorable to the State, from which the jury could find that a crime has been committed and that defendant committed it. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

The motion for nonsuit must be denied where there is sufficient evidence that the offense charged was committed and that the defendant committed it. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601, cert. denied, 292 N.C. 732, 235 S.E.2d 782 (1977).

If there is any competent evidence tending to establish each material element of the offense charged in the bill of indictment the motion to dismiss or for nonsuit must be overruled. State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977).

Where there is any competent evidence to support the allegations of the indictment, the motion to dismiss is properly denied. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982).

If there is any evidence tending to prove the fact of guilt, or which reasonably leads to that conclusion as a logical and legitimate deduction, the motion must be denied. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

A motion for judgment as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt is insufficient to be submitted to the jury. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940); State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943); State v. Kirkman, 224 N.C. 778, 32 S.E.2d 328 (1944); State v. Murphy, 225 N.C. 115, 33 S.E.2d 588 (1945); State v. Simmons, 240 N.C. 780, 83 S.E.2d 904 (1954).

Where the evidence for the prosecution is sufficient to make out a case, nonsuit on the ground that the defendant's evidence tended to establish a defense is properly denied. State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950).

A motion for judgment of nonsuit must be denied, if there be any substantial evidence — more than a scintilla — to prove the allegations of the indictment. State v. Weinstein, 224 N.C. 645, 31 S.E.2d 920, cert. denied, 324 U.S. 849, 65 S. Ct. 689, 89 L. Ed. 1410 (1944).

If there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, a motion for nonsuit should be denied. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971).

Trial court did not err in not dismissing the charges of assault with a deadly weapon with intent to kill, as the evidence was sufficient to show that defendant intended to kill the man that defendant fired his semi-automatic gun at five times in rapid succession; however, four of the five charges should have been dismissed since the evidence only showed one assault, not five assaults. State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601, 2003 N.C. App. LEXIS 1438 (2003).

Where a motion is not limited to a single count or to any one degree of the crimes charged, but is addressed to the entire bill or to both counts as a whole, it cannot be allowed to support either count or any degree of either count. State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

A motion for judgment as of nonsuit addressed to the entire bill is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included crime. State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

When State offers evidence of corpus delicti in addition to defendant's extrajudicial confessions, the defendant's motion to nonsuit is correctly denied. State v. Whitfield, 51 N.C. App. 241, 275 S.E.2d 540 (1981).

Motion will not lie for failure of the State to offer evidence of a nonessential averment in the indictment, when each essential element of the offense is supported by competent evidence. State v. Atkinson, 210 N.C. 661, 188 S.E. 73 (1936).

Denial of Motion Held Proper. — Motion to dismiss the charge of attempted first-degree murder was properly denied because the evidence was sufficient to support a conclusion that defendant acted with premeditation and deliberation. There was no provocation by the police officer, defendant fired multiple shots within a fairly close range towards the officer, which required separate pulls of the trigger, and defendant's own words demonstrated his intent to kill. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Trial court did not err in denying defendant's motion to dismiss the charges because, although defendant's actions while driving were not impaired by alcohol, they were still sufficient to establish the culpable negligence needed to support both involuntary manslaughter and assault with a deadly weapon inflicting serious injury. A witness noticed inappropriate driving by both defendant and the decedent prior to their vehicles approaching a sharp curve, as they approached the curve, defendant attempted to pass the decedent and the witness despite having no visibility around the curve, and defendant's attempt to pass the vehicles at that particular time was in blatant disregard of safety concerns associated with that portion of the highway and a violation of G.S. 20-150. State v. Wade, 161 N.C. App. 686, 589 S.E.2d 379, 2003 N.C. App. LEXIS 2268

(2003), cert. denied, 358 N.C. 241, 594 S.E.2d 33 (2004).

State presented sufficient evidence to survive G.S. 15-173 motion to dismiss kidnapping charges in capital murder case where a defendant and codefendant confined, restrained, or removed the victim for the purpose of doing serious bodily harm to or terrorizing the victim, resulting in serious injury to the victim including putting the victim in the victim's car trunk and then burning the car; the jury was not required to unanimously find any one of the "either/or" kidnapping predicates, as long as there was evidence for them to find at least one of the predicates — "unanimity" was not required. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Trial court properly denied defendant's motion to dismiss the charge of attempted murder of an infant child as the State of North Carolina presented sufficient evidence of defendant's specific intent to kill the child by showing that defendant carjacked a woman and her infant child, drove the woman and her infant child to a deserted area, raped the woman, beat the woman to death, and drove away while leaving the child behind in his diapers on a hot day in grass a foot tall at the deserted area. Additionally, a pediatric critical care expert testified that the infant's injuries, especially sunburns, were life-threatening and that if the infant had not been found by a passerby before nightfall he could have died as a result of exposure and dehydration. State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

B. Appeal from Denial of Motion.

Scope of Appellate Review. — On appeal in criminal cases the Supreme Court cannot pass upon the weight of evidence, but only upon whether there is sufficient evidence to support conviction. State v. Shoup, 226 N.C. 69, 36 S.E.2d 697 (1946).

Supreme Court Not to Weigh Evidence. — This section provides that if on the motion the judgment of nonsuit is allowed on appeal, it shall, in all cases, have the force and effect of a verdict of not guilty. This is not, therefore, the case of a new trial for some error of the judge, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that the Supreme Court should weigh the evidence and render a verdict. State v. Cooke, 176 N.C. 731, 97 S.E. 171 (1918).

Effect of Reversal of Judgment of Guilty. — Under the provisions of this section the reversal of a judgment of guilty has the force and effect of a verdict of "not guilty." State v. Corey, 199 N.C. 209, 153 S.E. 923 (1930).

Where defendant's motion to nonsuit was allowed in the Supreme Court, this ruling was tantamount to a verdict of not guilty. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953); State v. Wooten, 239 N.C. 117, 79 S.E.2d 254 (1953).

Appeal of Denial of Motion Without Exception in Record. — A defendant may properly present on appeal the questions enumerated in N.C.R.A.P., Rule 10(a) without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under this section without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Question on Appeal Where Defendant Offers Evidence. — Where defendant offers evidence, the only question on appeal is whether the court erred in the denial of the motion made by defendant at the close of all the evidence. State v. Leggett, 255 N.C. 358, 121 S.E.2d 533 (1961).

Where defendant offers evidence in his own behalf, his assignment of error must be directed to the court's refusal to grant his motion for compulsory nonsuit at the close of all the evidence. State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969).

The denial of defendant's motion to dismiss at the close of the State's evidence was not properly at issue on appeal, where defendant chose to offer evidence after his motion was denied and thereby waived appellate review of the trial judge's decision. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

Under this section, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as grounds for appeal. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

Where defendant chose to offer evidence after his motion to dismiss was denied, he thereby waived appellate review of the trial judge's decision. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Because defendant failed to renew his motion for dismissal at the close of all the evidence, defendant failed to preserve the issue of whether the court properly denied his motion to dismiss the charges against him for appellate review. State v. Brunson, 187 N.C. App. 472, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Supreme Court Will Consider Only Denial of Motion Made at Close of All the Evidence. — Where defendant offered evidence after his motion for judgment as of nonsuit at the close of the State's evidence, the Supreme Court on appeal will consider only the denial of the motion made at the close of all the evidence, and the court must act in light of all the evidence. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Consideration of Entire Evidence on Appeal. — Where a defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under this section, at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence, brings his exception to the Supreme Court on appeal upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. State v. Kelly, 186 N.C. 365, 119 S.E. 755 (1923).

Where both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion, the exceptions, therefore, required a consideration of the entire evidence. State v. Pasour, 183 N.C. 793, 111 S.E. 779 (1922).

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922).

A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. State v. Earp, 196 N.C. 164, 145 S.E. 23 (1928).

Upon appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State's evidence alone, but all the evidence in the State's favor, taken in the light most favorable to the State and giving it every reasonable intendment therefrom, will be considered, and where there is sufficient evidence of the defendant's guilt upon the whole record, the action of the trial judge in denying the motion of nonsuit will be upheld. State v. Lawrence, 196 N.C. 562, 146 S.E. 395 (1929).

When upon the trial of a criminal action, the State produces its evidence and rests, and the defendant preserves his exception to the refusal of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of the evidence of the State, but of all the evidence; and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion. State v. Norton, 222 N.C. 418, 23 S.E.2d 301 (1942).

Defendant's exception to the denial of his motion to dismiss, made at the close of all of the evidence, presented the issue of the sufficiency of all of the evidence to go to the jury. Therefore, for purposes of reviewing this assignment of error, the court would consider all of the evidence introduced at trial, and would not determine whether that evidence was competent. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

Later Testimony of Codefendant Not Considered. — Where the defendant had not offered evidence, he was entitled to have his motion for nonsuit passed upon based on the facts in evidence when the State rested its case, and the Court of Appeals did not consider the later testimony of the codefendant. State v. Berryman, 10 N.C. App. 649, 179 S.E.2d 875 (1971).

Where evidence was substantially similar to that introduced at former trial, decision of the Supreme Court on the former appeal that evidence was sufficient to be submitted to the jury is res judicata on question of nonsuit or sufficiency of evidence. State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946).

Defendant's exception to the denial of his motion to dismiss, made at the close of all of the evidence, presented the issue of the sufficiency of all of the evidence to go to the jury. Therefore, for purposes of reviewing this assignment of error, the court would consider all of the evidence introduced at trial, and would not determine whether that evidence was competent. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

Denial of Motion to Dismiss Was Proper. — Defendant's motion to dismiss a conspiracy to commit robbery with a dangerous weapon charge was properly denied as there was conflicting evidence as to whether a gun given to a person who committed a robbery (the actor) was real or not and there was sufficient evidence that the gun was an operable weapon where: (1) defendant and two other men told the actor to rob a store in exchange for drugs, which she agreed to do, (2) the men provided the actor with a gun and she committed the robbery, (3) the actor spoke primarily with defendant regarding the robbery, (4) the actor stated that one of the men told her that the gun was fake, but that she was uncertain whether it was fake, and (5) the actor stated that defendant and the others had a real gun and a fake gun and that she believed she had been given the fake one. State v. Carter, 177 N.C. App. 539, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

Where the victim, defendant's girlfriend, stated that defendant was angry that she had called the police after she discovered her car was gone, and had strangled, raped, and threatened to kill her, and her testimony was corroborated by witnesses who saw her afterwards, the trial court properly denied defendant's motion to dismiss. State v. Brunson, 187 N.C. App. 472, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

VI. EVIDENCE.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980); State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same, and simply mean that the evidence must be existing and real, not just seeming or imaginary. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

"No Evidence to Go to Jury" Not Taken Literally. — When it is said that there is no evidence to go to the jury, it does not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established. State v. Woodell, 211 N.C. 635, 191 S.E. 334 (1937).

Evidence Required to Withstand Motion. — There must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974); State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Upon motions for directed verdict of not guilty and nonsuit, the court must find that there is substantial evidence both that an offense charged has been committed and that the defendant committed it before it can overrule the motions. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

To withstand defendant's motion to dismiss, the State must have presented evidence of every essential element of the crime. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

Evidence May Be Either Circumstantial or Direct. — There must be substantial evidence of all material elements of the offense to withstand the motion to dismiss, and it is immaterial whether the substantial evidence is circumstantial or direct, or both. State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974); State v. Minor, 290 N.C. 68, 224 S.E.2d 180 (1976).

The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980), rev'd on other grounds, 306 N.C. 62, 291 S.E.2d 607 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Standard of Proof Not Same as for Conviction. — A trial judge, in passing upon a motion for a judgment as of nonsuit, under the provisions of this section is not bound by the measure or quantum of proof by which the State must prove a defendant's guilt before the jury can convict him. State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

Evidence Need Not Exclude Every Reasonable Hypothesis of Innocence. — The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Circumstantial Evidence Need Not Point Unerringly to Defendant's Guilt. — Where all of the evidence introduced by the State is circumstantial in nature, it is not necessary that such evidence must establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, but only that there be substantial evidence of all elements of the crime sufficient to submit the case to the jury. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

There must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. State v. Bass, 253 N.C. 318, 116 S.E.2d 772 (1960).

Evidence Raising Suspicion Only. — Evidence that does no more than raise a suspicion, somewhat strong, perhaps, of a crime and the defendant's guilt, is not enough, and demurrer to the evidence will be sustained. State v. Carter, 204 N.C. 304, 168 S.E. 204 (1933).

Where the evidence, taken in the light most favorable to the State, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilt and the motion must be allowed. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. State v. Ham, 224 N.C. 128, 29 S.E.2d 449 (1944).

Mere Possibility or Conjecture Insufficient. — Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to a jury. State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959).

Upon a motion for judgment of nonsuit the evidence is to be considered in the light most favorable for the State, but evidence which merely suggests the possibility of guilt or which raises only a conjecture is insufficient to require submission to the jury. State v. Guffey, 252 N.C. 60, 112 S.E.2d 734 (1960).

Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Renewal of the motion to dismiss at the conclusion of all the evidence compels the court to consider the motion in light of all the evidence presented at trial. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

Evidence Considered in Light Most Favorable to State. — On a motion for judgment as of nonsuit in a criminal case the evidence must be considered in the light most favorable to the State. State v. Marion, 200 N.C. 715, 158 S.E. 406 (1931); State v. Herndon, 223 N.C. 208, 25 S.E.2d 611, cert. denied, 320 U.S. 759, 64 S. Ct. 67, 88 L. Ed. 452 (1943). See State v. McMahan, 224 N.C. 476, 31 S.E.2d 357 (1944); State v. Fulk, 232 N.C. 118, 59 S.E.2d 617 (1950); State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950); State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Reeves, 253 N.C. 427, 70 S.E.2d 9 (1952); State v. Simmons, 240 N.C. 780, 83 S.E.2d 904 (1954); State v. Neal, 248 N.C. 544, 103 S.E.2d 722 (1958); State v. Glenn, 251 N.C. 156, 110 S.E.2d 791 (1959); State v. Rhodes, 252 N.C. 438, 113 S.E.2d 917 (1960); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Ferguson, 17 N.C. App. 367, 194 S.E.2d 219 (1973); State v. White, 18 N.C. App. 31, 195 S.E.2d 576, appeal dismissed, 283 N.C. 587, 196 S.E.2d 811 (1973); State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976); State v. Waite, 32 N.C. App. 279, 232 S.E.2d 278 (1977); State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601, cert. denied, 292 N.C. 732, 235 S.E.2d 782 (1977); State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982); State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

In considering a motion under this section, the evidence most favorable to the State must be considered as true. State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974).

Upon a motion for judgment of nonsuit, the evidence by the State is to be deemed true and is to be considered in the light most favorable to the State. State v. Madden, 292 N.C. 114, 232 S.E.2d 656 (1977).

Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses. State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921); State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936); State v. Johnson, 226 N.C. 671, 40 S.E.2d 113 (1946). See State v. Eubanks, 209 N.C. 758, 184 S.E. 839 (1936). See also State v. Mann, 219 N.C. 212, 13 S.E.2d 247, 132 A.L.R. 1309 (1941); State v. Webb, 233 N.C. 382, 64 S.E.2d 268 (1951); State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952); State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955); State v. Edmundson, 244 N.C. 693, 94 S.E.2d 844 (1956); State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959).

The court is required, in a motion for judgment of nonsuit, to consider all the State's voluminous and interlocking evidence in the light most favorable to it. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. State v. Beaver, 266 N.C. 115, 145 S.E.2d 330 (1965); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Berryman, 10 N.C. App. 649, 179 S.E.2d 875 (1971); State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977);

State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Foust, 32 N.C. App. 301, 232 S.E.2d 276 (1977); State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980), rev'd on other grounds, 306 N.C. 62, 291 S.E.2d 607 (1982); State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980); State v. Batts, 303 N.C. 155, 277 S.E.2d 385 (1981); State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981), 305 N.C. 154, 289 S.E.2d 382 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Dow, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

On motion for nonsuit in a criminal case the evidence must be considered in the light most favorable to the State, the State is entitled to every reasonable inference which may legitimately be drawn from the evidence. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971); State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980); State v. Fletcher, 301 N.C. 515, 271 S.E.2d 913 (1980).

On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. State v. Fleming, 194 N.C. 42, 138 S.E. 342 (1927). See also, State v. Lawrence, 196 N.C. 562, 146 S.E. 395 (1929); State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931); State v. Smoak, 213 N.C. 79, 195 S.E. 72 (1938); State v. Adams, 213 N.C. 243, 195 S.E. 822 (1938); State v. Hammonds, 216 N.C. 67, 3 S.E.2d 439 (1939); State v. Brown, 218 N.C. 415, 11 S.E.2d 321 (1940); State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961), judgment vacated, 373 U.S. 375, 83 S. Ct. 1311, 10 L. Ed. 2d 420 (1963), rev'd on other grounds, 262 N.C. 425, 137 S.E.2d 161 (1964); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966); State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976); State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980); State v. McNeil, 46 N.C. App. 533, 265 S.E.2d 416, cert. denied, 300 N.C. 560, 270 S.E.2d 114 (1980); State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980); State v. Collins, 50 N.C. App. 155, 272 S.E.2d 603 (1980); State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981), aff'd, 305 N.C. 642, 289 S.E.2d 354 (1982).

In passing upon a motion for judgment as of nonsuit, the trial judge must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and considering so much of defendant's evidence as may be favorable to the State. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976), further review denied, 303 N.C. 712, 283 S.E.2d 138 (1981).

Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all of the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932); State v. Ammons, 204 N.C. 753, 169 S.E. 631 (1933); State v. Mann, 219 N.C. 212, 13 S.E.2d 247, 132 A.L.R. 1309 (1941).

In considering a motion to dismiss the action under the statute, the appellate court is merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question the appellate court must not forget that the State is entitled to the most favorable interpretation of the circumstances and all inferences that may fairly be drawn from them. State v. Carlson, 171 N.C. 818, 89 S.E. 30 (1916); State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921); State v. Carr, 196 N.C. 129, 144 S.E. 698 (1928).

Upon defendant's motion to dismiss, all the evidence favorable to the State must be considered, such evidence must be deemed true and considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced therefrom. State v. Stanley, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

When defendant moves under G.S. 15A-1227(a)(2) or under this section for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Renewal of the motion to dismiss at the conclusion of all the evidence compels the court to consider the motion in light of all the evidence presented at trial. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987).

Whether True or False. — For purposes of ruling on the motion, the court takes as true all of the State's evidence; whether the testimony is true or false and what it proves or fails to prove are matters for the jury. State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

Any contradictions and discrepancies in the evidence are resolved in favor of the State for the purpose of considering a motion for nonsuit. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Reasonable Inferences Unfavorable to State Must Be Ignored. — If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion for nonsuit and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. State v. McNeil, 46 N.C. App. 533, 265 S.E.2d 416, cert. denied, 300 N.C. 560, 270 S.E.2d 114 (1980).

Evidence favorable to the State is to be considered as a whole in determining its sufficiency. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Only incriminating evidence need be considered upon defendant's motion as of nonsuit under this section, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment. State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). See also State v. Moses, 207 N.C. 139, 176 S.E. 267 (1934).

Defendant's Evidence May Be Considered. — In considering a motion to dismiss made at the close of all the evidence, the defendant's evidence as well as the State's evidence may be considered. State v. Davis, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

In reviewing a motion to dismiss at the conclusion of all the evidence, the court must consider any evidence presented by defendant which rebuts the inference of guilt, so long as it is not contradicted by any of the State's evidence. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

Defendant's Evidence Conflicting with State's Evidence Not Considered. — In considering a motion for judgment of nonsuit, evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Jacobs, 31 N.C. App. 582, 230 S.E.2d 550 (1976); State v. Banks, 31 N.C. App. 667, 230 S.E.2d 429 (1976), cert. denied, 292 N.C. 260, 233 S.E.2d 393 (1977); State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied and appeal dismissed, 301 N.C. 96, 273 S.E.2d 442 (1980).

In ruling on defendant's motions for nonsuit or for directed verdict of not guilty the trial judge must consider the State's evidence in the light most favorable to the State without considering the evidence of defendant in conflict therewith. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

All of the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered. State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Bryant, 50 N.C. App. 139, 272 S.E.2d 916 (1980).

But Is Considered Where It Explains or Clarifies State's Evidence. — On a demurrer to the evidence only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. State v. Oldham, 224 N.C. 415, 30 S.E.2d 318 (1944).

On a motion to nonsuit, the defendant's evidence which explains or makes clear the evidence of the State may be considered. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

In considering a motion under this section, the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when not in conflict with the State's evidence, it may be used to explain or make clear that which has been offered by the State. State v. Bryant, 235 N.C. 420, 70 S.E.2d 186 (1952); State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Roop, 255 N.C. 607, 122 S.E.2d 363 (1961); State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972); State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

In considering a motion for nonsuit lodged at the close of all the evidence, any portion of defendant's evidence which is favorable to the State and any portion of defendant's evidence which explains or clarifies the State's evidence is to be considered; thus by omitting defendant's evidence from the record on appeal, defendant would deprive the State of the benefit of such portions of defendant's evidence, which are entitled to consideration. State v. Paschall, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Or Where Not Inconsistent with State's Evidence. — On a motion for nonsuit, defendant's evidence which rebuts the inference of guilt may be considered when it is not inconsistent with the State's evidence. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976).

Defendant's evidence relating to matters in defense should not be considered on motion to nonsuit. State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); State v. Moseley, 251 N.C. 285, 111 S.E.2d 308 (1959).

Only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the State, will not be considered. State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); State v. Coble, 24 N.C. App. 79, 210 S.E.2d 118 (1974).

Conflicting Evidence. — Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. State v. Carr, 196 N.C. 129, 144 S.E. 698 (1928).

Conflicts in State's Evidence. — When the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to repel a demurrer thereto. State v. Tolbert, 240 N.C. 445, 82 S.E.2d 201 (1954); State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959); State v. Rogers, 252 N.C. 499, 114 S.E.2d 355 (1960).

Conflicts Resolved in State's Favor. — Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the credibility and effect of such evidence being a question for the jury. State v. Church, 265 N.C. 534, 144 S.E.2d 624 (1965).

The court must consider all of the evidence actually admitted in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence. State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976).

On a motion for nonsuit, the court considers all of the evidence actually admitted, whether from the State or defendant, in the light most favorable to the State, resolves any contradictions and discrepancies therein in the State's favor, and gives the State the benefit of all reasonable inferences from the evidence. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976); State v. Aleem, 49 N.C. App. 359, 271 S.E.2d 575 (1980).

Contradictions and Discrepancies in Evidence Are for Jury to Resolve. — Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972); State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973); State v. Coble, 24 N.C. App. 79, 210 S.E.2d 118 (1974); State v. McKinney, 24 N.C. App. 259, 210 S.E.2d 450 (1974), rev'd on other grounds, 288 N.C. 113, 215 S.E.2d 578 (1975); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 278 (1976); State v. Dangerfield, 32 N.C. App. 608, 633 S.E.2d 663, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977); State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981), cert. denied, 305 N.C. 154, 289 S.E.2d 382 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Dow, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Ordinarily contradictions and discrepancies bear solely upon the weight to be given the testimony of a witness, a matter within the province of the jury. State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971).

On demurrer to the evidence and motion to nonsuit, the evidence must be considered in the light most favorable to the State, and contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury. State v. Simpson, 244 N.C. 325, 93 S.E.2d 425 (1956); State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960), cert. denied, 364 U.S. 832, 81 S. Ct. 45, 5 L. Ed. 2d 58 (1960).

Upon a motion for judgment of nonsuit, only the evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974).

The conclusion of the court with respect to the sufficiency of the evidence is unaffected by defendant's contention that some of the State's evidence is contradictory and casts doubt on the credibility of the witnesses. Such contradictions and discrepancies are matters for the jury and do not warrant nonsuit. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury and, for the purposes of this motion, they are to be deemed by the court as if resolved in favor of the State. State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980), rev'd on other grounds, 306 N.C. 62, 291 S.E.2d 607 (1982).

Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

And Do Not Warrant Granting Motion. — On motion for judgment of nonsuit the evidence must be considered in the light most favorable to the State and contradictions and discrepancies therein do not warrant the granting of the motion. State v. Jackson, 265 N.C. 558, 144 S.E.2d 584 (1965).

Discrepancies in the State's evidence will not justify the granting of a motion for nonsuit. State v. Moseley, 251 N.C. 285, 111 S.E.2d 308 (1959).

And Are Disregarded in Ruling on Motion. — For the purpose of ruling upon a motion for judgment as of nonsuit, the evidence for the State is taken to be true, every reasonable inference favorable to the State is to be drawn therefrom and discrepancies therein are to be disregarded. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied and appeal dismissed, 301 N.C. 96, 273 S.E.2d 442 (1980); State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741, appeal dismissed, 302 N.C. 400, 279 S.E.2d 354 (1981).

In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Jacobs, 31 N.C. App. 582, 230 S.E.2d 550 (1976); State v. Banks, 31 N.C. App. 667, 230 S.E.2d 429 (1976), cert. denied, 292 N.C. 266, 233 S.E.2d 393 (1977); State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649, cert. denied, 292 N.C. 733, 235 S.E.2d 786 (1977).

Upon a motion for judgment of nonsuit, the evidence for the State is taken to be true and the State is entitled to every reasonable inference which may be drawn therefrom, contradictions and discrepancies in the State's evidence are disregarded and the evidence of the defendant in conflict with that of the State is not taken into consideration. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Any contradictions and inconsistencies, when in the State's evidence, are to be disregarded by the court in considering a trial court's denial of a motion for judgment as of nonsuit. State v. Williams, 31 N.C. App. 588, 229 S.E.2d 839 (1976), further review denied, 303 N.C. 712, 283 S.E.2d 138 (1981).

Both Competent and Incompetent Evidence Considered. — Incompetent evidence admitted is considered as if it were competent in considering a motion for nonsuit. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980), rev'd on other grounds, 306 N.C. 62, 291 S.E.2d 607 (1982).

Admitted evidence, whether competent or incompetent, must be considered in passing on defendant's motions for judgment as of nonsuit. State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966); State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970); State v. Holton, 284 N.C. 391, 200 S.E.2d 612 (1973).

All admitted evidence which is favorable to the State, whether competent or incompetent, must be taken into account and so considered by the court when ruling upon a motion for nonsuit. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Owen, 51 N.C. App. 429, 276

S.E.2d 478 (1981), cert. denied, 305 N.C. 154, 289 S.E.2d 382 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be taken into account and must be so considered by the court in ruling upon the motion for directed verdict or for judgment of nonsuit. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

All of the evidence actually admitted, whether competent or incompetent, including that offered by defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon a motion for nonsuit. State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969); State v. Jones, 32 N.C. App. 408, 232 S.E.2d 475 (1977).

In determining whether there is evidence sufficient for the judge to submit a case to the jury, all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed true. State v. Riddle, 300 N.C. 744, 268 S.E.2d 80 (1980).

Improperly Admitted Evidence. — Upon the consideration of a motion for judgment of nonsuit, evidence for the State, even though improperly admitted, is taken into account. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

Evidence as to Accomplices and Codefendants. — The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. State v. Rising, 223 N.C. 747, 28 S.E.2d 221 (1943).

The direct evidence of the guilt of one of the defendants and the circumstantial evidence as to the other's participation and guilt, is held sufficient to overrule their motions as of nonsuit. State v. Ammons, 204 N.C. 753, 169 S.E. 631 (1933).

Nonsuit May Not Be Based on Ground That Testimony Was Incredible. — Nonsuit may not be granted on the ground that the testimony of the State's witnesses was incredible and unworthy of belief, the credibility of the witnesses being for the jury and not the court. State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950); State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952).

Evidence of Mere Opportunity to Commit Crime Insufficient. — Where the evidence for the State where the defendants are charged with fornication and adultery, shows no more than that the defendants had opportunities to commit the crime, on motion of the defendants, the action should be dismissed, and a verdict of not guilty, entered under this section. State v. Woodell, 211 N.C. 635, 191 S.E. 334 (1937).

When State's case must rest entirely on declarations made by defendant, and there is no evidence contra which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained. In such case, the declarations of the defendant are presented by the State as worthy of belief, and when they are wholly exculpatory, the defendant is entitled to his acquittal. State v. Tolbert, 240 N.C. 445, 82 S.E.2d 201 (1954).

Defendant May Rely upon Complete Defense Made Out by State's Evidence. — It is axiomatic that when a complete defense is made out by the State's evidence, a defendant should be allowed to avail himself of such defense on a demurrer to the evidence under this section. This is true even when the exculpating evidence is in the form of statements of defendant offered in evidence by the State. State v. Tolbert, 240 N.C. 445, 82 S.E.2d 201 (1954).

Where State introduces declarations by defendant which present a complete defense while its evidence contra raises only a possibility of guilt, the defendant is entitled to acquittal upon his demurrer to the evidence. However, that the State, upon offering evidence of exculpatory declarations of a defendant, is not precluded from showing that the true facts differ from those related by the defendant and such conflicting evidence is sufficient to overcome a motion to dismiss. State v. Caudle, 58 N.C. App. 89, 293 S.E.2d 205 (1982).

Testimony by State witness that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit, since such self-serving declaration does not rebut any proof by the State. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

When State Bound by Defendant's Extrajudicial Statement. — When the State introduced the defendant's extrajudicial statement, it was bound by what he said except insofar as it was contradicted and shown to be false. State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972).

Fingerprints of Accused. — Evidence given by a qualified expert that fingerprints found at the scene of a crime correspond with those of an accused, when accompanied by substantial evidence of circumstances from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed, is sufficient to withstand a motion for nonsuit. State v. Reynolds, 18 N.C. App. 10, 195 S.E.2d 581 (1973); State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

VII. INTRODUCTION OF TESTIMONY BY DEFENDANT AT TRIAL.

Effect of Defendant Introducing Testimony at Trial. — By introducing testimony at the trial, a defendant waives his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. His later exception to the denial of his motion for nonsuit made at the close of all the evidence, however, draws into question the sufficiency of all the evidence to go to the jury. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

Where defendant introduced evidence, he waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974); State v. Logan, 25 N.C. App. 49, 212 S.E.2d 236 (1975); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977); State v. Lilly, 32 N.C. App. 467, 232 S.E.2d 495, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977); State v. Lee, 33 N.C. App. 162, 234 S.E.2d 482 (1977); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), aff'd, State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988); State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988); State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978); State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981).

By introducing evidence after the denial of his motion for judgment of nonsuit, made when the State had rested its case, defendant waived the motion for dismissal which he made prior to the introduction of his evidence. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. Davis, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

When the defendant offers evidence, he waives a motion for nonsuit lodged, either actually or by statute, at the close of the State's evidence and only the motion lodged at the close of all the evidence is considered. State v. Paschall, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Defendant's motions for nonsuit must be considered in light of all the evidence since he introduced evidence and thereby waived the motions made at the close of the State's evidence. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971).

When a defendant offers evidence after his motion for judgment as of nonsuit is overruled, he thereby waives all right to urge that denial as error upon appeal. State v. McLamb, 13 N.C. App. 705, 187 S.E.2d 458, cert. denied, 281 N.C. 316, 188 S.E.2d 899 (1972).

By introducing evidence defendant waived his motion to dismiss made at the close of the State's evidence, and having failed to renew his motion at the close of all evidence, defendant established no basis upon which to appeal denial of his motion. State v. Chambers, 53 N.C. App. 358, 280 S.E.2d 636, cert. denied, 304 N.C. 197, 285 S.E.2d 103 (1981).

By introducing evidence following denial of motion to dismiss made at the end of the State's case in chief, defendant waived the motion. State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885, cert. denied, 306 N.C. 748, 295 S.E.2d 484 (1982).

Motion Must Be Renewed. — A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence as this section requires. State v. Helms, 181 N.C. 566, 107 S.E. 228 (1921); State v. Kiziah, 217 N.C. 339, 8 S.E.2d 474 (1940).

Exception to Denial of Motion. — Defendant's exception to the denial of his motion for nonsuit made at the close of all the evidence raises the question of the sufficiency of all the evidence to go to the jury. State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

Failure to Renew Motion After Introducing Testimony. — Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first motion, and it is not subject to review in the Supreme Court on Appeal. State v. Hayes, 187 N.C. 490, 122 S.E. 13 (1924). See also State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929); State v. Chapman, 221 N.C. 157, 19 S.E.2d 250 (1942); State v. Epps, 223 N.C. 741, 28 S.E.2d 219 (1943); State v. Jackson, 226 N.C. 760, 40 S.E.2d 417 (1946).

Waiver of Motion. — Where defendant's motion to dismiss made at the close of the State's evidence was denied, and following the denial of the motion, he put on evidence in his own behalf, and no motion was made at the conclusion of all the evidence, defendant, therefore, waived his prior motion and cannot bring it forward as appealable error. State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

The failure of a defendant to renew his motion for nonsuit at the close of all the evidence constitutes a waiver of his right to insist upon his first motion for nonsuit, and it is not subject to review in the Supreme Court. State v. Howell, 261 N.C. 657, 135 S.E.2d 625 (1964); State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

Having elected to offer evidence defendant waived her motion to dismiss at the close of the State's evidence, and proper consideration is thereafter upon her motion to dismiss made at the close of all the evidence. State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, cert. denied, 449 U.S. 960, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

Where defendant introduced evidence at trial on his own behalf, he waived his right to complain on appeal of the denial of his initial motion to dismiss at the conclusion of the State's evidence. Accordingly, only the sufficiency of the evidence at the close of all of the evidence was before the court on appeal. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Under this section, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as ground for appeal. State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988).

Waiver Not Affected by § 15A-1227(d) or § 15A-1446(d)(5). — Under this section, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of G.S. 15A-1227(d) and 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

§§ 15-173.1, 15-174: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For provisions as to post-trial relief in criminal cases, see G.S. 15A-1411 et seq.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-175: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to this Chapter.

§ 15-176. Prisoner not to be tried in prison uniform.

It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a Class 1 misdemeanor. (1915, c. 124; C.S., s. 4646; 1993, c. 539, s. 296; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Section does not explicitly make it unlawful for defendant to be tried in prison clothes. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618, cert. denied, 281 N.C. 763, 191 S.E.2d 360 (1972).

Jail Identification Wristband. — The definitions of "uniform", "dress" and "apparel" clearly refer to garments and particular modes of dressing and do not include an identification wristband; thus, there was no error in requiring defendant to wear his jail identification band. State v. Johnson, 128 N.C. App. 361, 496 S.E.2d 805 (1998).

Refusal of Defendants to Wear Other Than Prison Clothing. — Defendants who are tried in a gray shirt and gray trousers entirely as the result of their own refusal to wear the other clothing offered or to obtain other attire suffer prejudice, if any, entirely of their own making. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618, cert. denied, 281 N.C. 763, 191 S.E.2d 360 (1972).

Applied in State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981).

§ 15-176.1. District attorney may argue for death penalty.

In the trial of capital cases, the district attorney or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment. (1961, c. 890; 1973, c. 47, s. 2.)

CASE NOTES

Right to Introduce Evidence Supporting Death Penalty. — The State is entitled to ask the jury not only to find the defendant guilty of murder in the first degree, but also to impose the death penalty, and it follows, necessarily, that it may introduce evidence, otherwise competent, to support such a verdict. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Discretion of Judge in Controlling Argument. — The argument of counsel must be left largely to the control and discretion of the presiding judge. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Prosecuting Attorney Need Not Be Neutral. — In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Counsel must be allowed wide latitude in arguing hotly contested cases. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Scope of Proper Argument. — The prosecuting attorney may not, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not travel outside of the record or inject into his argument facts of his own knowledge or other facts not included in the evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

When Argument Proper. — Where the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record, and there was nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial, the argument was proper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

When Argument Improper. — Where the prosecuting attorney, in his argument, traveled outside the record, used language offensive in its nature, and, in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor (now district attorney) in other cases for the purpose of persuading the jury that he did not ask the death penalty where it was not deserved, the argument was improper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Prosecuting attorney may use appropriate epithets which are warranted by the evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

And he may vigorously urge jury to convict and to impose the death penalty in the light of the evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The grand jury, an agency of the State, after investigation according to law, indicted the defendant for murder in the first degree, and the solicitor (now district attorney), an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Characterization of Defendant in Uncomplimentary Terms. — When the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Defendant's Brutality May Be Argued in Murder Prosecution. — In a first-degree murder prosecution, it was permissible for the solicitor (now district attorney) to argue that in view of the brutality of defendant's conduct in the killing of his victim, the jury should find the defendant guilty of murder in the first degree without any recommendation that punishment be life imprisonment. State v. Williams, 276 N.C. 703, 174 S.E.2d 503, death sentence rev'd, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1970), overruled on other grounds, State v. Taylor, 337 N.C. 597, 447 S.E.2d 360 (1994).

Defendant's Conduct in Connection with Killing. — A judgment imposing the death penalty was affirmed, although the solicitor (now district attorney), reviewed the evidence and argued with great zeal and fervor that in the light of the defendant's conduct in connection with the killing of the victim, the punishment therefor should be death and the jury should bring a verdict of guilty of murder in the first degree without a recommendation that the punishment should be life imprisonment. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Review on Appeal. — The Supreme Court must determine whether the solicitor (now district attorney) violated the right of the defendant to a fair trial by the nature of his argument to the jury, from the record, irrespective of its view as to the policy of the State with regard to the punishment of the offense in question and without regard to the sufficiency of the evidence to support the verdict and sentence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

When Defendant Entitled to New Trial. — If the prosecuting attorney passed over the boundary of his right and duty in his argument to the jury by his vigorous denunciation of the defendant and thereby denied him a fair trial, the defendant is entitled to a new trial. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Applied in State v. Christopher, 258 N.C. 249, 128 S.E.2d 667 (1962).

§ 15-176.2: Repealed by Session Laws 1973, c. 44, s. 1.

Cross References. — As to credits against the service of sentences and for attainment of prison privileges, see G.S. 15-196.1 through 15-196.4.

Article 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.3. Informing and questioning potential jurors on consequences of guilty verdict.

When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime. (1973, c. 1286, s. 12.)

CASE NOTES

Applied in State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976).

Cited in State v. Bell, 287 N.C. 248, 214 S.E.2d 53 (1975); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15-176.4. Instruction to jury on consequences of guilty verdict.

When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime. (1973, c. 1286, s. 12.)

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

CASE NOTES

Instruction Mandatory. — This section makes it mandatory that the trial judge give the instruction upon the request of either party. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Instruction in Absence of Request. — It is not error to give an instruction as to the death penalty even in the absence of a request. State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975).

Refusal to Instruct Held Not Prejudicial. — Trial judge erred when he refused to give the instruction mandated by this section, but there was no prejudice to the defendant since the jury knew the sentence of death would be imposed upon the return of a verdict of guilty of the crime. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Applied in State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Cited in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981).

§ 15-176.5. Argument to jury on consequences of guilty verdict.

When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge. (1973, c. 1286, s. 12.)

CASE NOTES

Trial court erred when it instructed jury that defendant's argument discussing punishment should be disregarded. This was a violation of defendant's statutory rights under this section and G.S. 84-14. State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995).

Applied in State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Cited in State v. Bell, 287 N.C. 248, 214 S.E.2d 53 (1975); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§§ 15-176.6 through 15-176.8: Reserved for future codification purposes.

ARTICLE 17B.

Informing Jury of Possible Punishment upon Conviction.

§ 15-176.9. Loss of motor vehicle driver's license.

When a case will be submitted to a jury on a charge for which the penalty involves the possibility of the loss of a motor vehicle driver's license, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge. (1973, c. 1286, s. 25.)

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

CASE NOTES

Cited in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

ARTICLE 18.

Appeal.

§§ 15-177 through 15-178: Repealed by Session Laws 1973, c. 1141, s. 17.

Cross References. — For provisions as to appeals in criminal cases, see G.S. 15A-1441 et seq.

§§ 15-179 through 15-186: Repealed by Session Laws 1977, c. 711, s. 33.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-186.1: Repealed by Session Laws 1973, c. 44, s. 1.

Cross References. — As to credits against the service of sentences and for attainment of prison privileges, see G.S. 15-196.1 through 15-196.4.

Article 19.

Execution.

§ 15-187. Death by administration of lethal drugs.

Death by electrocution under sentence of law and death by the administration of lethal gas under sentence of law are abolished. Any person convicted of a criminal offense and sentenced to death shall be executed only by the administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent. The warden of Central Prison may obtain and employ the drugs necessary to carry out the provisions of this Article, regardless of contrary provisions in Chapter 90 of the General Statutes. (1909, ch. 443, s. 1; C.S., s. 4657; 1935, c. 294, s. 1; 1983, c. 678, ss. 1, 4; 1998-212, s. 17.22(a).)

Cross References. — As to punishment for capital crimes committed before July 1, 1935, see G.S. 15-191.

Editor's Note. — Session Laws 1983, c. 678, s. 4, was formerly noted in Editor's Notes at G.S. 15-187, 15-188, and 15-190. It has now been codified as the last sentence in this section at the direction of the Revisor of Statutes.

Legal Periodicals. — For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

CASE NOTES

Section applies only to crimes committed after the effective date of the statute, July 1, 1935, and it will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. State v. Hester, 209 N.C. 99, 182 S.E. 738 (1935). See also State v. Dingle, 209 N.C. 293, 183 S.E. 376 (1936); State v. McNeill, 211 N.C. 286, 189 S.E. 872 (1937).

Method of Execution. — Stay of execution was lifted where the word "only" in the relevant statute limited the method of execution to lethal injection but did not limit the drugs or chemicals to an ultrashort-acting barbiturate combined with a chemical paralytic agent. State v. Hunt, 357 N.C. 454, 591 S.E.2d 502, 2003 N.C. LEXIS 1136 (2003).

Cited in State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934); State v. Wall, 205 N.C. 659, 172 S.E. 216 (1934); State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936); State v. Brice, 214 N.C. 34, 197 S.E. 690 (1938); State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948); State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948); State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

§ 15-188. Manner and place of execution.

In accordance with G.S. 15-187, the mode of executing a death sentence must in every case be by administering to the convict or felon a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until the convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, the punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article. (1909, c. 443, s. 2; C.S., s. 4658; 1935, c. 294, s. 2; 1983, c. 678, s. 2; 1998-212, s. 17.22(b).)

CASE NOTES

Standing. — North Carolina Department of Correction, its secretary, and a warden had standing to file an action against the North Caroline Medial Board to prohibit it from disciplining physicians for participating in an execution and to obtain a declaratory judgment delineating the parties' rights with regards to executions because they could not carry out their statutory duty to execute condemned inmates under the Execution Protocol without subjecting a physician to discipline by the Medical Board; there was a genuine controversy between the parties arising out of conflicting contentions as to their respective legal rights and liabilities under G.S. 15-190. N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

Method of Execution. — Stay of execution was lifted where the word "only" in the relevant statute limited the method of execution to lethal injection but did not limit the drugs or chemicals to an ultrashort-acting barbiturate combined with a chemical paralytic agent. State v. Hunt, 357 N.C. 454, 591 S.E.2d 502, 2003 N.C. LEXIS 1136 (2003).

Physician Participation in Executions. — Trial court did not err in ruling in favor of the North Carolina Department of Correction, its secretary, and a warden in their action seeking injunctive relief prohibiting the North Carolina Medical Board from disciplining physicians for participating in an execution because G.S. 15-190 envisioned physician participation in executions in some professional capacity, and the language of the Execution Protocol did not overstep the statutory authority of the Governor and Council of State to determine and approve the exact means of execution, and exceptional care was taken when drafting the Protocol to ensure that it would not cause a physician to violate the Hippocratic Oath; the Protocol's requirement that a physician help prevent "undue pain or suffering" was consistent with the physician's oath to "do no harm," the warden was well within his authority to require such monitoring, and the North Carolina Medical Board was without power to prevent the Warden from doing so. N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

Cited in State v. Brooks, 206 N.C. 113, 172 S.E. 879 (1934); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938); State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

§ 15-189. Sentence of death; prisoner taken to penitentiary.

Upon the sentence of death being pronounced against any person in the State of North Carolina convicted of a crime punishable by death, it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person. The clerk of the superior court in which such death sentence is pronounced shall prepare a certified copy of said judgment or sentence of death, including therewith a copy of any notice or entries of appeal made in such case; if no entries or notice of appeal have been made or given in such case, a statement to the effect shall be included in the certificate of the clerk; it shall also be the duty of the district attorney, assistant district attorney, or attorney prosecuting in behalf of the State in the absence of the district attorney, to prepare and sign a certificate stating in substance that he prosecuted said case in behalf of the State and that notice or entries of appeal have or have not been made or given in said case, and further that he has examined a copy of said judgment or sentence of death certified by the clerk, including the copy of the notice or entries of appeal or statement to the effect that no appeal has been given, and to the best of his knowledge the same is correct; the certificate of said district attorney, or other prosecuting officer above named, shall be attached to the certified copy of said sentence of death, as prepared and certified by the clerk, and both certificates shall be transmitted by the clerk of the superior court in which said sentence of death is pronounced to the warden of the State penitentiary at Raleigh, North Carolina; at the same time and in the same manner, a duplicate original of said certificates shall be prepared by the clerk of the superior court and the district attorney, or other prosecuting officer above named, and the said duplicate original or said certificates shall be transmitted to the Attorney General of North Carolina. If notice of appeal is given or entries of appeal are made after the expiration of the term of superior court in which said sentence of death is pronounced, said certificates shall be prepared by the clerk of the superior court in which said sentence is pronounced and by the district attorney, or other prosecuting officer above named, prosecuting in behalf of the State, in the same manner and shall be transmitted as soon as possible to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina. The above certificates so prepared by the clerk of the superior court in which such sentence of death is pronounced and by the district attorney, or other prosecuting officer above named, shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina, not more than 20 or less than 10 days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal, said sentence of death shall not be carried out by the warden of the State penitentiary or by any of his deputies or agents until said certificates so prepared and transmitted by the clerk of the superior court in which said sentence of death is pronounced, and by the district attorney, or the prosecuting officer above named, have been received in the office of the warden of the State penitentiary at Raleigh, North Carolina. In all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary, at Raleigh, North Carolina, such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary. (1909, c. 443, s. 3; C.S., s. 4659; 1951, c. 899, s. 1; 1973, c. 47, s. 2.)

Legal Periodicals. — For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

CASE NOTES

No Distinction Between Conviction by Plea and by Verdict. — Since an accused may be convicted by his plea as well as by a verdict, there is no reason to read into this section a legislative attempt to distinguish between conviction by plea and by verdict. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Judgment Must Be Written and Signed by Trial Judge. — The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930).

Failure to Refer to Trial or Crime in Judgment. — A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. State v. Edney, 202 N.C. 706, 164 S.E. 23 (1932).

Death Sentence Without Reference to Crime. — A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commenced is held sufficient. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927).

Judgment Must Show Degree of Murder. — Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State penitentiary. State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, under this section and G.S. 15-188, 15-190, must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death, the case will be remanded. State v. Langley, 204 N.C. 687, 169 S.E. 705 (1933).

Applied in State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

§ 15-190. Person or persons to be designated by warden to execute sentence; supervision of execution; who shall be present.

Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be executed as provided by this Article and all amendments thereto. The execution shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be executed as provided by this Article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in the warden's place, and the surgeon or physician of the penitentiary. Four respectable citizens, two members of the victim's family, the counsel and any relatives of such person, convict or felon and a minister or member of the clergy or religious leader of the person's choosing may be present if they so desire. The identities, including the names, residential addresses, residential telephone numbers, and social security numbers, of witnesses or persons designated to carry out the execution shall be confidential and exempted from Chapter 132 of the General Statutes and are not subject to discovery or introduction as evidence in any proceeding. The Senior Resident Superior Court Judge for Wake County may order disclosure of names made confidential by this section after making findings that support a conclusion that disclosure is necessary to a proper administration of justice. (1909, c. 443, s. 4; C.S., s. 4660; 1925, c. 123; 1935, c. 294, s. 3; 1983, c. 678, s. 3; 1997-70, s. 1; 2004-124, s. 17.6A; 2004-199, s. 52; 2004-203, s. 22.)

CASE NOTES

Standing. — North Carolina Department of Correction, its secretary, and a warden had standing to file an action against the North Caroline Medial Board to prohibit it from disciplining physicians for participating in an execution and to obtain a declaratory judgment delineating the parties' rights with regards to executions because they could not carry out their statutory duty to execute condemned inmates under the Execution Protocol without subjecting a physician to discipline by the Medical Board; there was a genuine controversy between the parties arising out of conflicting contentions as to their respective legal rights and liabilities under G.S. 15-190. N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

Audiotape or Videotape of Execution Not Allowed. — Plaintiffs (prisoner and television talk-show host) did not have a right under either the First or Fourteenth Amendments to the United States Constitution or under Art. I, § 14 of the North Carolina Constitution to audiotape or videotape prisoner/plaintiff's scheduled execution. Under this section the execution was under the supervision and control of the warden and, as a matter of law, neither the Secretary of the North Carolina Department of Correction nor the warden could be mandamused to permit the requested audiotaping or videotaping. Lawson v. Dixon, 336 N.C. 312, 446 S.E.2d 799 (1994).

Physician Participation in Executions. — North Carolina Medial Board's position statement, which prohibited physicians from participating in executions, exceeded the Board's authority under N.C. Gen. Stat. ch. 90 because the statement directly contravened the specific requirement of physician presence found in G.S 15-190; G.S. 15-190, by its plain language, envisions physician participation in executions in some professional capacity, and while the Medical Board would retain disciplinary power over a licensed medical doctor who participates in an execution pursuant to G.S. 90-14, it may not discipline or threaten discipline against its licensees solely for participating in the execution alone. N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

Trial court did not err in ruling in favor of the North Carolina Department of Correction, its secretary, and a warden in their action seeking injunctive relief prohibiting the North Carolina Medical Board from disciplining physicians for participating in an execution because G.S. 15-190 envisioned physician participation in executions in some professional capacity, and the language of the Execution Protocol did not overstep the statutory authority of the Governor and Council of State to determine and approve the exact means of execution, and exceptional care was taken when drafting the Protocol to ensure that it would not cause a physician to violate the Hippocratic Oath; the Protocol's requirement that a physician help prevent "undue pain or suffering" was consistent with the physician's oath to "do no harm," the warden was well within his authority to require such monitoring, and the North Carolina Medical Board was without power to prevent the Warden from doing so. N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

Cited in State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946).

§ 15-191. Pending sentences unaffected.

Nothing in G.S. 15-187, 15-188, and 15-190 shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before July 1, 1935. (1935, c. 294, s. 4.)

Editor's Note. — The act from which this section was codified changed the mode of executing a death sentence from electrocution to the administration of lethal gas.

§ 15-192. Certificate filed with clerk.

The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5; C.S., s. 4661.)

CASE NOTES

Cited in N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

§ 15-193. Notice of reprieve or new trial.

Should the condemned person, convict or felon be granted a reprieve by the Governor or obtain a writ of error, or a new trial be granted by the Supreme Court of the State of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6; C.S., s. 4662.)

§ 15-194. Time for execution.

In sentencing a capital defendant to a death sentence pursuant to G.S. 15A-2000(b), the sentencing judge need not specify the date and time the execution is to be carried out by the Department of Correction. The Secretary of Correction shall immediately schedule a date for the execution of the original death sentence not less than 30 days nor more than 60 days from the date of receiving written notification from the Attorney General of North Carolina or the district attorney who prosecuted the case of any one of the following:

(1) The United States Supreme Court has filed an opinion upholding the sentence of death following completion of the initial State and federal postconviction proceedings, if any;

(2) The mandate issued by the Supreme Court of North Carolina on direct appeal pursuant to N.C.R. App. P. 32(b) affirming the capital defendant's death sentence and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;

(3) The capital defendant, if indigent, failed to timely seek the appointment of counsel pursuant to G.S. 7A-451(c), or failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a);

(4) The superior court denied the capital defendant's motion for appropriate relief, but the capital defendant failed to file a timely petition for writ of certiorari to the Supreme Court of North Carolina pursuant to N.C.R. App. P. 21(f);

(5) The Supreme Court of North Carolina denied the capital defendant's petition for writ of certiorari pursuant to N.C.R. App. P. 21(f), or, if certiorari was granted, upheld the capital defendant's death sentence, but the capital defendant failed to file a timely petition for writ of certiorari to the United States Supreme Court; or

(6) Following State postconviction proceedings, if any, the capital defendant failed to file a timely petition for writ of habeas corpus in the appropriate federal district court, or failed to timely appeal or petition an adverse habeas corpus decision to the United States Court of Appeals for the Fourth Circuit or the United States Supreme Court.

The Secretary shall send a certified copy of the document fixing the date to the clerk of superior court of the county in which the case was tried or, if venue was changed, in which the defendant was indicted. The certified copy shall be recorded in the minutes of the court. The Secretary shall also send certified copies to the capital defendant, the capital defendant's attorney, the district attorney who prosecuted the case, and the Attorney General of North Carolina. (1909, c. 443, s. 6; C.S., s. 4663; 1925, c. 55; 1951, c. 244, ss. 1, 2; 1973, c. 47, s. 2; 1981, c. 900; 1995 (Reg. Sess., 1996), c. 719, s. 5; 1997-289, s. 1; 1999-358, s. 2.)

CASE NOTES

Applied in State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948); Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953).

Cited in State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995); Moseley v. French, 961 F. Supp. 889 (M.D.N.C. 1997).

§ 15-195. Prisoner taken to place of trial when new trial granted.

Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7; C.S., s. 4664.)

§ 15-196: Repealed by Session Laws 1989, c. 353, s. 3.

Article 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed.

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1; 1977, c. 711, s. 16A; 1977, 2nd Sess., c. 1147, s. 30; 1997-237, s. 3.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Section repealed former §§ 15-176.2 and 15-186.1 and was made applicable to all prisoners, including those convicted prior to its enactment, who are entitled to, but who have not heretofore received all such allowable credit. State v. Lewis, 18 N.C. App. 681, 198 S.E.2d 57, cert. denied and appeal dismissed, 283 N.C. 756, 198 S.E.2d 726 (1973).

Constitutional guarantee against double jeopardy absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under former § 15-184.

To deny petitioner 64-day credit against his original sentence, after subjecting petitioner to the loss of his liberty by incarceration in a foreign state, would amount to punishment twice for the same offense and a deprivation of his liberty without due process of law, both in violation of U.S. Const., Amend. V, as made applicable to the states via U.S. Const., Amend. XIV. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

By its express terms, this statute includes only time spent in custody in "State" institutions and requires a credit against only custody under a charge already "commenced." "State" is defined at subdivision (8) of G.S. 15A-101 as "The State of North Carolina" and does not include other states. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

Detention in a foreign city jail at the request of North Carolina amounts to just as much deprivation of liberty and punishment as incarceration in any municipal jail in North Carolina. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

Where petitioner was arrested and confined in a Virginia city jail solely at the request and direction of the State of North Carolina, whose sole justification for having petitioner arrested and jailed was the fact that petitioner had not yet completed a lawfully imposed sentence of imprisonment; refusal of credit against his original sentence for the time he spent in custody, in effect amounts to an increase in petitioner's prison sentence at the whim of state prison authorities. Clearly, such an increase in petitioner's sentence amounts to a violation of his right under U.S. Const., Amend. V to be free from being punished for the same offense twice. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

"Custody." — Defendant participating in a residential treatment program where his freedom was substantially limited was in "custody," for purposes of entitlement to a sentencing credit for time spent in the program. State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Language of G.S. 15-196.1 demonstrates the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of a charge. State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Life Sentence Not Reduced by Credits. — Because a life sentence lasts for the prisoner's natural life, no reduction in sentence by credits of any kind is possible. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under former § 15-184 before the enactment of this Article.

Credit for Time Awaiting Affirmance of Appeal. — Denial of credit to a prisoner for the time he spent in jail from the date of his first conviction until the affirmance of his second appeal is multiple punishment. Such time must be fully credited insofar as possible as punishment already exacted. Although it cannot be credited against his life sentence, which by its very nature is indefinite, it can be credited toward the 10 years he must wait to be considered for parole. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971), decided under former § 15-184 before the enactment of this Article.

Treatment Program Constituted Custody in State Institution. — Participation in alternative treatment program constituted commitment or confinement in a State institution such that a defendant was entitled to credit under G.S. 15-196.1 for time spent participating therein. State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Trial court erred in denying defendant's motion for credit against his sentence for time he spent in a substance abuse program as defendant was confined and in custody pursuant to the plain meaning of G.S. 15-196.1 since defendant's freedom and liberty were limited by the programs and daily schedule and, although he could leave or withdraw from the program at any time, he was told that if he did so, he would be charged with additional crimes and have his suspended sentence activated. State v. Lutz, 177 N.C. App. 140, 628 S.E.2d 34, 2006 N.C. App. LEXIS 712 (2006).

Time spent on parole is not to be credited on an active sentence. State v. Davis, 19 N.C. App. 459, 199 S.E.2d 37 (1973).

But a defendant who has served, pursuant to special probation, an active sentence is entitled to credit for that time on any sentence imposed upon revocation of probation. State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803, aff'd, 336 N.C. 552, 444 S.E.2d 182 (1994).

Incarceration for Probation Violation. — Trial court erred by failing to award defendant credit for her prior confinement for violation of her probation; the state conceded that defendant was entitled to a 30-day credit for the time she spent incarcerated for her violation of probation. State v. Belcher, 173 N.C. App. 620, 619 S.E.2d 567, 2005 N.C. App. LEXIS 2112 (2005).

House arrest (whether or not accompanied by electronic monitoring) in a defendant's own home while awaiting trial does not constitute confinement in a state or local institution and does not qualify as time that can be credited against a defendant's sentence pursuant to this section. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

Withholding of Credit for inability to make bail discriminatory. — Denial of credit for pretrial custody necessitated by financial inability to make bail is discrimination based on financial status. Steele v. North Carolina, 348 F. Supp. 1023 (W.D.N.C. 1972), aff'd in part, 475 F.2d 1401 (4th Cir. 1973), decided under former § 15-176.2.

Constitutionality of Revocation of Time Credited Pursuant to This Section. — The trial court's revocation of defendant's credit for time spent under house arrest prior to her entry of plea did not violate her constitutional right against double jeopardy because the restraints ordered were properly imposed to ensure her presence at the trial and to disable her from committing other offenses. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

Trial court committed no error in failing to credit time already credited to previously imposed sentence for secret assault. State v. Lewis, 18 N.C. App. 681, 198 S.E.2d 57, cert.

denied and appeal dismissed, 283 N.C. 756, 198 S.E.2d 726 (1973).

Out-of-Term Stripping of Defendant's Jail Credit Erroneously Given for Time in Home Detention Upheld. — Because a judge's signing of an order in compliance with this section is mechanical and routine, the trial court's order depriving the defendant of a jail credit for her time in home detention, which she had erroneously received, was the correction of a clerical error and within the court's power although the term of court had expired. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

Trial court erred in failing to give a juvenile credit for the time she served in secure custody prior to her dispositional hearing because the provisions of G.S. 15-196.1 were applicable to juvenile commitments. In re D.L.H., — N.C. App. —, 679 S.E.2d 449, 2009 N.C. App. LEXIS 1175 (July 21, 2009).

Credit Properly Applied in Juvenile Proceedings. — Where a juvenile was credited for time served in conjunction with the violation of her conditional release, she was not also entitled to receive similar credit toward a new commitment term under a new disposition order. In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Cited in State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

§ 15-196.2. Allowance in cases of multiple sentences.

In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent. (1973, c. 44, s. 1.)

CASE NOTES

Detention in a foreign city jail at the request of North Carolina amounts to just as much deprivation of liberty and punishment as incarceration in any municipal jail in North Carolina. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

Where petitioner was arrested and confined in a Virginia city jail solely at the request and direction of the State of North Carolina, whose sole justification for having petitioner arrested and jailed was the fact that petitioner had not yet completed a lawfully imposed sentence of imprisonment; refusal of credit against his original sentence for the time he spent in custody, in effect amounts to an increase in petitioner's prison sentence at the whim of state prison authorities. Clearly, such an increase in petitioner's sentence amounts to a violation of his right under U.S. Const., Amend. V to be free from being punished for the same offense twice. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

Where two life sentences which were imposed on defendant were to run concurrently, defendant should have been credited on both life sentences with time spent in jail awaiting trial. State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Cited in State v. Cloer, — N.C. App. —, 678 S.E.2d 399, 2009 N.C. App. LEXIS 1107 (July 7, 2009).

§ 15-196.3. Effect of credit.

Time creditable under this section shall reduce the minimum and maximum term of a sentence; and, irrespective of sentence, shall reduce the time required to attain privileges made available to inmates in the custody of the State Department of Correction which are dependent, in whole or in part, upon the passage of a specific length of time in custody, including parole or post-release supervision consideration by the Post-Release Supervision and Parole Commission. However, nothing in this section shall be construed as requiring an automatic award of privileges by virtue of the passage of time. (1973, c. 44, s. 1; 1977, c. 711, s. 17; 1997-237, s. 4.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32 provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Reduction of Original Sentence Not A Credit. — The fact that a judge reduced defendant's original seven year sentence to six years and nine months, a total reduction of 90 days, did not satisfy the requirement that the defendant be given a 90-day credit. A credit reduces the time required to attain privileges which are dependent upon the passage of a specific length of time in custody, and a reduction in the sentence term did not accomplish that purpose. State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803, aff'd, 336 N.C. 552, 444 S.E.2d 182 (1994).

Application to Resentencing. — A person who was initially, and unconstitutionally, sentenced to death, and is resentenced to life imprisonment is entitled to receive credit for pretrial custody provided in this section. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978).

§ 15-196.4. Procedures for judicial award.

Upon sentencing or activating a sentence, the judge presiding shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits. Upon committing a defendant upon the conclusion of an appeal, or a parole, probation, or post-release supervision revocation, the committing authority shall determine any credits allowable on account of these proceedings and shall cause to be transmitted, as in all other cases, a statement of the allowable credit to the custodian of the defendant. Upon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit to the custodian of the petitioner. (1973, c. 44, s. 1; 1997-237, s. 5.)

CASE NOTES

Appellate review. — Defendant's request for additional sentencing credit was not properly before the appellate court because the issue of additional sentencing credit was a matter for administrative action, as provided by G.S. 15-196.4, rather than a subject for appeal; the proper procedure to obtain additional credit was for defendant to initially have presented her claim to the trial court. State v. Cloer, — N.C. App. —, 678 S.E.2d 399, 2009 N.C. App. LEXIS 1107 (July 7, 2009).

Remand Necessary Where no Credit Given. — After defendant's probation was revoked, the case was remanded to a district court for further proceedings because no credit was given for the time that defendant was in custody. State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003).

Cited in State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978); Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).

Article 20.

Suspension of Sentence and Probation.

§§ 15-197 through 15-200.1: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For provisions as to post-trial relief, see G.S. 15A-1411 et seq.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-200.2: Repealed by Session Laws 1975, c. 309, s. 2.

Cross References. — For provisions as to post-trial relief, see G.S. 15A-1411 et seq.

Editor's Note. — This section was again repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

§§ 15-201, 15-202: Repealed by Session Laws 1973, c. 1262, s. 10.

Cross References. — As to transfer of the functions of the State Probation Commission to the Department of Correction, see G.S. 143B-262.

§ 15-203. Duties of the Secretary of Correction; appointment of probation officers; reports; requests for extradition.

The Secretary of Correction shall direct the work of the probation officers appointed under this Article. He shall consult and cooperate with the courts and institutions in the development of methods and procedure in the administration of probation, and shall arrange conferences of probation officers and judges. He shall make an annual written report with statistical and other information to the Department of Correction and the Governor. He is authorized to present to the Governor written applications for requisitions for the return of probationers who have broken the terms of their probation, and are believed to be in another state, and he shall follow the procedure outlined for requests for extradition as set forth in G.S. 15-77. (1937, c. 132, s. 7; 1959, c. 127; 1963, c. 914, s. 2; 1973, c. 1262, s. 10.)

Editor's Note. — Section 15-77, referred to in this section, was transferred to G.S. 15A-743 by Session Laws 1973, c. 1286, s. 16, effective July 1, 1975.

§ 15-203.1: Repealed by Session Laws 1963, c. 914, s. 6.

Cross References. — For duties of the Secretary of Correction, see G.S. 15-203.

§ 15-204. Assignment, compensation and oath of probation officers.

Probation officers appointed under this Article shall be assigned to serve in such courts or districts or otherwise as the Secretary of Correction may determine. They shall be paid annual salaries to be fixed by the Department of Correction, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have been authorized and approved by the Secretary of Correction.

Each person appointed as a probation officer shall take an oath of office before the judge of the court or courts in which he is to serve, which oath shall be as follows:

"I, ________________, do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain, and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God," and shall be noted of record by the clerk of the court. (1937, c. 132, s. 8; 1973, c. 1262, s. 10.)

CASE NOTES

Immunity. — Pursuant to the terms of G.S. 15-204 and G.S. 205, a probation officer was a public official, who could not be held liable for negligence in an individual capacity. Lambert v. Cartwright, 160 N.C. App. 73, 584 S.E.2d 341, 2003 N.C. App. LEXIS 1674 (2003), cert. denied, 357 N.C. 658, 590 S.E.2d 268 (2003).

§ 15-205. Duties and powers of the probation officers.

A probation officer shall investigate all cases referred to him for investigation by the judges of the courts or by the Secretary of Correction. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring reports, and in other ways, and shall report thereon in writing as often as the court or the Secretary of Correction may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the court or the Secretary of Correction, to aid and encourage persons on probation to bring about improvement in their conduct and condition, and shall within the first 30 days of a person's probation take such person to a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation. Such officer shall keep detailed records of his work; shall make such reports in writing to the Secretary of Correction as he may require; and shall perform such other duties as the Secretary of Correction may require. A probation officer shall have, in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State. (1937, c. 132, s. 9; 1973, c. 1262, s. 10; 1975, c. 229, s. 1; 1977, c. 711, s. 18.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

This section refers only to the power to investigate on behalf of the court the advisability of placing the defendant on probation. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Authority to Arrest Probationer Without Warrant. — If a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a warrant, then it is reasonable to conclude that this section and G.S. 15A-1345 read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Immunity. — Pursuant to the terms of G.S. 15-204 and G.S. 205, a probation officer was a public official, who could not be held liable for negligence in an individual capacity. Lambert v. Cartwright, 160 N.C. App. 73, 584 S.E.2d 341, 2003 N.C. App. LEXIS 1674 (2003), cert. denied, 357 N.C. 658, 590 S.E.2d 268 (2003).

No Authority to Order DAPP to Supervise Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

§ 15-205.1: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For provisions as to post-trial relief, see G.S. 15A-1411 et seq.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-206. Cooperation with Department of Correction and officials of local units.

It shall be the duty of the Secretary of Correction and the Department of Correction to cooperate with each other to the end that the purposes of probation and parole may be more effectively carried out. When requested, each shall make available to the other case records in his possession, and in cases of emergency, where time and expense can be saved, shall provide investigation service.

It is hereby made the duty of every city, county, or State official or department to render all assistance and cooperation within his or its fundamental power which may further the objects of this Article. The State Department of Correction, the Secretary of Correction, and the probation officers are authorized to seek the cooperation of such officials and departments, and especially of the county superintendents of social services and of the Department of Health and Human Services. (1937, c. 132, s. 10; 1961, c. 139, s. 2; 1969, c. 982; 1973, c. 476, s. 138; c. 1262, s. 10; 1997-443, s. 11A.118(a).)

§ 15-207. Records treated as privileged information.

All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this Article to receive reports, unless and until otherwise ordered by a judge of the court or the Secretary of Correction. (1937, c. 132, s. 11; 1973, c. 1262, s. 10.)

CASE NOTES

Section Requires Court Order, Not Discovery Motion. — Where defendant requested, in motion for discovery, records, files, information or knowledge in the possession of the State, trial court did not err in its refusal to allow defendant access to his parole records; this section requires a court order to obtain probation records to protect their confidentiality and defense counsel did not follow this procedure; therefore, defendant's discovery motion was not applicable to defendant's probation records. State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Cited in State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282 (1977).

§ 15-208: Repealed by Session Laws 1975, c. 138.

§ 15-209. Accommodations for probation offices.

(a) The county commissioners in each county in which a probation office exists shall provide, in or near the courthouse, suitable office space for those probation officers assigned to the county who have probationary caseloads and their administrative support. This requirement does not include management staff of the Department of Correction, nonprobation staff, or other Department of Correction employees.

(b) If a county is unable to provide the space required under subsection (a) of this section for any reason, it may elect to request that the Department of Correction lease space for the probation office and receive reimbursement from the county for the leased space. If a county fails to reimburse the Department for such leased space, the Secretary of Correction may request that the Administrative Office of the Courts transfer the unpaid amount to the Department from the county's court and jail facility fee remittances. (1937, c. 132, s. 13; 2009-451, s. 19.19.)

Editor's Note. — Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-451, s. 19.19, effective July 1, 2009, substituted "offices" for "officers" in the section heading; designated the previously existing provisions as subsection (a); in subsection (a), in the first sentence, substituted "office exists" for "officer serves" near the middle, and "those probation officers assigned to the county who have probationary caseloads and their administrative support" for "such officer" at the end, and added the last sentence; and added subsection (b).

ARTICLE 21.

Segregation of Youthful Offenders.

§§ 15-210 through 15-216: Repealed by Session Laws 1967, c. 996, s. 17.

ARTICLE 22.

Review of Criminal Trials.

§ 15-217: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For provisions as to post-trial relief in criminal cases, see G.S. 15A-1411 et seq.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-217.1: Recodified as § 15A-1420(b1) by Session Laws 1995 (Regular Session, 1996), c. 719, s. 3.

§§ 15-218 through 15-222: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For provisions as to post-trial relief in criminal cases, see G.S. 15A-1411 et seq.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 23.

Expunction of Records.

§§ 15-223, 15-224: Recodified as §§ 15A-145 and 15A-146 by Session Laws 1985, c. 636, s. 1, effective July 5, 1985.

Chapter 15A.
Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

Article 1.
Definitions and General Provisions.

Sec.

15A-1 through 15A-100. [Reserved.]
15A-101. Definitions.
15A-101.1. Electronic technology in criminal process and procedure.

Article 2.
Jurisdiction.

15A-102 through 15A-130. [Reserved.]

Article 3.
Venue.

15A-131. Venue generally.
15A-132. Concurrent venue.
15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.
15A-134. Offense occurring in part outside North Carolina.
15A-135. Allegation of venue conclusive in absence of timely motion.
15A-136. Venue for sexual offenses.
15A-137 through 15A-140. [Reserved.]

Article 4.
Entry and Withdrawal of Attorney in Criminal Case.

15A-141. When entry of attorney in criminal proceeding occurs.
15A-142. Requirement that clerk record entry.
15A-143. Attorney making general entry obligated to represent defendant at all subsequent stages.
15A-144. Withdrawal of attorney with permission of court.

Article 5.
Expunction of Records.

15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.
15A-145.1. Expunction of records for first offenders under the age of 18 at the time of conviction of certain gang offenses.

Sec.

15A-145.2. Expunction of records for first offenders not over 21 years of age at the time of the offense of certain drug offenses.
15A-145.3. Expunction of records for first offenders not over 21 years of age at the time of the offense of certain toxic vapors offenses.
15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.
15A-147. Expunction of records when charges are dismissed or there are findings of not guilty as a result of identity theft.
15A-148. Expunction of DNA records when charges are dismissed on appeal or pardon of innocence is granted.
15A-149. Expunction of records when pardon of innocence is granted.
15A-150. (Effective October 1, 2010) Notification requirements.
15A-151. (Effective October 1, 2010) AOC maintain confidential file.
15A-152. (Effective October 1, 2010) Civil liability for dissemination of certain criminal history information.
15A-153 through 15A-172. [Reserved.]

Article 6.
[Reserved.]

15A-173 through 15A-200. [Reserved.]

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

Article 7.
[Reserved.]

15A-201 through 15A-210. [Reserved.]

Article 8.
Electronic Recording of Interrogations.

15A-211. Electronic recording of interrogations.
15A-212 through 15A-220. [Reserved.]

Article 9.
Search and Seizure by Consent.

15A-221. General authorization; definition of "consent".

Sec.
15A-222. Person from whom effective consent may be obtained.
15A-223. Permissible scope of consent search and seizure.
15A-224 through 15A-230. [Reserved.]

Article 10.

Other Searches and Seizures.

15A-231. Other searches and seizures.
15A-232 through 15A-240. [Reserved.]

Article 11.

Search Warrants.

15A-241. Definition of search warrant.
15A-242. Items subject to seizure under a search warrant.
15A-243. Who may issue a search warrant.
15A-244. Contents of the application for a search warrant.
15A-245. Basis for issuance of a search warrant; duty of the issuing official.
15A-246. Form and content of the search warrant.
15A-247. Who may execute a search warrant.
15A-248. Time of execution of a search warrant.
15A-249. Officer to give notice of identity and purpose.
15A-250. [Reserved.]
15A-251. Entry by force.
15A-252. Service of a search warrant.
15A-253. Scope of the search; seizure of items not named in the warrant.
15A-254. List of items seized.
15A-255. Frisk of persons present in premises or vehicle to be searched.
15A-256. Detention and search of persons present in private premises or vehicle to be searched.
15A-257. Return of the executed warrant.
15A-258. Disposition of seized property.
15A-259. Application of Article to all warrants; exception as to inspection warrants and special riot situations.

Article 12.

Pen Registers; Trap and Trace Devices.

15A-260. Definitions.
15A-261. Prohibition and exceptions.
15A-262. Application for order for pen register or trap and trace device.
15A-263. Issuance of order for pen register or trap and trace device.
15A-264. Assistance in installation and use of a pen register or a trap and trace device.
15A-265. [Reserved.]

Article 13.

DNA Database and Databank.

Sec.
15A-266. Short title.
15A-266.1. Policy.
15A-266.2. Definitions.
15A-266.3. Procedural compatibility with the FBI.
15A-266.4. Blood sample required for DNA analysis upon conviction or finding of not guilty by reason of insanity.
15A-266.5. Tests to be performed on blood sample.
15A-266.6. Procedures for withdrawal of blood sample for DNA analysis.
15A-266.7. Procedures for conducting DNA analysis of blood sample.
15A-266.8. DNA database exchange.
15A-266.9. Cancellation of authority to exchange DNA records.
15A-266.10. [Repealed.]
15A-266.11. Unauthorized uses of DNA Databank; penalties.
15A-266.12. Confidentiality of records.
15A-267. Access to DNA samples from crime scene.
15A-268. Preservation of biological evidence.
15A-269. Request for postconviction DNA testing.
15A-270. Post-test procedures.
15A-270.1. Right to appeal denial of defendant's motion for DNA testing.

Article 14.

Nontestimonial Identification.

15A-271. Authority to issue order.
15A-272. Time of application; additional investigative procedures not precluded.
15A-273. Basis for order.
15A-274. Issuance of order.
15A-275. Modification of order.
15A-276. Failure to appear.
15A-277. Service of order.
15A-278. Contents of order.
15A-279. Implementation of order.
15A-280. Return.
15A-281. Nontestimonial identification order at request of defendant.
15A-282. Copy of results to person involved.
15A-283 through 15A-284.49 [Reserved.]

Article 14A.

Eyewitness Identification Reform Act.

15A-284.50. Short title.
15A-284.51. Purpose.
15A-284.52. Eyewitness identification reform.
15A-284.53. Training of law enforcement officers.

Article 15.

Urgent Necessity.

Sec.
15A-285. Non-law-enforcement actions when urgently necessary.

Article 16.

Electronic Surveillance.

15A-286. Definitions.
15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.
15A-288. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited.
15A-289. Confiscation of wire, oral, or electronic communication interception devices.
15A-290. Offenses for which orders for electronic surveillance may be granted.
15A-291. Application for electronic surveillance order; judicial review panel.
15A-292. Request for application for electronic surveillance order.
15A-293. Issuance of order for electronic surveillance; procedures for implementation.
15A-294. Authorization for disclosure and use of intercepted wire, oral, or electronic communications.
15A-295. Reports concerning intercepted wire, oral, or electronic communications.
15A-296. Recovery of civil damages authorized.
15A-297. Conformity to provisions of federal law.
15A-298. Subpoena authority.

Article 16A.

Discontinuation of Telecommunications Services.

15A-299. Discontinuation of telecommunications services used for unlawful purposes.
15A-300. [Reserved.]

SUBCHAPTER III. CRIMINAL PROCESS.

Article 17.

Criminal Process.

15A-301. Criminal process generally.
15A-301.1. Electronic Repository.
15A-302. Citation.
15A-303. Criminal summons.
15A-304. Warrant for arrest.
15A-305. Order for arrest.

Article 18.

[Reserved.]

Sec.
15A-306 through 15A-353. [Reserved.]

Article 19.

[Reserved.]

15A-354 through 15A-400. [Reserved.]

SUBCHAPTER IV. ARREST.

Article 20.

Arrest.

15A-401. Arrest by law-enforcement officer.
15A-402. Territorial jurisdiction of officers to make arrests.
15A-403. Arrest by officers from other states.
15A-404. Detention of offenders by private persons.
15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.
15A-406. Assistance by federal officers.
15A-407 through 15A-409. [Reserved.]

Article 21.

[Reserved.]

15A-410 through 15A-453. [Reserved.]

Article 22.

[Reserved.]

15A-454 through 15A-500. [Reserved.]

SUBCHAPTER V. CUSTODY.

Article 23.

Police Processing and Duties upon Arrest.

15A-501. Police processing and duties upon arrest generally.
15A-502. Photographs and fingerprints.
15A-503. Police assistance to persons arrested while unconscious or semiconscious.
15A-504. Return of released person.
15A-505. Notification of parent and school.
15A-506 through 15A-510. [Reserved.]

Article 24.

Initial Appearance.

15A-511. Initial appearance.
15A-512 through 15A-520. [Reserved.]

Article 25.

Commitment.

15A-521. Commitment to detention facility pending trial.

Sec.
15A-522 through 15A-530. [Reserved.]

Article 26.

Bail.

Part 1. General Provisions.

15A-531. Definitions.
15A-532. Persons authorized to determine conditions for release; use of two-way audio and video transmission.
15A-533. Right to pretrial release in capital and noncapital cases.
15A-534. Procedure for determining conditions of pretrial release.
15A-534.1. Crimes of domestic violence; bail and pretrial release.
15A-534.2. Detention of impaired drivers.
15A-534.3. Detention for communicable diseases.
15A-534.4. Sex offenses and crimes of violence against child victims: bail and pretrial release.
15A-534.5. Detention to protect public health.
15A-534.6. Bail in cases of manufacture of methamphetamine.
15A-535. Issuance of policies on pretrial release.
15A-536. Release after conviction in the superior court.
15A-537. Persons authorized to effect release.
15A-538. Modification of order on motion of person detained; substitution of surety.
15A-539. Modification upon motion of prosecutor.
15A-540. Surrender of a defendant by a surety; setting new conditions of release.
15A-541. Persons prohibited from becoming surety.
15A-542. False qualification by surety.
15A-543. Penalties for failure to appear.
15A-544. [Repealed.]

Part 2. Bail Bond Forfeiture.

15A-544.1. Forfeiture jurisdiction.
15A-544.2. Identifying information on bond.
15A-544.3. Entry of forfeiture.
15A-544.4. Notice of forfeiture.
15A-544.5. Setting aside forfeiture.
15A-544.6. Final judgment of forfeiture.
15A-544.7. Docketing and enforcement of final judgment of forfeiture.
15A-544.8. Relief from final judgment of forfeiture.
15A-545. [Reserved.]

Part 3. Other Provisions.

15A-546. Contempt.
15A-547. Right to habeas corpus.
15A-547.1. Remit bail bond if defendant sentenced to community or intermediate punishment.
15A-547.2 through 15A-547.6. [Reserved.]

Article 27.

[Reserved.]

15A-548 through 15A-574. [Reserved.]

Article 28.

[Reserved.]

15A-575 through 15A-600. [Reserved.]

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

Article 29.

First Appearance Before District Court Judge.

15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court; use of two-way audio and video transmission.
15A-602. Warning of right against self-incrimination.
15A-603. Assuring defendant's right to counsel.
15A-604. Determination of sufficiency of charge.
15A-605. Additional proceedings at first appearance before judge.
15A-606. Demand or waiver of probable-cause hearing.
15A-607 through 15A-610. [Reserved.]

Article 30.

Probable-Cause Hearing.

15A-611. Probable-cause hearing procedure.
15A-612. Disposition of charge on probable-cause hearing.
15A-613. Setting offense for trial in district court.
15A-614. Review of eligibility for pretrial release.
15A-615. Testing of certain persons for sexually transmitted infections.
15A-616 through 15A-620. [Reserved.]

Article 31.

The Grand Jury and Its Proceedings.

15A-621. "Grand jury" defined.
15A-622. Formation and organization of grand juries; other preliminary matters.

Sec.

15A-623. Grand jury proceedings and operation in general.
15A-624. Grand jury the judge of facts; judge the source of legal advice.
15A-625. [Reserved.]
15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge.
15A-627. Submission of bill of indictment to grand jury by prosecutor.
15A-628. Functions of grand jury; record to be kept by clerk.
15A-629. Procedure upon finding of not a true bill; release of defendant, etc.; institution of new charge.
15A-630. Notice to defendant of true bill of indictment.
15A-631. Grand jury venue.
15A-632 through 15A-640. [Reserved.]

Article 32.

Indictment and Related Instruments.

15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.
15A-642. Prosecutions originating in superior court to be upon indictment or information; waiver of indictment.
15A-643. Joinder of offenses and defendants and consolidation of indictments and informations.
15A-644. Form and content of indictment, information or presentment.
15A-644.1. Filing of information when plea of guilty or no contest in district court to Class H or I felony.
15A-645. Allegations of previous convictions.
15A-646. Superseding indictments and informations.

Article 33.

[Reserved.]

15A-647 through 15A-673. [Reserved.]

Article 34.

[Reserved.]

15A-674 through 15A-700. [Reserved.]

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

Article 35.

Speedy Trial.

15A-701 through 15A-710. [Repealed.]

Article 36.

Special Criminal Process for Attendance of Defendants.

15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.
15A-712 through 15A-720. [Reserved.]

Article 37.

Uniform Criminal Extradition Act.

15A-721. Definitions.
15A-722. Duty of Governor as to fugitives from justice of other states.
15A-723. Form of demand for extradition.
15A-724. Governor may cause investigation to be made.
15A-725. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.
15A-726. Extradition of persons not present in demanding state at time of commission of crime.
15A-727. Issue of Governor's warrant of arrest; its recitals.
15A-728. Manner and place of execution of warrant.
15A-729. Authority of arresting officer.
15A-730. Rights of accused person; application for writ of habeas corpus.
15A-731. Penalty for noncompliance with § 15A-730.
15A-732. Confinement in jail when necessary.
15A-733. Arrest prior to requisition.
15A-734. Arrest without a warrant.
15A-735. Commitment to await requisition; bail.
15A-736. Bail in certain cases; conditions of bond.
15A-736.1. [Recodified.]
15A-737. Extension of time of commitment; adjournment.
15A-738. Forfeiture of bail.
15A-739. Persons under criminal prosecution in this State at time of requisition.
15A-740. Guilt or innocence of accused, when inquired into.
15A-741. Governor may recall warrant or issue alias.
15A-742. Fugitives from this State; duty of governors.
15A-743. Application for issuance of requisition; by whom made; contents.
15A-744. Costs and expenses.
15A-745. Immunity from service of process in certain civil actions.
15A-746. Written waiver of extradition proceedings.
15A-747. Nonwaiver by this State.
15A-748. No right of asylum; no immunity from other criminal prosecution while in this State.
15A-749. Interpretation.
15A-750. Short title.
15A-751 through 15A-760. [Reserved.]

Article 38.

Interstate Agreement on Detainers.

Sec.
15A-761. Agreement on Detainers entered into; form and contents.
15A-762. Meaning of "appropriate court."
15A-763. Cooperation in enforcement.
15A-764. Escape from temporary custody.
15A-765. Authority and duty of official in charge of institution.
15A-766. Designation of central administrator of and information agent for agreement.
15A-767. Distribution of copies of Article.
15A-768 through 15A-770. [Reserved.]

Article 39.

Other Special Process for Attendance of Defendants.

15A-771. Securing attendance of defendants confined in federal prisons.
15A-772. Securing attendance of defendants who are outside the United States.
15A-773. Securing attendance of organizations; appearance.

Article 40.

[Reserved.]

15A-774 through 15A-786. [Reserved.]

Article 41.

[Reserved.]

15A-787 through 15A-800. [Reserved.]

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

Article 42.

Attendance of Witnesses Generally.

15A-801. Subpoena for witness.
15A-802. Subpoena for the production of documentary evidence.
15A-803. Attendance of witnesses.
15A-804. Voluntary protective custody.
15A-805. Securing attendance of witnesses confined in institutions within the State.
15A-806 through 15A-810. [Reserved.]

Article 43.

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings.

15A-811. Definitions.
15A-812. Summoning witness in this State to testify in another state.

Sec.
15A-813. Witness from another state summoned to testify in this State.
15A-814. Exemption from arrest and service of process.
15A-815. Uniformity of interpretation.
15A-816. Title of Article.
15A-817 through 15A-820. [Reserved.]

Article 44.

Securing Attendance of Prisoners as Witnesses.

15A-821. Securing attendance of prisoner in this State as witness in proceeding outside the State.
15A-822. Securing attendance of prisoner outside the State as witness in proceeding in the State.
15A-823. Securing attendance of prisoner in federal institution as witness in proceeding in the State.

SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.

Article 45.

Fair Treatment for Certain Victims and Witnesses.

15A-824. Definitions.
15A-825. Treatment due victims and witnesses.
15A-826. Assistants for administrative and victim and witness services.
15A-827. Scope.
15A-828, 15A-829. [Reserved.]

Article 46.

Crime Victims' Rights Act.

15A-830. Definitions.
15A-831. Responsibilities of law enforcement agency.
15A-831.1. Polygraph examinations of victims of sexual assaults.
15A-832. Responsibilities of the district attorney's office.
15A-832.1. Responsibilities of judicial officials issuing arrest warrants.
15A-833. Evidence of victim impact.
15A-834. Restitution.
15A-835. Posttrial responsibilities.
15A-836. Responsibilities of agency with custody of defendant.
15A-837. Responsibilities of Division of Community Corrections.
15A-838. Notice of commuted sentence or pardon.
15A-839. No money damages.
15A-840. No ground for relief.
15A-841. Incompetent victim's rights exercised.
15A-842 through 15A-849. [Reserved.]

Article 47.
[Reserved.]

Sec.
15A-850 through 15A-900. [Reserved.]

SUBCHAPTER IX. PRETRIAL PROCEDURE.

Article 48.
Discovery in the Superior Court.

15A-901. Application of Article.
15A-902. Discovery procedure.
15A-903. Disclosure of evidence by the State — Information subject to disclosure.
15A-904. Disclosure by the State — Certain information not subject to disclosure.
15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.
15A-906. Disclosure of evidence by the defendant — Certain evidence not subject to disclosure.
15A-907. Continuing duty to disclose.
15A-908. Regulation of discovery — Protective orders.
15A-909. Regulation of discovery — Time, place, and manner of discovery and inspection.
15A-910. Regulation of discovery — Failure to comply.
15A-911 through 15A-920. [Reserved.]

Article 49.
Pleadings and Joinder.

15A-921. Pleadings in criminal cases.
15A-922. Use of pleadings in misdemeanor cases generally.
15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.
15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.
15A-925. Bill of particulars.
15A-926. Joinder of offenses and defendants.
15A-927. Severance of offenses; objection to joinder of defendants for trial.
15A-928. Allegation and proof of previous convictions in superior court.
15A-929, 15A-930. [Reserved.]

Article 50.
Voluntary Dismissal.

15A-931. Voluntary dismissal of criminal charges by the State.
15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.

Sec.
15A-933 through 15A-940. [Reserved.]

Article 51.
Arraignment.

15A-941. Arraignment before judge only upon written request; use of two-way audio and video transmission; entry of not guilty plea if not arraigned.
15A-942. Right to counsel.
15A-943. Arraignment in superior court — Required calendaring.
15A-944. Arraignment in superior court — Optional calendaring.
15A-945. Waiver of arraignment.
15A-946 through 15A-950. [Reserved.]

Article 52.
Motions Practice.

15A-951. Motions in general; definition, service, and filing.
15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.
15A-953. Motions practice in district court.
15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.
15A-955. Motion to dismiss — Grounds applicable to indictments.
15A-956. Deferral of ruling on motion to dismiss when charge to be reinstituted.
15A-957. Motion for change of venue.
15A-958. Motion for a special venire from another county.
15A-959. Notice of defense of insanity; pretrial determination of insanity.
15A-960 through 15A-970. [Reserved.]

Article 53.
Motion to Suppress Evidence.

15A-971. Definitions.
15A-972. Motion to suppress evidence before trial in superior court in general.
15A-973. Motion to suppress evidence in district court.
15A-974. Exclusion or suppression of unlawfully obtained evidence.
15A-975. Motion to suppress evidence in superior court prior to trial and during trial.
15A-976. Timing of pretrial suppression motion and hearing.
15A-977. Motion to suppress evidence in superior court; procedure.

Sec.
15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.
15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.
15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

Article 54.
[Reserved.]

15A-981 through 15A-990. [Reserved.]

Article 55.
[Reserved.]

15A-991 through 15A-1000. [Reserved.]

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.
Incapacity to Proceed.

15A-1001. No proceedings when defendant mentally incapacitated; exception.
15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.
15A-1003. Referral of incapable defendant for civil commitment proceedings.
15A-1004. Orders for safeguarding of defendant and return for trial.
15A-1005. Reporting to court with regard to defendants incapable of proceeding.
15A-1006. Return of defendant for trial upon gaining capacity.
15A-1007. Supplemental hearings.
15A-1008. Dismissal of charges.
15A-1009. Dismissal with leave when defendant is found incapable of proceeding.
15A-1010. [Reserved.]

Article 57.
Pleas.

15A-1011. Pleas in district and superior courts; waiver of appearance.
15A-1012. Aid of counsel; time for deliberation.
15A-1013 through 15A-1020. [Reserved.]

Article 58.
Procedures Relating to Guilty Pleas in Superior Court.

15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.
Sec.
15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.
15A-1022.1. Procedure in accepting admissions of the existence of aggravating factors in felonies.
15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.
15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement.
15A-1025. Plea discussion and arrangement inadmissible.
15A-1026. Record of proceedings.
15A-1027. Limitation on collateral attack on conviction.
15A-1028 through 15A-1029. [Reserved.]

Article 58A.
Procedures Relating to Felony Guilty Pleas in District Court.

15A-1029.1. Transfer of case from superior court to district court to accept guilty and no contest pleas for certain felony offenses.
15A-1030. [Reserved.]

Article 59.
Maintenance of Order in the Courtroom.

15A-1031. Custody and restraint of defendant and witnesses.
15A-1032. Removal of disruptive defendant.
15A-1033. Removal of disruptive witnesses and spectators.
15A-1034. Controlling access to the courtroom.
15A-1035. Other powers.
15A-1036 through 15A-1039. [Reserved.]

Article 60.
[Reserved.]

15A-1040 through 15A-1050. [Reserved.]

Article 61.
Granting of Immunity to Witnesses.

15A-1051. Immunity; general provisions.
15A-1052. Grant of immunity in court proceedings.
15A-1053. Grant of immunity before grand jury.
15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

Sec.
15A-1055. Evidence of grant of immunity or testimonial arrangement may be fully developed; impact may be argued to the jury.
15A-1056 through 15A-1060. [Reserved.]

Article 62.
Mistrial.

15A-1061. Mistrial for prejudice to defendant.
15A-1062. Mistrial for prejudice to the State.
15A-1063. Mistrial for impossibility of proceeding.
15A-1064. Mistrial; finding of facts required.
15A-1065. Procedure following mistrial.
15A-1066 through 15A-1070. [Reserved.]

Article 63.
[Reserved.]

15A-1071 through 15A-1080. [Reserved.]

Article 64.
[Reserved.]

15A-1081 through 15A-1100. [Reserved.]

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

Article 65.
In General.

15A-1101. Applicability of superior court procedure.
15A-1102 through 15A-1110. [Reserved.]

Article 66.
Procedure for Hearing and Disposition of Infractions.

15A-1111. General procedure for disposition of infractions.
15A-1112. Venue.
15A-1113. Prehearing procedure.
15A-1114. Hearing procedure for infractions.
15A-1115. Review of disposition by superior court.
15A-1116. Enforcement of sanctions.
15A-1117. [Recodified.]
15A-1118. Costs.

Article 67 to 70.
[Reserved.]

15A-1119 through 15A-1200. [Reserved.]

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 71.
Right to Trial by Jury.

15A-1201. Right to trial by jury.
15A-1202 through 15A-1210. [Reserved.]

Article 72.
Selecting and Impaneling the Jury.

Sec.
15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.
15A-1212. Grounds for challenge for cause.
15A-1213. Informing prospective jurors of case.
15A-1214. Selection of jurors; procedure.
15A-1215. Alternate jurors.
15A-1216. Impaneling jury.
15A-1217. Number of peremptory challenges.
15A-1218 through 15A-1220. [Reserved.]

Article 73.
Criminal Jury Trial in Superior Court.

15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.
15A-1222. Expression of opinion prohibited.
15A-1223. Disqualification of judge.
15A-1224. Death or disability of trial judge.
15A-1225. Exclusion of witnesses.
15A-1225.1. Child witnesses; remote testimony.
15A-1225.2. Witnesses with developmental disabilities or mental retardation; remote testimony.
15A-1226. Rebuttal evidence; additional evidence.
15A-1227. Motion for dismissal.
15A-1228. Notes by the jury.
15A-1229. View by jury.
15A-1230. Limitations on argument to the jury.
15A-1231. Jury instructions.
15A-1232. Jury instructions; explanation of law; opinion prohibited.
15A-1233. Review of testimony; use of evidence by the jury.
15A-1234. Additional instructions.
15A-1235. Length of deliberations; deadlocked jury.
15A-1236. Admonitions to jurors; regulation and separation of jurors.
15A-1237. Verdict.
15A-1238. Polling the jury.
15A-1239. Judicial comment on verdict.
15A-1240. Impeachment of the verdict.
15A-1241. Record of proceedings.
15A-1242. Defendant's election to represent himself at trial.
15A-1243. Standby counsel for defendant representing himself.
15A-1244 through 15A-1250. [Reserved.]

Article 74 to 77.
[Reserved.]

15A-1251 through 15A-1300. [Reserved.]

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 78.

Order of Commitment to Imprisonment.

Sec.
15A-1301. Order of commitment to imprisonment when not otherwise specified.
15A-1302 through 15A-1310. [Reserved.]

Article 79.

15A-1311 through 15A-1320. [Reserved.]

Article 80.

Defendants Found Not Guilty by Reason of Insanity.

15A-1321. Automatic civil commitment of defendants found not guilty by reason of insanity.
15A-1322. Temporary restraint.
15A-1323 through 15A-1330. [Reserved.]

Article 81.

General Sentencing Provisions.

15A-1331. Authorized sentences; conviction.
15A-1331A. Forfeiture of licensing privileges after conviction of a felony.
15A-1332. Presentence reports.
15A-1333. Availability of presentence report.
15A-1334. The sentencing hearing.
15A-1335. Resentencing after appellate review.
15A-1336. Compliance with criminal case firearm notification requirements of the federal Violence Against Women Act.
15A-1337 through 15A-1340. [Reserved.]

Article 81A.

Sentencing Persons Convicted of Felonies.

15A-1340.1 through 15A-1340.7. [Repealed.]
15A-1340.8, 15A-1340.9. [Reserved.]

Article 81B.

Structured Sentencing of Persons Convicted of Crimes.

Part 1. General Provisions.

15A-1340.10. Applicability of structured sentencing.
15A-1340.11. Definitions.
15A-1340.12. Purposes of sentencing.

Part 2. Felony Sentencing.

Sec.
15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.
15A-1340.14. Prior record level for felony sentencing.
15A-1340.15. Multiple convictions.
15A-1340.16. Aggravated and mitigated sentences.
15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm or deadly weapon during the commission of the felony.
15A-1340.16B. Life imprisonment without parole for a second or subsequent conviction of a Class B1 felony if the victim was 13 years of age or younger and there are no mitigating factors.
15A-1340.16C. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bullet-proof vest during the commission of the felony.
15A-1340.16D. Enhanced sentence if defendant is convicted of manufacture of methamphetamine and the offense resulted in serious injury to a law enforcement officer, probation officer, parole officer, emergency medical services employee, or a firefighter.
15A-1340.17. Punishment limits for each class of offense and prior record level.
15A-1340.18, 15A-1340.19. [Reserved.]

Part 3. Misdemeanor Sentencing.

15A-1340.20. Procedure and incidents of sentence of imprisonment for misdemeanors.
15A-1340.21. Prior conviction level for misdemeanor sentencing.
15A-1340.22. Multiple convictions.
15A-1340.23. Punishment limits for each class of offense and prior conviction level.
15A-1340.24 through 15A-1340.33. [Reserved.]

Article 81C.

Restitution.

15A-1340.34. Restitution generally.
15A-1340.35. Basis for restitution.
15A-1340.36. Determination of restitution.
15A-1340.37. Effect of restitution order; beneficiaries.
15A-1340.38. Enforcement of certain orders for restitution.
15A-1340.39 through 15A-1340.49. [Reserved.]

Article 81D.

Permanent No Contact Order Against Convicted Sex Offender.

Sec.
15A-1340.50. Permanent no contact order prohibiting future contact by convicted sex offender with crime victim.

Article 82.

Probation.

15A-1341. Probation generally.
15A-1342. Incidents of probation.
15A-1343. Conditions of probation.
15A-1343.1. [Repealed.]
15A-1343.2. Special probation rules for persons sentenced under Article 81B.
15A-1343.3. Department of Corrections to establish regulations for continuous alcohol monitoring systems.
15A-1344. Response to violations; alteration and revocation.
15A-1344.1. Procedure to insure payment of child support.
15A-1345. Arrest and hearing on probation violation.
15A-1346. Commencement of probation; multiple sentence.
15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.
15A-1348 through 15A-1350. [Reserved.]

Article 83.

Imprisonment.

15A-1351. Sentence of imprisonment; incidents; special probation.
15A-1352. Commitment to Department of Correction or local confinement facility.
15A-1353. Order of commitment when imprisonment imposed; release pending appeal.
15A-1354. Concurrent and consecutive terms of imprisonment.
15A-1355. Calculation of terms of imprisonment.
15A-1356 through 15A-1360. [Reserved.]

Article 84.

Fines.

15A-1361. Authorized fines and penalties.
15A-1362. Imposition of fines.
15A-1363. Remission of a fine or costs.
15A-1364. Response to nonpayment.
15A-1365. Judgment for fines docketed; lien and execution.
15A-1366, 15A-1367. [Reserved.]

Article 84A.

Post-Release Supervision.

Sec.
15A-1368. Definitions and administration.
15A-1368.1. Applicability of Article 84A.
15A-1368.2. Post-release supervision eligibility and procedure.
15A-1368.3. Incidents of post-release supervision.
15A-1368.4. Conditions of post-release supervision.
15A-1368.5. Commencement of post-release supervision; multiple sentences.
15A-1368.6. Arrest and hearing on post-release supervision violation.

Article 84B.

Medical Release of Inmates.

15A-1369. Definitions.
15A-1369.1. Authority to release.
15A-1369.2. Eligibility.
15A-1369.3. Procedure for medical release.
15A-1369.4. Conditions of medical release.
15A-1369.5. Change in medical status.
15A-1370. [Reserved].

Article 85.

Parole.

15A-1370.1. Applicability of Article 85.
15A-1371. Parole eligibility, consideration, and refusal.
15A-1372. Length and effect of parole term.
15A-1373. Incidents of parole.
15A-1374. Conditions of parole.
15A-1375. Commencement of parole; multiple sentences.
15A-1376. Arrest and hearing on parole violation.
15A-1377. [Repealed.]
15A-1378 through 15A-1380. [Reserved.]

Article 85A.

Parole of Certain Convicted Felons.

15A-1380.1 through 15A-1380.4. [Repealed.]

Article 85B.

Review of Sentences of Life Imprisonment Without Parole.

15A-1380.5. [Repealed.]

Article 86.

Reports of Dispositions of Criminal Cases.

15A-1381. Disposition defined.
15A-1382. Reports of disposition; fingerprints.
15A-1382.1. Reports of disposition; domestic violence; sentencing.
15A-1383. Plans for implementation of Article;

Sec.

punishment for failure to comply; modification of plan.
15A-1384 through 15A-1390. [Reserved.]

Article 87.

[Reserved.]

15A-1391 through 15A-1400. [Reserved.]

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 88.

Post-Trial Motions and Appeal.

15A-1401. Post-trial motions and appeal.
15A-1402 through 15A-1410. [Reserved.]

Article 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

15A-1411. Motion for appropriate relief.
15A-1412. Provisions of Article procedural.
15A-1413. Trial judges empowered to act.
15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.
15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.
15A-1416. Motion by the State for appropriate relief.
15A-1417. Relief available.
15A-1418. Motion for appropriate relief in the appellate division.
15A-1419. When motion for appropriate relief denied.
15A-1420. Motion for appropriate relief; procedure.
15A-1421. Indigent defendants.
15A-1422. Review upon appeal.
15A-1423 through 15A-1430. [Reserved.]

Article 90.

Appeals from Magistrates and District Court Judges.

15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.
15A-1432. Appeals by State from district court judge.
15A-1433 through 15A-1440. [Reserved.]

Article 91.

Appeal to Appellate Division.

15A-1441. Correction of errors by appellate division.
15A-1442. Grounds for correction of error by appellate division.

Sec.

15A-1443. Existence and showing of prejudice.
15A-1444. When defendant may appeal; certiorari.
15A-1445. Appeal by the State.
15A-1446. Requisites for preserving the right to appellate review.
15A-1447. Relief available upon appeal.
15A-1448. Procedures for taking appeal.
15A-1449. Security for costs not required.
15A-1450. Withdrawal of appeal.
15A-1451. Stay of sentence; bail; no stay when State appeals.
15A-1452. Execution of sentence upon determination of appeal; compliance with directive of appellate court.
15A-1453. Ancillary actions during appeal.
15A-1454 through 15A-1459. [Reserved.]

Article 92.

Innocence Inquiry Commission.

15A-1460. Definitions.
15A-1461. Purpose of Article.
15A-1462. Commission established.
15A-1463. Membership; chair; meetings; quorum.
15A-1464. Terms of members; compensation; expenses.
15A-1465. Director and other staff.
15A-1466. Duties.
15A-1467. Claims of innocence; waiver of convicted person's procedural safeguards and privileges; formal inquiry; notification of the crime victim.
15A-1468. Commission proceedings.
15A-1469. Postcommission three-judge panel.
15A-1470. No right to further review of decision by Commission or three-judge panel; convicted person retains right to other postconviction relief.
15A-1471 through 15A-1474. [Reserved.]
15A-1475. Reports.

Article 93 to 99.

[Reserved.]

15A-1476 through 15A-1999. [Reserved.]

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
15A-2001. Capital offenses; plea of guilty.
15A-2002. Capital offenses; jury verdict and sentence.

Sec.
15A-2003. Disability of trial judge.
15A-2004. Prosecutorial discretion.
15A-2005. Mentally retarded defendants; death sentence prohibited.
15A-2006. [Repealed.]
15A-2007 through 15A-2009. [Reserved.]

Article 101.

North Carolina Racial Justice Act.

Sec.
15A-2010. North Carolina Racial Justice Act.
15A-2011. Proof of racial discrimination.
15A-2012. Hearing procedure.

OFFICIAL COMMENTARY

This commentary is based upon the commentary included in the January 1973 report of the Criminal Code Commission with its proposed code of pretrial procedure. The consultant-draftsmen of the Commission have revised the commentary to reflect changes that were made by the General Assembly in the course of passage.

The Commission's commentary was drafted by the consultant-draftsmen in an effort to explain the rationale behind policy decisions, to enlighten practitioners as to the aims and intent of the Commission, and in some cases to draw attention to pertinent cases or factual situations which either made the inclusion of a provision desirable or necessary.

The Commission's debates and debates in committees of the legislature and on the floor are the source of much of this commentary but neither the commission nor any legislative official has reviewed and approved this commentary on a line-by-line basis.

Editor's Note. — Session Laws 1973, c. 1286, repealed many, but not all, of the sections of Chapter 15, Criminal Procedure, and a number of sections elsewhere in the General Statutes, and enacted in their place Chapter 15A, Criminal Procedure Act, effective July 1, 1975. Certain sections in Chapter 15 and in other chapters of the General Statutes were transferred and renumbered as sections in Chapter 15A. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in Chapter 15A.

The "Official Commentary" under Articles 1 to 34, 36 to 61 of this Chapter appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Many of the cases cited in the annotations under the various sections of this Chapter were decided under former similar provisions of Chapter 15 and earlier statutes.

Session Laws 1973, c. 1286, ss. 27, 28 and 31, provided:

"Sec. 27. All statutes which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

"Sec. 28. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amended Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

Session Laws 1975, c. 166, ss. 27 and 28, provided:

"Sec. 27. Chapter 15A of the General Statutes is hereby amended by striking out the words 'district solicitor' wherever the words appear throughout Chapter 15A, and inserting in lieu thereof the words 'district attorney,' and by striking out the word 'solicitor,' wherever the word appears throughout Chapter 15A and inserting in lieu thereof the word 'prosecutor.' The Michie Company, publishers of the General Statutes of North Carolina, is authorized and directed to make the changes directed above wherever they might appear appropriate in the text of Chapter 15A of the General Statutes.

"Sec. 28. This act shall become effective on the date that Chapter 1286 of the 1973 Session Laws becomes effective."

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

OFFICIAL COMMENTARY

This Article includes definitions of those words or terms which are used in more than one article of Chapter 15A and which have attached to them a significance beyond or different from that which one would ordinarily associate with the word or phrase defined.

§§ 15A-1 through 15A-100: Reserved for future codification purposes.

§ 15A-101. Definitions.

Unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Appeal. — When used in a general context, the term “appeal” also includes appellate review upon writ of certiorari.

(1a) Attorney of Record. — An attorney who, under Article 4 of this Chapter, Entry and Withdrawal of Attorney in Criminal Case, has entered a criminal proceeding and has not withdrawn.

(2) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(3) District Court. — The District Court Division of the General Court of Justice.

(4) District Attorney. — The person elected and currently serving as district attorney in his prosecutorial district.

(4a) Entry of Judgment. — Judgment is entered when sentence is pronounced. Prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment.

(5) Judicial Official. — A magistrate, clerk, judge, or justice of the General Court of Justice.

(6) Officer. — Law-enforcement officer.

(7) Prosecutor. — The district attorney, any assistant district attorney or any other attorney designated by the district attorney to act for the State or on behalf of the district attorney.

(8) State. — The State of North Carolina, all land or water in respect to which the State of North Carolina has either exclusive or concurrent jurisdiction, and the airspace above that land or water. “Other state” means any state or territory of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

(9) Superior Court. — The Superior Court Division of the General Court of Justice.

(10) Superior Court Judge. — A superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1.

(11) Vehicle. — Aircraft, watercraft, or landcraft or other conveyance. (1973, c. 1286, s. 1; 1975, c. 166, s. 2; 1977, c. 711, s. 19; 1987 (Reg. Sess., 1988), c. 1037, s. 52; 1997-456, s. 27.)

OFFICIAL COMMENTARY

(1) Attorney of record is defined to draw attention to the new provisions of Article 4 of this Chapter, Entry and Withdrawal of Attorney in Criminal Case, and the obligations which that designation carries with it.

(2) Clerk, (3) district court, (6) officer, and (9) superior court are defined here because these "shorthand" terms are used throughout the Chapter for convenience and ease of expression and consistently are intended to carry the definition listed here.

(4) District solicitor and (7) solicitor are defined to distinguish the general but less controversial authority given the persons representing the State including assistant solicitors and even temporary "per diem" prosecutors acting for the district solicitor from the authority granted only to the elected district solicitor to whose personal attention certain critical decisions in prosecution of cases and selecting extraordinary investigative techniques are reserved. For example, only the elected district solicitor (and not an assistant solicitor) may make decisions in the area of granting immunity.

(5) Judicial official is defined to distinguish the broader group, i.e., judges, clerks and magistrates (without having to enumerate the categories on each occasion), from any one classification of persons exercising judicial functions, i.e., district court judge.

(8) State is patterned after the Illinois statute's definition. (Ill. Rev. Stat. Ch. 38, § 2-21.)

(10) Superior court judge is intended to encompass all those superior court judges, regular or special, resident or presiding in a district, without having to recite the extended definition. Where a more restricted classification such as the senior resident superior court judge is intended, the less broad term is spelled out in the statute.

(11) Vehicle is intended to be more broad than the Chapter 20 of the General Statutes (Motor Vehicles Law) definition for purposes of the search sections. Because of the wide acceptance of the Chapter 20 definition of a vehicle, the more broad definition was inserted.

The Commission resisted the tendency to define words or terms unnecessarily. Only when the Commission intended a distinction which it found might not be recognized in the text of the statute or where a "shorthand" term was employed for ease of drafting and economy of words were definitions included here. Terms which have a special meaning in one Article only are defined in the text of the Article without needless repetition here.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Subdivisions (0.1) and (1) of this section were renumbered as subdivisions (1) and (1a), respectively, pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Legal Periodicals. — For article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

There are no cases which have construed subdivision (4a), which governs "entry of judgment" in criminal cases. However, G.S. 1A-1, Rule 58 is sufficiently analogous to provide guidance in the area. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Subdivision (4a) Should Apply to Judgments and Orders. — Although subdivision (4a) of this section does not specifically apply to orders, the Supreme Court thinks the same rule should apply to judgments and orders. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Many rights relating to the appeals process are "keyed" to the time of "entry of judgment," and it is therefore imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Imposition of Judgment on Prayer for Judgment Necessary for Appeal. — Appellate court was unable to address defendant's assignments of error for armed robbery convictions because the trial court never imposed judgment on defendant's prayer for judgment. State v. Escoto, 162 N.C. App. 419, 590 S.E.2d

898, 2004 N.C. App. LEXIS 181 (2004).

Clerk Properly Denied Request from Bond Company's Attorney for an Order of Arrest. — Where a bond company's attorney made the request for an order for arrest of defendant who failed to appear at a scheduled court appearance, the county clerk complied with the statutory mandate in denying the request, because the attorney was not a law-enforcement officer. State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

Applied in State v. Maye, 104 N.C. App. 437, 410 S.E.2d 8 (1991); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002); State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584, 2007 N.C. App. LEXIS 2201 (2007).

Cited in State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980); State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985); State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988); State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993); State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993); State v. Smith, 138 N.C. App. 605, 532 S.E.2d 235, 2000 N.C. App. LEXIS 778 (2000); N.C. Dep't of Corr. v. Brunson, 152 N.C. App. 430, 567 S.E.2d 416, 2002 N.C. App. LEXIS 930 (2002); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005).

§ 15A-101.1. Electronic technology in criminal process and procedure.

As used in this Chapter, in Chapter 7A of the General Statutes, in Chapter 15 of the General Statutes, and in all other provisions of the General Statutes that deal with criminal process or procedure:

(1) "Copy" means all identical versions of a document created or existing in paper form, including the original and all other identical versions of the document in paper form.

(2) "Document" means any pleading, criminal process, subpoena, complaint, motion, application, notice, affidavit, commission, waiver, consent, dismissal, order, judgment, or other writing intended in a criminal or contempt proceeding to authorize or require an action, to record a decision or to communicate or record information. The term does not include search warrants. A document may be created and exist in paper form or in electronic form or in both forms. Each document shall contain the legible, printed name of the person who signed the document.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, Internet, or similar capabilities.

(4) "Electronic Repository" means an automated electronic repository for criminal process created and maintained pursuant to G.S. 15A-301.1.

(5) "Electronic signature" means any electronic method of signing a document that meets each of the following requirements:

a. Identifies and authenticates a particular person as the signer of the document, is unique to the person using it, is capable of certification, and is under the sole control of the person using it.

b. Is attached to or logically associated with the document in such a manner that if the document is altered in any way without authorization of the signer, the signature is invalidated.

c. Indicates that person's intent to issue, enter or otherwise authenticate the document.

(6) "Entered" means signed and filed in the office of the clerk of superior court of the county in which the document is to be entered. A document may be entered in either paper form or electronic form.

(7) "Filing" or "filed" means:

a. When the document is in paper form, delivering the original document to the office where the document is to be filed. Filing is complete when the original document is received in the office where the document is to be filed.

b. When the document is in electronic form, creating and saving the document, or transmitting it, in such a way that it is unalterably retained in the electronic records of the office where the document is to be filed. A document is "unalterably retained" in an electronic record when it may not be edited or otherwise altered except by a person with authorization to do so. Filing is complete when the document has first been unalterably retained in the electronic records of the office where the document is to be filed.

(8) "Issued" applies to documents in either paper form or electronic form. A document that is first created in paper form is issued when it is signed. A document that is first created in electronic form is issued when it is signed, filed in the office of the clerk of superior court of the county for which it is to be issued, and retained in the Electronic Repository.

(9) "Original" means:

a. A document first created and existing only in paper form, bearing the original signature of the person who signed it. The term also includes each copy in paper form that is printed through the facsimile transmission of the copy bearing the original signature of the person who signed it.

b. A document existing in electronic form, including the electronic form of the document and any copy that is printed from the electronic form.

(10) "Signature" means any symbol, including, but not limited to, the name of an individual, which is executed by that individual, personally or through an authorized agent, with the intent to authenticate or to effect the issuance or entry of a document. The term includes an electronic signature. A document may be signed by the use of any manual, mechanical or electronic means that causes the individual's signature to appear in or on the document. Any party challenging the validity of a signature shall have the burden of pleading, producing evidence, and proving the following:

a. The signature was not the act of the person whose signature it appears to be.

b. If the signature is an electronic signature, the requirements of subdivision (5) of this section have not been met. (2002-64, s. 1.)

Cross References. — As to criminal process, generally, see G.S. 15A-301. As to automated electronic repository for criminal process, see G.S. 15A-301.1.

CASE NOTES

Cited in State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

ARTICLE 2.

Jurisdiction.

Editor's Note. — As to jurisdiction, see the Official Commentary under Article 3 of this Chapter.

§§ 15A-102 through 15A-130: Reserved for future codification purposes.

ARTICLE 3.

Venue.

OFFICIAL COMMENTARY

The Criminal Code Commission in its 1973 proposal has left an Article vacant for later dealing with the question of jurisdiction. For now, jurisdiction of courts is still primarily covered in Chapter 7A of the General Statutes. See, e.g., G.S. 7A-271 and G.S. 7A-273.

With respect to venue, this Article gathers together various provisions concerning venue. The Article contains or refers to most of the provisions on venue set out in proposed Chapter 15A, though it is not fully inclusive. For example, the special waiver of venue described in G.S. 15A-1011(c) is neither covered nor cross-referenced in this Article.

In general, venue in a criminal case remains in the county in which the crime was committed. A new provision is the placing of venue in the judicial district rather than the county for certain pretrial proceedings in cases in the original jurisdiction of the superior court.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-131. Venue generally.

(a) Venue for pretrial and trial proceedings in district court of cases within the original jurisdiction of the district court lies in the county where the charged offense occurred.

(b) Except for the probable cause hearing, venue for pretrial proceedings in cases within the original jurisdiction of the superior court lies in the superior court district or set of districts as defined in G.S. 7A-41.1 embracing the county where the venue for trial proceedings lies.

(c) Except as otherwise provided in this subsection, venue for probable cause hearings and trial proceedings in cases within the original jurisdiction of the superior court lies in the county where the charged offense occurred. Except as otherwise provided in this subsection, if the alleged offense is committed within the corporate limits of a municipality which is the seat of superior court and is located in more than one county, venue lies in the superior court which sits within that municipality, but upon timely objection of the defendant or the district attorney in the county in which the alleged offense occurred the case must be transferred to the county in which the alleged offense occurred. However, for charges brought by municipal law enforcement officers only, if the alleged offense is committed within the corporate limits of a municipality that extends into four or more counties, each of which is in a separate superior court district, offenses committed within the corporate limits of the municipality but in a superior court district other than the one for which the municipality is the seat of superior court shall be disposed of in the municipality with no allowance for objections by the defendant or the district attorney.

(d) Venue for misdemeanors appealed for trial de novo in superior court lies in the county where the misdemeanor was first tried.

(e) An offense occurs in a county if any act or omission constituting part of the offense occurs within the territorial limits of the county.

(f) For the purposes of this Article, pretrial proceedings are proceedings occurring after the initial appearance before the magistrate and prior to arraignment. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 134; 1983, c. 727; 1987 (Reg. Sess., 1988), c. 1037, s. 53; 2009-398, s. 3.)

OFFICIAL COMMENTARY

Subsection (a) states the rule of venue applicable in district court. This subsection is not intended to effect any change of existing law, but does by implication clarify that trial in one county rather than the other in district court is a matter of venue rather than jurisdiction.

Subsections (b), (c), and (d) state the rules of venue applicable in superior court or to cases in the original jurisdiction of the superior court. The purpose of placing pretrial venue of superior court cases in the judicial district is to facilitate discovery procedures and pretrial motions practice, including the motion to suppress. This will be particularly important in rural areas with infrequent sessions of court. The venue for the probable cause hearing remains in the county in which the crime occurred. The Commission thought that witnesses should not be ordinarily required to leave the county to testify, and this district court proceeding should be easier to schedule than motions and hearings in the superior court.

Cross References. — As to venue in trial of an accessory, see G.S. 14-7. As to venue in cases of receiving stolen goods, see G.S. 14-71. As to venue in cases of bigamy, see G.S. 14-183. As to venue in case of bribery of players in athletic contests, see G.S. 14-378. As to assault in one county, death in another, see G.S. 15-130. As to assault in this State, death in another, see G.S. 15-131. As to person in this State injuring one in another, see G.S. 15-132. As to offenses that may be prosecuted in county where death occurs, see G.S. 15-133. As to venue in cases involving determination of fatherhood, see G.S. 49-5. As to offenses by officers of State institutions, see G.S. 143-116.

Effect of Amendments. — Session Laws 2009-398, s. 3, effective December 1, 2009, and applicable to offenses committed on or after that date, in subsection (c), in the second sentence, substituted "Except as otherwise provided in this subsection, if the" for "If the", and added the last sentence.

CASE NOTES

Editor's Note. — Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.

Venue is under the control of the legislature. State v. Woodard, 123 N.C. 710, 31 S.E. 219 (1898).

Right to be tried in county where charged crime allegedly occurred is statutorily based, and is not a right grounded in the federal or State Constitutions. State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

Court's Jurisdiction Must Be Averred. — In an indictment for murder, the offense must be charged in the body of the bill, to have been committed within the district over which the court has jurisdiction; it is not sufficient that the caption names the district. State v. Adams, 1 N.C. 21 (1793).

Improper venue will not deprive the court of jurisdiction. State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

Want of averment of proper and perfect venue is not fatal to a bill of indictment. State v. Williamson, 81 N.C. 540 (1879).

Principles of venue, not jurisdiction, are involved when deciding the proper county in which to bring a criminal action. State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

Crime of offering bribe to juror is committed in the county where the offer is communicated to the juror, and the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's kinsmen and wife in the county of their residence. State v. Noland, 204 N.C. 329, 168 S.E. 412 (1933).

As to findings of facts and the totality of the circumstances justifying trial judge's transfer of venue in a sexual offense case involving children, see State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Applied in State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

Cited in State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000).

§ 15A-132. Concurrent venue.

(a) If acts or omissions constituting part of the commission of the charged offense occurred in more than one county, each county has concurrent venue.

(b) If charged offenses which may be joined in a single criminal pleading under G.S. 15A-926 occurred in more than one county, each county has concurrent venue as to all charged offenses.

(c) When counties have concurrent venue, the first county in which a criminal process is issued in the case becomes the county with exclusive venue. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section on concurrent venue essentially states the prior practice. With its cross reference to the joinder provisions in G.S. 15A-926, it clarifies the rules of venue in multi-county situations. In this connection it is also important to note the rule as to when an offense occurs in a county set out in G.S. 15A-131(e).

This subsection, in conjunction with G.S. 15A-134, should solve many of the problems treated in G.S. 15-130 through G.S. 15-133, but as a matter of caution the Commission recommends leaving these statutes unrepealed until after the jurisdictional provisions in Article 2 of Chapter 15A have been drafted.

CASE NOTES

Reason for grant of exclusive venue to the first court in which charges are filed is to prevent confusion and contentions between different courts, each seeking to exercise jurisdiction, and not to shield one accused of crime from prosecution when the court in which a complaint is first lodged loses its exclusive venue by dismissal of the case. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Loss of Exclusive Venue When Process Is Dismissed. — A county which has acquired exclusive venue pursuant to subsection (a) or (b) of this section loses that exclusive venue when the criminal process upon which the exclusive venue is based is dismissed. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

An indictment returned "no true bill" does not involve the issuance of criminal process, since it lacks the force and effect to instigate criminal action against an individual. State v. Vines, 317 N.C. 242, 345 S.E.2d 169 (1986).

Applied in State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Cited in State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986); State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620 (1989).

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

(a) A waiver of venue must be in writing and signed by the defendant and the prosecutor indicating the consent of all parties to the waiver. The waiver must specify what stages of the proceedings are affected by the waiver, and the county to which venue is changed. If the venue is to be laid in a county in another prosecutorial district, the consent in writing of the prosecutor in that district must be filed with the clerks of both counties.

(b) Repealed by Session Laws 1989, c. 688, s. 2.

(c) Motions for change of venue by the defendant are made under G.S. 15A-957. If venue is laid in a county in another prosecutorial district by order of the judge ruling on the motion, no consent of any prosecutor is required.

(d) If venue is changed to a county in another prosecutorial district, whether upon waiver of venue or by order of a judge, the prosecutor of the prosecutorial district where the case originated must prosecute the case unless the prosecutor of the district to which venue has been changed consents to conduct the prosecution.

(e) If venue is changed, whether upon waiver of venue or by order of a judge, the grand jury in the county to which venue has been transferred has the power to return an indictment in the case. If an indictment has already been returned before the change of venue, no new indictment is necessary and prosecution may be had in the new county under the original indictment. (1921, c. 12, ss. 1, 2; C.S., ss. 4606(a), 4606(b); 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1987 (Reg. Sess., 1988), c. 1037, s. 54; 1989, c. 688, s. 2.)

OFFICIAL COMMENTARY

Subsection (a) sets out the procedure to be followed when there is a voluntary change of venue with the consent of all parties. The subsection makes clear that the waiver may be as to only a particular proceeding or stage of the proceedings rather than the more usual change of venue for all subsequent stages of a proceeding.

Subsection (b) ties in with the speedy trial provisions of Article 35.

Subsection (c) refers to the situation in which the defendant makes a motion for a change of venue because he cannot obtain a fair trial in the county in which venue is laid. If the judge orders the change of venue in accordance with G.S. 15A-957, the judge may shift venue to another county in the judicial district or to another county in an adjoining judicial district.

In the past it has not always been clear, upon a change of venue to another district, which solicitor was responsible for prosecution of the case. Subsection (d) states the Commission's opinion that the solicitor who first had the case should remain primarily responsible for prosecuting it.

Subsection (e) is intended to carry forward the provisions of G.S. 15-135 and G.S. 15-136.

CASE NOTES

The trial court did not violate §§ 15A-957 and 15A-958 or this section by ordering a special venire from another county; as the defendant never moved for a change of venue, G.S. 15A-957 did not apply and there was no violation of this section where the trial court ruled on the issue of venue for jury selection. Furthermore, given the nature and circumstances of the alleged crimes against two law-enforcement officers and defendants' acquiescence to the stipulation and proposal at the hearing, the trial court had the inherent authority to order the change of venue for the limited purpose of jury selection. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Cited in State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978); State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982).

§ 15A-134. Offense occurring in part outside North Carolina.

If a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State if he has not been placed in jeopardy for the identical offense in another state. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is new. It states the constitutional rule. Cf. Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970).

Cross References. — As to assault in this State, death in another, see G.S. 15-131. As to person in this State injuring one in another, see G.S. 15-132. As to offenses that may be prosecuted in county where death occurs, see G.S. 15-133.

CASE NOTES

Jurisdiction Where Any Part of Crime Occurred. — This section does not fix jurisdiction where the crime was completed, but where any part of the crime occurred. State v. First Resort Properties, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

Fact that check was issued in North Carolina would support jurisdiction of worthless check charge under this section, even though an officer of defendant added the date and payee's name in Florida, and it was physically transferred in Florida, subject to the condition that payee hold it until officer got back in touch with him. Moreover, officer's call four days later from North Carolina authorizing payee to deposit the check also supported a conclusion that some part of the delivery occurred in North Carolina. State v. First Resort Properties, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

Proof of State Offense Required. — In a prosecution for larceny and felonious possession of stolen goods, the bare fact that defendant possessed the car in the District of Columbia a few hours after its theft from an automobile dealership in North Carolina, without any supporting evidence was not sufficient to establish a prima facie showing of jurisdiction to warrant its submission to the jury. There was not a rational connection between the defendant's possession of the stolen vehicle in Washington and the inference which the jury would be allowed to draw, that being the defendant possessed the car in North Carolina, to meet due process standards. State v. Williams, 74 N.C. App. 131, 327 S.E.2d 300 (1985).

§ 15A-135. Allegation of venue conclusive in absence of timely motion.

Allegations of venue in any criminal pleading become conclusive in the absence of a timely motion to dismiss for improper venue under G.S. 15A-952. A defendant may move to dismiss for improper venue upon trial de novo in superior court, provided he did not in the district court with benefit of counsel stipulate venue or expressly waive his right to contest venue. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section carries forward the provisions contained in G.S. 15-134 in modified form. The plea in abatement is replaced by the motion to dismiss for improper venue, and the requirement that the defendant allege the county in which venue should properly be laid is omitted.

The Commission's proposal would have made allegation of venue conclusive in misdemeanor cases tried in the district court absent timely motion to contest venue in that court. The purpose was to prevent use of the venue objection in superior court upon trial de novo, and accounts in part for the wording in G.S. 15A-952(e) and 15A-953. This provision was in line with the thrust of G.S. 15-134, and was sufficiently strong to cause the Commission to recommend repeal of G.S. 15-129, which is being repealed upon the effective date of the new code. In the General Assembly, however, this section was rewritten to preserve the right to raise venue objections for the first time in superior court upon trial de novo; if the motion is not timely made there, of course, the allegation as to venue would become conclusive.

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former G.S. 15-134.*

Effect of Section. — The allegation in a criminal pleading of the county where the charged offense occurred is not essentially one of venue. Under the common law a grand jury could only indict for crimes which allegedly occurred in its own county. The statement of the county where the offense took place established prima facie jurisdiction of the grand jury to return the indictment. Former G.S. 15-134 did not change this. It merely limited a defendant's means of attacking the indictment on the ground that the offense occurred in a county other than that named in the indictment. Current G.S. 15A-135, however, only limits a defendant's means of attacking venue. Since the statement in an indictment of the county where the crime allegedly occurred establishes prima facie jurisdiction, a challenge to this statement can be asserted at any time as stated in G.S. 15A-952(d). State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Purpose of Former § 15-134. — Former

G.S. 15-134 was intended to provide relief from difficulties originating in doubt, entertained in good faith, as to the county in which the offense was committed, and would not be construed to modify the common law beyond the reasonable scope of its manifest purpose. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

The purpose of former G.S. 15-134 was to forestall the possibility that a criminal offender would escape punishment merely because of uncertainty as to the county in which the crime was committed. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The mischief intended to be remedied by former G.S. 15-134 was the difficulty encountered by the court in effecting the conviction of persons who had violated the criminal law of the state where the offense was committed near the boundaries of counties which were undetermined or unknown. And it often happened that, where the boundaries were established and known, it was uncertain from the proof whether the offense was committed on the one or the other side of the line, and, in consequence of the uncertainty and the doubt arising from it, offenders went "unwhipped of justice." This was the evil intended to be remedied. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, 317 N.C. 457, 346 S.E.2d 646 (1986).

Demurrer to Evidence Improper Remedy. — An objection to venue must be taken by plea in abatement (now motion to dismiss), and a demurrer to the evidence on this ground was properly overruled. State v. Burton, 138 N.C. 575, 50 S.E. 214 (1905).

Burden of Proof Is on State. — This section, like former G.S. 15-134, is silent concerning the burden of proof with regard to proper venue. Hence, the common law controls and the burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Former G.S. 15-134 did not state which party had the burden of proof if a plea in abatement was filed. At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, 317 N.C. 457, 346 S.E.2d 646 (1986).

But Venue Need Not Be Shown beyond Reasonable Doubt. — Venue need not be shown beyond a reasonable doubt, since it does not affect the question of a defendant's guilt or the power of the court to try him. Proof of venue by a preponderance of the evidence is sufficient. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

When Objection to Venue Waived. — Objection to venue is waived unless objection is taken in apt time by plea in abatement (now motion to dismiss). State v. Lytle, 117 N.C. 799, 23 S.E. 476 (1895); State v. Woodard, 123 N.C. 710, 31 S.E. 219 (1898); State v. Holder, 133 N.C. 709, 45 S.E. 862 (1903).

Crime Deemed to Have Taken Place Where Alleged. — A criminal offense is deemed to have taken place in the county in which the indictment charges it occurred, unless the defendant deny the same by the plea in abatement (now motion to dismiss). State v. Allen, 107 N.C. 805, 11 S.E. 1016 (1890); State v. Oliver, 186 N.C. 329, 119 S.E. 370 (1923).

Where there is no challenge to the indictment prior to a plea of guilty, the offense is deemed to have been committed in the county alleged in the indictment. State v. McKeon, 223 N.C. 404, 26 S.E.2d 914 (1943).

An offense is deemed to have been committed in the county in which it is laid in the indictment unless the defendant shall deny the same by plea in abatement (now motion to dismiss). State v. Dozier, 277 N.C. 615, 178 S.E.2d 412 (1971).

Where a prisoner is charged with killing the deceased in the county in which the indictment is found, the State need not prove that the offense was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement (now motion to dismiss). State v. Outerbridge, 82 N.C. 617 (1880).

Applied in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390 (1980).

Cited in State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982); State v. Flowers, 318 N.C. 208, 347 S.E.2d 773 (1986).

§ 15A-136. Venue for sexual offenses.

If a person is transported by any means, with the intent to violate any of the provisions of Article 7A of Chapter 14 (§ 14-27.1 et seq.) of the General Statutes and the intent is followed by actual violation thereof, the defendant may be tried in the county where transportation was offered, solicited, begun, continued or ended. (1979, c. 682, s. 2.)

Editor's Note. — This section was enacted by Session Laws 1979, c. 682, which provides in s. 13:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency."

CASE NOTES

This section addresses a matter of venue, i.e., the location of the tribunal where a defendant may be compelled to stand trial. State v. Flowers, 318 N.C. 208, 347 S.E.2d 773 (1986).

No provision of this section expands the power of grand juries to permit them to return indictments for criminal activity outside their territorial boundaries. State v. Flowers, 318 N.C. 208, 347 S.E.2d 773 (1986).

§§ 15A-137 through 15A-140: Reserved for future codification purposes.

Article 4.

Entry and Withdrawal of Attorney in Criminal Case.

OFFICIAL COMMENTARY

Several provisions of Chapter 15A add requirements that notice be given a defendant's attorney during pretrial stages of criminal proceedings. It became obvious from discussions within the Commission that in many instances the State will not know who is representing a defendant. The Commission therefore requested that a draft be prepared requiring counsel entering a case to file a notice of entry in the case.

Another problem reported by a number of members of the Commission was that caused by the defendant who said he would employ his own attorney but who shows up at a subsequent stage of the proceedings without counsel. Getting counsel, or continuing the case until he can retain counsel, causes a number of delays. The defendant in some instances has conferred with an attorney but has not yet been able to obtain the money for the fee and actually retain the attorney; in other cases, the defendant has never gotten around to employing a lawyer. In a few situations an attorney may have appeared for the defendant in a limited capacity, for example at a bail hearing or at preliminary hearing, but has declined to accept the case — either unconditionally or without the payment of additional remuneration. The Commission asked one of its committees to investigate this problem, and that committee studied a draft which would have placed fairly stringent conditions upon attorneys taking any part in a criminal case. The draft required filing with the clerk whenever entry in the case was made; it defined entry as acting on the defendant's behalf in any manner or accepting any compensation, including part payment or installment payments; and it required leave of the court for an attorney to withdraw from the case.

After reviewing a toned-down version of the original draft, the Commission made additional modifications. It realized the problems which uncounseled defendants cause the courts, but it felt that defense lawyers earning their livelihood from the practice of criminal law should not be boxed in with restrictions which might drastically affect their relations with clients and their modes of arranging for payment of fees. The resulting proposal is contained in this Article, as further liberalized by the General Assembly in the course of passage. Though relatively mild, it should still lead to substantial improvement over the former situation.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-141. When entry of attorney in criminal proceeding occurs.

An attorney enters a criminal proceeding when he:

(1) Files a written notice of entry with the clerk indicating an intent to represent a defendant in a specified criminal proceeding; or

(2) Appears in a criminal proceeding without limiting the extent of his representation; or

(3) Appears in a criminal proceeding for a limited purpose and indicates the extent of his representation by filing written notice thereof with the clerk; or

(4) Accepts assignment to represent an indigent defendant under the terms of Article 36 of Chapter 7A of the General Statutes; or

(5) Files a written waiver of arraignment, except that representation in this instance may not be limited pursuant to subdivision (3). (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 135.)

OFFICIAL COMMENTARY

This section lists the ways in which an attorney enters a criminal case. Two of them involve filing written documents with the clerk. Filing is not required in two instances, but they are situations in which the clerk would either be involved in the entry (assignment of counsel) or would be able to observe the entry (appearance in a proceeding). The fifth situation concerns the attorney who limits the scope of his representation; he may either state the limitation orally in open court at his initial appearance or file a written notice as to what the limits are. It seems implicit that the written notice would be filed prior to or at the time of the initial appearance, for otherwise there would be a general appearance under subdivision (2).

There is no restriction on the attorney's right to enter the case for a limited purpose, if he files written notice of the limitation or orally notes it in open court, except as provided in subdivision (5).

CASE NOTES

Attorney Entered an Appearance. — Actions of defendant, an attorney, in abandoning a client at a courthouse on the day of a hearing because the client failed to pay defendant's fee were not legally justifiable as defendant entered an appearance in a criminal proceeding without limiting the representation under G.S. 15A-141(2), failed to comply with defendant's duties to the client under G.S. 15A-143, did not have the trial court's permission to withdraw under G.S. 15A-144, and substantially interfered with the court's business under G.S. 5A-11(a)(7) by requiring the trial court, its staff, and its officers to expend significant time and effort in an attempt to get the client's case resolved over a two-day period. State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007), cert. denied, 649 S.E.2d 398, 2007 N.C. LEXIS 759 (N.C. 2007).

Cited in State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814, 2001 N.C. App. LEXIS 578 (2001).

§ 15A-142. Requirement that clerk record entry.

The clerk must note each entry by an attorney in the records of the proceeding. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

As indicated in the commentary to the preceding section, the clerk should be able to determine when an entry is made under the terms of this Article in order to perform his duty of noting this in the records. In district court the only effective record of the proceedings is the case record, and entry should be made there. In superior court, if entry is made for the first time, entry would have to be noted in the minutes of the proceeding, but the clerk should also note entry in the case records.

It may be of interest to compare the provisions of Rule 303(a) of the Pennsylvania Rules of Criminal Procedure:

"(a) Counsel for defendant shall enter his appearance in writing with the clerk of courts promptly after being retained or appointed and serve a copy thereof on the attorney for the Commonwealth. If a firm name is entered, the name of an individual lawyer shall be designated as being responsible for the conduct of the case.

"Counsel shall not be permitted to represent a defendant following a preliminary hearing unless his appearance is entered."

§ 15A-143. Attorney making general entry obligated to represent defendant at all subsequent stages.

An attorney who enters a criminal proceeding without limiting the extent of his representation pursuant to G.S. 15A-141(3) undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage. An attorney who appears for a limited purpose under the provisions of G.S. 15A-141(3) undertakes to represent the defendant only for that purpose and is deemed to have withdrawn from the proceedings, without the need for permission of the court, when that purpose is fulfilled. (1973, c. 1286, s. 1; 1977, c. 1117.)

OFFICIAL COMMENTARY

The purpose of this section is self-evident in the light of the general commentary for this Article. This section was modified after introduction to bind the lawyer's freedom to withdraw only in the particular division of the court in which he is appearing. Also added after introduction was the clarifying sentence concerning automatic withdrawal in the case of a limited appearance.

If circumstances do arise which make it necessary or desirable for an attorney to withdraw from a case, there should be no difficulty in obtaining permission from the court. Compare Rule 303(b) of the Pennsylvania Rules of Criminal Procedure:

"(b) Counsel for a defendant may not withdraw his appearance except by leave of court. Such leave shall be granted only upon application made and served on the attorney for the Commonwealth and the client, unless the interests of justice otherwise require."

CASE NOTES

Abandoning Client. — Actions of defendant, an attorney, in abandoning a client at a courthouse on the day of a hearing because the client failed to pay defendant's fee were not legally justifiable as defendant entered an appearance in a criminal proceeding without limiting the representation under G.S. 15A-141(2), failed to comply with defendant's duties to the client under G.S. 15A-143, did not have the trial court's permission to withdraw under G.S. 15A-144, and substantially interfered with the court's business under G.S. 5A-11(a)(7) by requiring the trial court, its staff, and its officers to expend significant time and effort in an attempt to get the client's case resolved over a two-day period. State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007), cert. denied, 649 S.E.2d 398, 2007 N.C. LEXIS 759 (N.C. 2007).

Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, 187 N.C. App. 616, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

Willful refusal to appear in court on behalf of a client, in contravention of G.S. 15A-143, violates the Rule of Diligence to a client and amounts to conduct that has a reasonable likelihood of prejudicing the administration of justice, N.C. Rev. R. Prof. Conduct 8.4. N.C. State Bar v. Key, 189 N.C. App. 80, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

Cited in State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814, 2001 N.C. App. LEXIS 578 (2001).

§ 15A-144. Withdrawal of attorney with permission of court.

The court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The court in this instance would be the judge presiding over the court having jurisdiction of the case. The statute does not specifically direct it, but it is assumed the clerk would note withdrawals of attorneys in the records of the case.

Legal Periodicals. — For note discussing failure to communicate and effective assistance of counsel in light of State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981), see 13 N.C. Cent. L.J. 101 (1981).

CASE NOTES

Violation of Constitutional Right to Counsel Not Found. — Where the defendant failed to show that he was prejudiced by the court's denial of his counsel's motion to withdraw, his Sixth Amendment guarantee of effective assistance of counsel was not violated. State v. Cole, 343 N.C. 399, 471 S.E.2d 362 (1996), cert. denied, 519 U.S. 1064, 117 S. Ct. 703, 136 L. Ed. 2d 624 (1997).

The fact that defense counsel attempted to withdraw from the case as a result of defendant's violent behavior did not deprive defendant of effective assistance of counsel, particularly as defendant would not show that he received anything less than professional representation. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Short-form indictment was not constitutionally defective simply because it did not allege any of the elements of first-degree murder that distinguished it from second-degree murder. State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001).

Failure to Obtain Permission to Withdraw. — Actions of defendant, an attorney, in abandoning a client at a courthouse on the day of a hearing because the client failed to pay defendant's fee were not legally justifiable as defendant entered an appearance in a criminal proceeding without limiting the representation under G.S. 15A-141(2), failed to comply with defendant's duties to the client under G.S. 15A-143, did not have the trial court's permission to withdraw under G.S. 15A-144, and substantially interfered with the court's business under G.S. 5A-11(a)(7) by requiring the trial court, its staff, and its officers to expend significant time and effort in an attempt to get the client's case resolved over a two-day period. State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007), cert. denied, 649 S.E.2d 398, 2007 N.C. LEXIS 759 (N.C. 2007).

Applied in State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814, 2001 N.C. App. LEXIS 578 (2001).

Cited in State v. Chivers, 180 N.C. App. 275, 636 S.E.2d 590, 2006 N.C. App. LEXIS 2330 (2006).

ARTICLE 5.

Expunction of Records.

§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.

(a) Whenever any person who has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the

G.S. 15A-145(c) and (d) are set out twice. See note.

United States, the laws of this State or any other state, (i) pleads guilty to or is guilty of a misdemeanor other than a traffic violation, and the offense was committed before the person attained the age of 18 years, or (ii) pleads guilty to or is guilty of a misdemeanor possession of alcohol pursuant to G.S. 18B-302(b)(1), and the offense was committed before the person attained the age of 21 years, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than: (i) two years after the date of the conviction, or (ii) the completion of any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against him are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and (i) petitioner was not 18 years old at the time of the offense in question, or (ii) petitioner was not 21 years old at the time of the offense of possession of alcohol pursuant to G.S. 18B-302(b)(1), it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) **(Effective until October 1, 2010)** The court shall also order that the said misdemeanor conviction, or a civil revocation of a drivers license as the result of a criminal charge, be expunged from the records of the court, and direct all law-enforcement agencies, including the Division of Motor Vehicles, bearing record of the same to expunge their records of the conviction or a civil revocation of a drivers license as the result of a criminal charge. This subsection does not apply to civil or criminal charges based upon the civil revocation, or to civil revocations under G.S. 20-16.2. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The clerk shall forward a certified copy of the order to the Division of Motor Vehicles for the expunction of a civil revocation provided the underlying criminal charge is also expunged. The civil revocation of a drivers license shall not be expunged prior to a final disposition of any pending civil or criminal charge based upon the civil revocation. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(c) **(Effective October 1, 2010)** The court shall also order that the misdemeanor conviction, or a civil revocation of a drivers license as the result of a criminal charge, be expunged from the records of the court. The court shall direct all law-enforcement agencies, the Department of Correction, the Division of Motor Vehicles, and any other State or local government agencies identified by the petitioner as bearing record of the same to expunge their records of the petitioner's conviction or a civil revocation of a drivers license as the result of a criminal charge. This subsection does not apply to civil or criminal charges based upon the civil revocation, or to civil revocations under G.S. 20-16.2. The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150. The clerk shall forward a certified copy of the order to the Division of Motor Vehicles for the expunction of a civil revocation provided the underlying criminal charge is also expunged. The civil revocation of a drivers license shall not be expunged prior to a final disposition of any pending civil or criminal charge based upon the civil revocation.

(d) **(Effective until October 1, 2010)** The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

(d) **(Effective October 1, 2010)** The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150.

(d1) Notwithstanding subsection (a) of this section and any other provision of law, a person may file a petition in the court where the person was convicted for expunction of a misdemeanor conviction from the person's criminal record if the person has no prior felony convictions and was convicted for misdemeanor larceny pursuant to G.S. 14-72(a) more than 15 years prior to the filing of the petition.

The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has not been convicted of any felony, has been of good behavior for the 15-year period preceding the filing of the petition, and has not been convicted of any misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state during the 15-year period.

G.S. 15A-145(c) and (d) are set out twice. See note.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State during the 10-year period preceding the filing of the petition.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against him are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the 10-year period that he deems desirable.

If the court, after hearing, finds that the petitioner had remained of good behavior and been free on conviction of any felony or misdemeanor, other than a traffic violation, during the 10-year period preceding the petition, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and the petitioner was convicted of misdemeanor larceny pursuant to G.S. 14-72(a) more than 10 years prior to the filing of the petition, it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

The provisions of subsections (c), (d), and (e) of this section shall apply to a petition for expunction filed or granted pursuant to this subsection.

(e) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of one hundred twenty-five dollars ($125.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent. (1973, c. 47, s. 2; c. 748; 1975, c. 650, s. 5; 1977, c. 642, s. 1; c. 699, ss. 1, 2; 1979, c. 431, ss. 1, 2; 1985, c. 636, s. 1; 1999-406, s. 8; 2002-126, ss. 29A.5(a), (b); 2004-133, s. 1; 2005-276, s. 43.1(e); 2007-509, s. 1; 2008-187, s. 35; 2009-510, s. 4(a), (b); 2009-577, s. 10.)

Subsections (c) and (d) Set Out Twice. — The first versions of subsections (c) and (d) set out above are effective until October 1, 2010. The second versions of subsections (c) and (d) set out above are effective October 1, 2010.

Editor's Note. — This Article is former Article 23 of Chapter 15, as recodified by Session Laws 1985, c. 636, s. 1. The historical citations to the sections in the former Article have been added to the corresponding sections in this Article as recodified.

Session Laws 1999-406, s. 18, states that this act, which added clause (ii) to subsections (a) and (b) and made other conforming amendments in this section, does not obligate the General Assembly to appropriate additional funds, and that this act shall be implemented with funds available or appropriated to the

Department of Transportation and the Administrative Office of the Courts.

Session Laws 2007-509, s. 3, provides: "The Administrative Office of the Courts, in consultation with the Division of Motor Vehicles, shall develop a system for making a good faith effort to review expungment records, for those offenses expunged pursuant to G.S. 15A-145 and G.S. 15A-146 prior to October 1, 2007, to determine if an expunged offense resulted in a civil revocation. For any expunged offenses that resulted in a civil revocation, the civil revocation shall be reviewed to determine if it should be expunged pursuant to Section 1 or 2 of this act. If the Administrative Office of the Courts determines that a civil revocation should be expunged, it shall expunge the civil revocation from the records of the court and shall notify the Division of Motor Vehicles to expunge any record of the civil revocation."

Effect of Amendments. — Session Laws 2007-509, s. 1, effective October 1, 2007, in subsection (c), in the first sentence, inserted "or a civil revocation of a drivers license as the result of a criminal charge," inserted "including the Division of Motor Vehicles," inserted "or a civil revocation of a drivers license as the result of a criminal charge" at the end, and made minor punctuation changes, and added the second, fourth, and fifth sentences.

Session Laws 2008-187, s. 35, effective August 7, 2008, added clause (i) and (ii) designators in the second sentence of the first paragraph of subsection (a), and made related changes.

Session Laws 2009-510, s. 4(a) and (b), effective October 1, 2010, rewrote subsections (c) and (d).

Session Laws 2009-577, s. 6, effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date, rewrote the first sentence of subsection (a); substituted both uses of "offense" for "conviction" in the first sentence of subsection (b); and added subsection (d1).

OPINIONS OF ATTORNEY GENERAL

Construction. — This section and G.S. 15A-146 which prescribe procedures for expunction of criminal records, operate as exceptions to the general prohibition to the alteration of records. Thus, the statutes should be strictly construed. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

Section Applicable to Offenses Which Occurred at Any Time and Were Committed by Individual under Age 18. — See opinion of Attorney General to Mr. Ray H. Garland, Deputy Director, State Bureau of Investigation, 43 N.C.A.G. 1 (1973).

Consolidation of Several Misdemeanor Offenses for Trial. — Where a person under the age of 18 years, who has not previously or subsequently been convicted of any offense, is charged with several misdemeanor offenses, the charges are consolidated for trial and judgment, and the sentence imposed is within the statutory limit for conviction of a single offense, the court may order expungement of the record pursuant to this section. See opinion of Attorney General to Honorable Russell G. Walker, Jr., District Attorney, Nineteenth-B Prosecutorial District, 49 N.C.A.G. 17 (1979).

Expungement of Multiple Offenses. — Where a person is charged or convicted of several misdemeanor offenses, and the charges are not consolidated for trial and judgment, nor arise from the same transaction or occurrence, the court may not order an expungement of the multiple offenses pursuant to this section and G.S. 15A-146. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

Multiple Expunctions Not Authorized. — The precise language of this section clearly does not authorize multiple expunctions or one expunction of multiple offenses. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

§ 15A-145.1. Expunction of records for first offenders under the age of 18 at the time of conviction of certain gang offenses.

(a) Whenever any person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state pleads guilty to or is guilty of (i) a Class H felony under Article 13A of Chapter 14 of the General Statutes or (ii) an enhanced offense under G.S. 14-50.22, or has been discharged and had the proceedings against the person dismissed pursuant to G.S. 14-50.29, and the offense was committed before the person attained the age of 18 years, the person may file a petition in the court where the person was convicted for expunction of the offense from the person's criminal record. Except as provided in G.S. 14-50.29 upon discharge and dismissal, the petition cannot be filed earlier than (i) two years after the date of the conviction or (ii) the completion of any period of probation, whichever occurs later. The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that the petitioner has been of good behavior (i) during the period of probation since the decision to defer further proceedings on the offense in question pursuant to G.S. 14-50.29 or (ii) during the two-year period since the date of conviction of the offense in question, whichever applies, and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives, and that the petitioner's character and reputation are good.

(3) If the petition is filed subsequent to conviction of the offense in question, a statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State (i) during the period of probation since the decision to defer further proceedings on the offense in question pursuant to G.S. 14-50.29 or (ii) at any time prior to the conviction for the offense in question or during the two-year period following that conviction, whichever applies.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period or during the two-year period after conviction.

(b) If the court, after hearing, finds that (i) the petitioner was dismissed and the proceedings against the petitioner discharged pursuant to G.S. 14-50.29 and that the person had not yet attained 18 years of age at the time of the offense or (ii) the petitioner has remained of good behavior and been free of conviction of any felony or misdemeanor other than a traffic violation for two years from the date of conviction of the offense in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and the petitioner had not attained the age of 18 years at the time of the offense in question, it shall order that such person be restored, in the contemplation of the law, to the status occupied by the petitioner before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment or information, or trial, or response to any inquiry made of the person for any purpose. The court shall also order that the said conviction be expunged from the records of the court and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction as the result of a criminal charge. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief of police, or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(c) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (2009-577, s. 1.)

Editor's Note. — Session Laws 2009-577, s. 11, made this section effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date.

§ 15A-145.2. Expunction of records for first offenders not over 21 years of age at the time of the offense of certain drug offenses.

(a) Whenever a person is discharged, and the proceedings against the person dismissed, pursuant to G.S. 90-96(a) or (a1), and the person was not over 21 years of age at the time of the offense, the person may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under G.S. 90-96(c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the offense in question and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the offense in question or during the period of probation following the decision to defer further proceedings on the offense in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was discharged and the proceedings against him dismissed and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court and direct all law enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the sheriff, chief of police, or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(b) Whenever any person is charged with a misdemeanor under Article 5 of Chapter 90 of the General Statutes by possessing a controlled substance included within Schedules II through VI of Article 5 of Chapter 90 of the General Statutes or a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing, that such person was not over 21 years of age at the time the offense for which the person was charged occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(c) Whenever any person who has not previously been convicted of an offense under Article 5 of Chapter 90 of the General Statutes or under any statute of the United States or any state relating to controlled substances included in any schedule of Article 5 of Chapter 90 of the General Statutes or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or has been found guilty of (i) a misdemeanor under Article 5 of Chapter 90 of the General Statutes by possessing a controlled substance included within Schedules II through VI of Article 5 of Chapter 90 of the General Statutes or by possessing drug paraphernalia as prohibited by G.S. 90-113.22 or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment or information, trial, and conviction. A conviction in which the judgment of conviction has been canceled and the records expunged pursuant to this subsection shall not be thereafter deemed a conviction for purposes of this subsection or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions of Article 5 of Chapter 90 of the General Statutes. Cancellation and expunction under this subsection may occur only once with respect to any person. Disposition of a case under this subsection at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this subsection shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under G.S. 90-96(c)) all recordation relating to the petitioner's arrest, indictment or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this subsection.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of (i) a misdemeanor under Article 5 of Chapter 90 of the General Statutes for possessing a controlled substance included within Schedules II through VI of Article 5 of Chapter 90 of the General Statutes or for possessing drug paraphernalia as prohibited in G.S. 90-113.22 or (ii) a felony under G.S. 90-95(a)(3) for possession of less than one gram of cocaine, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Health and Human Services, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the offense in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order all law enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been canceled and expunged under the provisions of this subsection, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been canceled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under Article 5 of Chapter 90 of the General Statutes has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this subsection.

(d) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent. (2009-577, s. 2.)

Editor's Note. — Session Laws 2009-577, s. 11, made this section effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date.

§ 15A-145.3. Expunction of records for first offenders not over 21 years of age at the time of the offense of certain toxic vapors offenses.

(a) Whenever a person is discharged and the proceedings against the person dismissed under G.S. 90-113.14(a) or (a1), such person, if he was not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under G.S. 90-113.14(c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the misdemeanor in question and has not been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was discharged and the proceedings against him dismissed and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court and direct all law enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the sheriff, chief of police, or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(b) Whenever any person is charged with a misdemeanor under Article 5A of Chapter 90 of the General Statutes or possessing drug paraphernalia as prohibited by G.S. 90-113.22, upon dismissal by the State of the charges against him or upon entry of a nolle prosequi or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, and trial. If the court determines, after hearing that such person was not over 21 years of age at the time the offense for which the person was charged occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(c) Whenever any person who has not previously been convicted of an offense under Article 5 or 5A of Chapter 90 of the General Statutes or under any statute of the United States or any state relating to controlled substances included in any schedule of Article 5 of Chapter 90 of the General Statutes or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or has been found guilty of a misdemeanor under Article 5A of Chapter 90 of the General Statutes, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment or information, trial, and conviction. A conviction in which the judgment of conviction has been cancelled and the records expunged pursuant to this subsection shall not be thereafter deemed a conviction for purposes of this subsection or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions of violation of Article 5A of Chapter 90 of the General Statutes. Cancellation and expunction under this subsection may occur only once with respect to any person. Disposition of a case under this subsection at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this subsection shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under G.S. 90-113.14(c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this subsection.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of a misdemeanor under Article 5A of Chapter 90 of the General Statutes, or for possessing drug paraphernalia as prohibited by G.S. 90-113.22, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Health and Human Services, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the misdemeanor in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before such arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order all law enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been cancelled and expunged under the provisions of this subsection, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been cancelled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under Article 5A of Chapter 90 of the General Statutes has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this subsection. (2009-577, s. 3.)

Editor's Note. — Session Laws 2009-577, s. 11, made this section effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date.

§ 15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

(a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, G.S. 15A-145.1, 15A-145.2, or 15A-145.3, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(a1) Notwithstanding subsection (a) of this section, if a person is charged with multiple offenses and all the charges are dismissed, or findings of not guilty or not responsible are made, then a person may apply to have each of those charges expunged if the offenses occurred within the same 12-month period of time or if the charges are dismissed or findings are made at the same term of court. Unless circumstances otherwise clearly provide, the phrase "term of court" shall mean one week for superior court and one day for district court. There is no requirement that the multiple offenses arise out of the same transaction or occurrence or that the multiple offenses were consolidated for judgment. The court shall hold a hearing on the application. If the court finds (i) that the person had not previously received an expungement under this subsection, or that any previous expungement received under this subsection occurred prior to October 1, 2005 and was for an offense that occurred within the same 12-month period of time, or was dismissed or findings made at the same term of court, as the offenses that are the subject of the current application, (ii) that the person had not previously received an expungement under G.S. 15A-145, 15A-145.1, 15A-145.2, or 15A-145.3, and (iii) that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) **(Effective until October 1, 2010)** The court may also order that the said entries, including civil revocations of drivers licenses as a result of the underlying charge, shall be expunged from the records of the court, and direct all law-enforcement agencies, including the Division of Motor Vehicles, bearing record of the same to expunge their records of the entries, including civil revocations of drivers licenses as a result of the underlying charge being expunged. This subsection does not apply to civil or criminal charges based upon the civil revocation, or to civil revocations under G.S. 20-16.2. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The clerk shall forward a certified copy of the order to the Division of Motor Vehicles for the expunction of a civil revocation provided the underlying criminal charge is also expunged. The civil revocation of a drivers license shall not be expunged prior to a final disposition of any pending civil or criminal charge based upon the civil revocation. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging these records shall not be taxed against the petitioner.

(b) **(Effective October 1, 2010)** The court may also order that the said entries, including civil revocations of drivers licenses as a result of the underlying charge, shall be expunged from the records of the court, and direct all law-enforcement agencies, the Department of Correction, the Division of Motor Vehicles, and any other State or local government agencies identified by the petitioner as bearing record of the same to expunge their records of the entries, including civil revocations of drivers licenses as a result of the underlying charge being expunged. This subsection does not apply to civil or criminal charges based upon the civil revocation, or to civil revocations under G.S. 20-16.2. The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150. The clerk shall forward a certified copy of the order to the Division of Motor Vehicles for the expunction of a civil revocation provided the underlying criminal charge is also expunged. The civil revocation of a drivers license shall not be expunged prior to a final disposition of any pending civil or criminal charge based upon the civil revocation. The costs of expunging the records, as required under G.S. 15A-150, shall not be taxed against the petitioner.

(b1) Any person entitled to expungement under this section may also apply to the court for an order expunging DNA records when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expungement of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the felony charges were brought not less than 20 days prior to the date of the hearing on the application. If the application for expungement is granted, a certified copy of the trial court's order dismissing the charges shall be attached to an order of expungement. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expungement as required by subsection (b2) of this section.

(b2) Upon receiving an order of expungement entered pursuant to subsection (b1) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

(c) **(Effective until October 1, 2010)** The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement.

(c) **(Effective October 1, 2010)** The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150. (1979, c. 61; 1985, c. 636, ss. 1-7; 1991, c. 326, s. 1; 1997-138, s. 1; 1999-406, s. 9; 2001-108, s. 2; 2001-282, s. 1; 2002-126, s. 29A.5(c); 2005-452, s. 1; 2007-509, s. 2; 2009-510, s. 5(a), (b); 2009-577, ss. 3.1, 8, 9.)

Subsections (b) and (c) Set Out Twice. — The first versions of subsections (b) and (c) set out above are effective until October 1, 2010. The second versions of subsections (b) and (c) set out above are effective October 1, 2010.

Editor's Note. — Session Laws 1999-406, s. 18, states that this act, which amended the first sentence of subsection (a), does not obligate the General Assembly to appropriate additional funds, and that this act shall be implemented with funds available or appropriated to the Department of Transportation and the Administrative Office of the Courts.

Session Laws 2007-509, s. 3, provides: "The Administrative Office of the Courts, in consultation with the Division of Motor Vehicles, shall develop a system for making a good faith effort to review expungment records, for those offenses expunged pursuant to G.S. 15A-145 and G.S. 15A-146 prior to October 1, 2007, to determine if an expunged offense resulted in a civil revocation. For any expunged offenses that resulted in a civil revocation, the civil revocation shall be reviewed to determine if it should be expunged pursuant to Section 1 or 2 of this act. If the Administrative Office of the Courts determines that a civil revocation should be expunged, it shall expunge the civil revocation from the records of the court and shall notify the Division of Motor Vehicles to expunge any record of the civil revocation."

Effect of Amendments. — Session Laws 2007-509, s. 2, effective October 1, 2007, in subsection (b), in the first sentence, inserted "including civil revocations of drivers licenses as a result of the underlying charge," inserted "including the Division of Motor Vehicles," inserted "including civil revocations of drivers licenses as a result of the underlying charge being expunged" at the end, and added the second, fourth, and fifth sentences.

Session Laws 2009-510, s. 5(a) and (b), effective October 1, 2010, in subsection (b), substituted "the Department of Correction, the Division of Motor Vehicles, and any other State or local government agencies identified by the petitioner as" for "including the Division of Motor Vehicles" in the first sentence, substituted "shall notify State and local agencies of the court's order as provided in G.S. 15A-150" for "shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency" in the third sentence, deleted the former fourth sentence, which read: "The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation" and substituted "the records, as required under G.S. 15A-150" for "these records" in the last sentence; and rewrote subsection (c).

Session Laws 2009-577, ss. 3.1, 8, and 9, effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date, substituted "G.S. 15A-145, G.S. 15A-145.1, 15A-145.2, or 15A-145.3" for "G.S. 15A-145, or G.S. 90-96" in the second sentence of subsection (a); and, in the fifth sentence of subsection (a1), inserted the (i)-(iii) clause designations, inserted "or that any previous expungement received under this subsection occurred prior to October 1, 2005 and was for an offense that occurred within the same 12-month period of time, or was dismissed or findings made at the same term of court, as the offenses that are the subject of the current application", and substituted "G.S. 15A-145, 15A-145.1, 15A-145.2, or 15A-145.3" for "G.S. 15A-145 or G.S. 90-96".

CASE NOTES

Expungement Only Available for Dismissed Charge. — Since an offender was convicted of assault inflicting serious bodily injury at the same time that his assault and battery charge was dismissed, he was eligible for expungement under G.S. 15A-146 only for the assault and battery charge, and an original order should have been amended to reflect expungement only for the assault and battery. In re Expungement for Kearney, 174 N.C. App. 213, 620 S.E.2d 276, 2005 N.C. App. LEXIS 2294 (2005).

Expungement of Multiple Offenses. — Trial court improperly expunged, pursuant to G.S. 15A-146(a), numerous unrelated arrests that occurred over a period of years from the applicant's record; the plain language of G.S. 15A-146(a) allowed only one expungement and did not allow expungements of multiple unrelated offenses occurring over a number of years. In re Robinson, 172 N.C. App. 272, 615 S.E.2d 884, 2005 N.C. App. LEXIS 1581 (2005).

Cited in Bates v. City of Gastonia, 653 F. Supp. 960 (W.D.N.C. 1987); Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383; State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

OPINIONS OF ATTORNEY GENERAL

Expungement of Multiple Offenses. — Where a person is charged or convicted of several misdemeanor offenses, and the charges are not consolidated for trial and judgment, nor arise from the same transaction or occurrence, the court may not order an expungement of the multiple offenses pursuant to G.S. 15A-145 and this section. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (October 13, 1995).

An expungement should only be allowed for a singular offense and not for multiple offenses occurring over a period of time. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (October 13, 1995).

Construction. — Section 15A-145 and this section which prescribe procedures for expunction of criminal records, operate as exceptions to the general prohibition to the alteration of records. Thus, the statutes should be strictly construed. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (October 13, 1995).

This Section Does Not Apply to Records of Civil Drivers License Revocations Maintained by Division of Motor Vehicles. — Section 15A-146, which prescribes procedures for expunction of criminal records, does not apply to records of civil drivers license revocations maintained by the Division of Motor Vehicles and, therefore, does not require the Division of Motor Vehicles to expunge records of a 30-day drivers license revocation under G.S. 20-16.5 based on the same operation of a vehicle that gave rise to a criminal charge against the driver which is subsequently dismissed. See opinion of Attorney General to Mr. Mike Bryant, Director, Driver License Section, N.C. Division of Motor Vehicles, 2001 N.C. AG LEXIS 22 (6/13/2001).

§ 15A-147. Expunction of records when charges are dismissed or there are findings of not guilty as a result of identity theft.

(a) If any person is named in a charge for an infraction or a crime, either a misdemeanor or a felony, as a result of another person using the identifying information of the named person and the charge against the named person is dismissed, a finding of not guilty is entered, or the conviction is set aside, the named person may apply by petition or written motion to the court where the charge was last pending on a form approved by the Administrative Office of the Courts supplied by the clerk of court for an order to expunge from all official records any entries relating to the person's apprehension, charge, or trial. The court, after notice to the district attorney, shall hold a hearing on the motion or petition and, upon finding that the person's identity was used without permission and the charges were dismissed or the person was found not guilty, the court shall order the expunction.

(b) No person as to whom such an order has been entered under this section shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of the person's failure to recite or acknowledge any expunged entries concerning apprehension, charge, or trial.

(c) **(Effective until October 1, 2010)** The court shall also order that the said entries shall be expunged from the records of the court and direct all law enforcement agencies, the Division of Motor Vehicles, or any other State or local government agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other charging agency; and, when applicable, to the Division of Motor Vehicles and any other State or local agency. The sheriff, chief, or head of such other charging agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. Upon receipt of a certified copy of the order, the agency must purge its records as required by this section. The costs of expunging these records shall not be taxed against the petitioner.

(c) **(Effective October 1, 2010)** The court shall also order that the said entries shall be expunged from the records of the court and direct all law enforcement agencies, the Department of Correction, the Division of Motor Vehicles, or any other State or local government agencies identified by the petitioner as bearing record of the same to expunge their records of the entries. The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150. The costs of expunging the records, as required under G.S. 15A-150, shall not be taxed against the petitioner.

(d) The Division of Motor Vehicles shall expunge from its records entries made as a result of the charge or conviction ordered expunged under this section. The Division of Motor Vehicles shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions expunged, including the assessment of drivers license points and drivers license suspension or revocation. Notwithstanding any other provision of this Chapter, the Division of Motor Vehicles shall provide to the person whose motor vehicle record is expunged under this section a certified corrected driver history at no cost and shall reinstate at no cost any drivers license suspended or revoked as a result of a charge or conviction expunged under this section.

(e) **(Effective until October 1, 2010)** Any other applicable State or local government agency shall expunge from its records entries made as a result of the charge or conviction ordered expunged under this section. The agency shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions expunged. Notwithstanding any other provision of law, the normal fee for any reinstatement of a license or privilege resulting under this section shall be waived.

G.S. 15A-147(c) and (e) are set out twice. See note.

(e) **(Effective October 1, 2010)** The Department of Correction and any other applicable State or local government agency shall expunge its records as provided in G.S. 15A-150. The agency shall also reverse any administrative actions taken against a person whose record is expunged under this section as a result of the charges or convictions expunged. Notwithstanding any other provision of law, the normal fee for any reinstatement of a license or privilege resulting under this section shall be waived.

(f) Any insurance company that charged any additional premium based on insurance points assessed against a policyholder as a result of a charge or conviction that was expunged under this section shall refund those additional premiums to the policyholder upon notification of the expungement. (2001-108, s. 1; 2005-414, s. 8; 2009-510, s. 6.)

Subsections (c) and (e) Set Out Twice. — The first versions of subsections (c) and (e) set out above are effective until October 1, 2010. The second versions of subsections (c) and (e) set out above are effective October 1, 2010.

Effect of Amendments. — Session Laws 2009-510, s. 6, effective October 1, 2010, rewrote subsection (c); and, in the first sentence of subsection (e), added "The Department of Correction and" at the beginning and substituted "shall expunge its records as provided in G.S. 15A-150" for "shall expunge from its records entries made as a result of the charge or conviction ordered expunged under this section" at the end of the sentence.

§ 15A-148. Expunction of DNA records when charges are dismissed on appeal or pardon of innocence is granted.

(a) Upon a motion by the defendant following the issuance of a final order by an appellate court reversing and dismissing a conviction of an offense for which a DNA analysis was done in accordance with Article 13 of Chapter 15A of the General Statutes, or upon receipt of a pardon of innocence with respect to any such offense, the court shall issue an order of expungement of the DNA record and samples in accordance with subsection (b) of this section. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expungement as required by subsection (b) of this section.

(b) When an order of expungement has been issued pursuant to subsection (a) of this section, the order of expungement, together with a certified copy of the final appellate court order reversing and dismissing the conviction or a certified copy of the instrument granting the pardon of innocence, shall be provided to the SBI by the clerk of court. Upon receiving an order of expungement for an individual whose DNA record or profile has been included in the State DNA Database and whose DNA sample is stored in the State DNA Databank, the DNA profile shall be expunged and the DNA sample destroyed by the SBI, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expungement. The SBI shall adopt procedures to comply with this subsection. (2001-282, s. 2.)

§ 15A-149. Expunction of records when pardon of innocence is granted.

(a) If any person is convicted of a crime and receives a pardon of innocence, the person may apply by petition or written motion to the court in which the person was convicted on a form approved by the Administrative Office of the Courts supplied by the clerk of court for an order to expunge from all official records any entries relating to the person's apprehension, charge, or trial. Upon receipt of the petition or written motion, the clerk of court shall verify that an attested copy of the warrant and return granting a pardon of innocence has been filed with the court in accordance with G.S. 147-25. Upon verification by the clerk that the warrant and return have been filed, the court shall issue an order of expunction.

(b) **(Effective until October 1, 2010)** The order of expunction shall include an instruction that any entries relating to the person's apprehension, charge, or trial shall be expunged from the records of the court and direct all law enforcement agencies, the Division of Motor Vehicles, or any other State or local government agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other charging agency; and, when applicable, to the Division of Motor Vehicles and any other State or local agency. The sheriff, chief, or head of such other charging agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. Upon receipt of a certified copy of the order, the agency must purge its records as required by this section. The costs of expunging these records shall not be taxed against the petitioner.

(b) **(Effective October 1, 2010)** The order of expunction shall include an instruction that any entries relating to the person's apprehension, charge, or trial shall be expunged from the records of the court and direct all law enforcement agencies, the Department of Correction, the Division of Motor Vehicles, or any other State or local government agencies identified by the petitioner as bearing record of the same to expunge their records of the entries. The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150. The costs of expunging the records, as required under G.S. 15A-150, shall not be taxed against the petitioner.

(c) No person as to whom such an order has been entered under this section shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of the person's failure to recite or acknowledge any expunged entries concerning apprehension, charge, or trial. (2005-319, s. 1; 2009-510, s. 7.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until October 1, 2010. The second version of subsections (b) set out above is effective October 1, 2010.

Effect of Amendments. — Session Laws 2009-510, s. 7, effective October 1, 2010, rewrote subsection (b).

§ 15A-150. (Effective October 1, 2010) Notification requirements.

(a) Notification to AOC. — The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court, file with the Administrative Office of the Courts the names of the following:

(1) Persons granted a discharge or an expunction under this Article.

(2) Persons granted an expunction under G.S. 14-50.29 or G.S. 14-50.30.
(3) Persons granted a conditional discharge or an expunction under G.S. 90-96 or G.S. 90-113.14.
(4) Persons whose judgments of convictions have been canceled and expunged under G.S. 90-96 or G.S. 90-113.14.

(b) Notification to Other State and Local Agencies. — The clerk of superior court in each county in North Carolina shall send a certified copy of an order granting an expunction to a person named in subsection (a) of this section to all of the agencies listed in this subsection. An agency receiving an order under this subsection shall expunge from its records all entries made as a result of the charge or conviction ordered expunged.

(1) The sheriff, chief of police, or other arresting agency.
(2) When applicable, the Division of Motor Vehicles and the Department of Correction.
(3) Any State or local agency identified by the petition as bearing record of the offense that has been expunged.

(c) Notification to SBI and FBI. — An arresting agency that receives a certified copy of an order under this section shall forward a copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation. The State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(d) Notification to Private Entities. — A State agency that receives a certified copy of an order under this section shall notify any private entity with which it has a licensing agreement for bulk extracts of data from the agency criminal record database to delete the record in question. The private entity shall notify any other entity to which it subsequently provides in a bulk extract data from the agency criminal database to delete the record in question from its database. (2009-510, s. 1.)

Editor's Note. — Session Laws 2009-510, s. 10, makes this section effective October 1, 2010.

§ 15A-151. (Effective October 1, 2010) AOC maintain confidential file.

The Administrative Office of the Courts shall maintain a confidential file containing the names of those people for whom it received a notice under G.S. 15A-150. The information contained in the file may be disclosed only as follows:

(1) To a judge of the General Court of Justice of North Carolina for the purpose of ascertaining whether a person charged with an offense has been previously granted a discharge or an expunction.
(2) To a person requesting confirmation of the person's own discharge or expunction, as provided in G.S. 15A-152.
(3) To the General Court of Justice of North Carolina in response to a subpoena or other court order issued pursuant to a civil action under G.S. 15A-152. (2009-510, s. 1.)

Editor's Note. — Session Laws 2009-510, s. 10, makes this section effective October 1, 2010.

§ 15A-152. (Effective October 1, 2010) Civil liability for dissemination of certain criminal history information.

(a) Duty to Delete Record. — A private entity that holds itself out as being in the business of compiling and disseminating criminal history record information for compensation shall destroy and shall not disseminate any information in the possession of the entity with respect to which the entity has received a notice to delete the record in question.

(b) Dissemination of Information. — Unless the entity is regulated by the federal Fair Credit Reporting, Act 15 U.S.C. § 1681, et seq. or the Gramm-Leach-Bliley Act 15 U.S.C. §§ 6801-6809, a private entity described by subsection (a) of this section that is licensed to access a State agency's criminal history record database may disseminate that information only if, within the 90-day period preceding the date of dissemination, the entity originally obtained the information or received the information as an updated record information to its database. The private entity must notify the State agency from which it receives the information of any other entity to which it subsequently provides a bulk extract of the information.

(c) Civil Liability. — A private entity subject to the provisions of this section that disseminates information in violation of this section is liable for any damages that are sustained as a result of the violation by the person who is the subject of that information. A person who prevails in an action brought under this section is also entitled to recover court costs and reasonable attorneys' fees. This subsection does not apply to an entity regulated by and subject to the civil liability remedies of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., or the Gramm Leach-Bliley Act, 15 U.S.C. 6801-6809, et seq.

(d) Certificate of Verification. — Prior to filing an action under this section, a person who is the subject of a record that has been expunged may apply to the Administrative Office of the Courts for a certificate verifying that the person is the subject of a record that has been expunged and that notice of the expunction was made in accordance with G.S. 15A-150. The application must include a sworn affidavit attesting, under penalty of perjury, that the applicant is the person who was the subject of the record in question and identifying the specific case expunged. A notary or official taking an acknowledgment, oath, or affirmation of an applicant affidavit under this subsection may not disclose the nature of content of the application, except as required in a court action related to the application. Unless made part of the record of a subsequent court proceeding, a certificate of verification and an application for the certificate are not public records under G.S. 132-1. The Administrative Office of the Courts may establish procedures pertaining to the application for and issuance of certificates of verification. (2009-510, s. 1.)

Editor's Note. — Session Laws 2009-510, s. 10, makes this section effective October 1, 2010.

§§ 15A-153 through 15A-172: Reserved for future codification purposes.

Article 6.

§§ 15A-173 through 15A-200: Reserved for future codification purposes.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 7.

§§ 15A-201 through 15A-210: Reserved for future codification purposes.

ARTICLE 8.

Electronic Recording of Interrogations.

§ 15A-211. Electronic recording of interrogations.

(a) Purpose. — The purpose of this Article is to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and increasing court efficiency.

(b) Application. — The provisions of this Article shall only apply to custodial interrogations in homicide investigations conducted at any place of detention.

(c) Definitions. — The following definitions apply in this Article:

(1) Electronic recording. — An audio recording that is an authentic, accurate, unaltered record; or a visual recording that is an authentic, accurate, unaltered record.

(2) In its entirety. — An uninterrupted record that begins with and includes a law enforcement officer's advice to the person in custody of that person's constitutional rights, ends when the interview has completely finished, and clearly shows both the interrogator and the person in custody throughout. If the record is a visual recording, the camera recording the custodial interrogation must be placed so that the camera films both the interrogator and the suspect. Brief periods of recess, upon request by the person in custody or the law enforcement officer, do not constitute an "interruption" of the record. The record will reflect the starting time of the recess and the resumption of the interrogation.

(3) Place of detention. — A jail, police or sheriff's station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in custody in connection with criminal charges.

(d) Electronic Recording of Interrogations Required. — Any law enforcement officer conducting a custodial interrogation in a homicide investigation shall make an electronic recording of the interrogation in its entirety.

(e) Admissibility of Electronic Recordings. — During the prosecution of any homicide, an oral, written, nonverbal, or sign language statement of a defendant made in the course of a custodial interrogation may be presented as evidence against the defendant if an electronic recording was made of the custodial interrogation in its entirety and the statement is otherwise admissible. If the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement. The State may establish through clear and convincing evidence that the statement was both voluntary and reliable and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety. Good cause shall include, but not be limited to, the following:

(1) The accused refused to have the interrogation electronically recorded, and the refusal itself was electronically recorded.

(2) The failure to electronically record an interrogation in its entirety was the result of unforeseeable equipment failure, and obtaining replacement equipment was not feasible.

(f) Remedies for Compliance or Noncompliance. — All of the following remedies shall be granted as relief for compliance or noncompliance with the requirements of this section:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.

(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable.

(g) Article Does Not Preclude Admission of Certain Statements. — Nothing in this Article precludes the admission of any of the following:

(1) A statement made by the accused in open court during trial, before a grand jury, or at a preliminary hearing.

(2) A spontaneous statement that is not made in response to a question.

(3) A statement made during arrest processing in response to a routine question.

(4) A statement made during a custodial interrogation that is conducted in another state by law enforcement officers of that state.

(5) A statement obtained by a federal law enforcement officer.

(6) A statement given at a time when the interrogators are unaware that the person is suspected of a homicide.

(7) A statement used only for impeachment purposes and not as substantive evidence.

(h) Destruction or Modification of Recording After Appeals Exhausted. — The State shall not destroy or alter any electronic recording of a custodial interrogation of a defendant convicted of any offense related to the interrogation until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings. Every electronic recording should be clearly identified and catalogued by law enforcement personnel. (2007-434, s. 1.)

Editor's Note. — The definitions in subsection (c) have been set out in alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2007-434, s. 2, made this Article effective March 1, 2008, and applicable to interrogations occurring on or after that date.

§§ 15A-212 through 15A-220: Reserved for future codification purposes.

ARTICLE 9.

Search and Seizure by Consent.

OFFICIAL COMMENTARY

This Article expresses the common-law authority to make searches upon consent. It requires no warnings to the person from whom consent is sought, thus making it necessary only that the consent be voluntary, under the decision in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

§ 15A-221. General authorization; definition of "consent".

(a) Authority to Search and Seize Pursuant to Consent. — Subject to the limitations in the other provisions of this Article, a law-enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given.

(b) Definition of "Consent". — As used in this Article, "consent" means a statement to the officer, made voluntarily and in accordance with the requirements of G.S. 15A-222, giving the officer permission to make a search. (1973, c. 1286, s. 1.)

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

CASE NOTES

Editor's Note. *— Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

One may submit or consent to a warrantless search or seizure. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

The defendant voluntarily consented to the search of his person where the court found that after defendant agreed to speak with the officers, the officers noticed that defendant had an odor of alcohol about him and that his eyes appeared to be dilated and that when the officers asked defendant if they could search him, he agreed. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

And Miranda Warnings Are Not Required. — The warnings required by *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966),* in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

Owner of premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent, but to have such effect, the consent of the owner must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

Defendant's Non-Verbal Response Was Valid Consent. — For purposes of G.S. 15A-221(b), defendants nonverbal response after a detective knocked on the hotel room door, made defendant aware that the detective was a police officer, engaged in conversation, and asked to come in, constituted valid consent for the detective and another officer to enter the hotel room. State v. Harper, 158 N.C. App. 595, 582 S.E.2d 62 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 372 (2003).

Voluntariness Is Question of Fact. — The question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103

S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Hearing as to Voluntariness. — When the validity of a consent to search is challenged, the trial court must conduct a voir dire hearing to determine whether the consent was in fact given voluntarily and without compulsion. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Consent Did Not Need to Be in Writing. — In its order, the trial court found that the defendant refused to sign a consent form and then concluded that the State had failed to satisfy its burden of proving that the defendant had given consent to search. The trial court's finding did not support its conclusion, and the conclusion appeared to be based on a legal misperception that consent must be in writing to be valid. There is no requirement that consent to search be made in writing, and the trial court's order simply did not resolve the issue of fact of whether the defendant gave his oral consent to search the vehicle. The evidence at the suppression hearing presented a question of fact which can be resolved only by the factfinder, largely on the credibility of the witnesses, and the case had to be remanded for a new hearing on defendant's motion to suppress. State v. Ghaffar, 93 N.C. App. 281, 377 S.E.2d 818 (1989).

Officer's threat to impound defendant's car if he would not consent to a search of the car did not constitute duress and negate the voluntary character of defendant's consent to search, since the officer had the legal right to impound the car, where the officer had probable cause to search. State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978).

Implied consent. — Trial court did not err in denying defendant's motion to suppress evidence seized during a warrantless entry into the residence he shared with his mother because the facts supported the trial court's conclusion that implied consent to search was given; once defendant's mother told police officers that defendant had a gun in the residence, and defendant confirmed the presence of a gun in the residence and where it could be located, the officers were justified in entering the residence and seizing the weapon, and defendant and his mother, both co-habitants of the residence, gave consent through their words and actions for the officers to enter the residence and seize the weapon. State v. McLeod, — N.C. App. —, 682 S.E.2d 396, 2009 N.C. App. LEXIS 1067 (2009).

Use of Evidence Obtained in Search by Consent. — Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Handgun, cocaine, and several thousand dollars in cash found in a safe in the bedroom of defendant's apartment were admissible because the contents of the safe were discovered as the result of a valid consent search, pursuant to G.S. 15A-221 and G.S. 15A-222; defendant was arrested outside his apartment building after a confidential police informant made a controlled purchase of cocaine from defendant; defendant was taken in handcuffs to his apartment; defendant, without being advised of his Miranda rights, consented to a search of rooms his apartment; defendant gave the officers the combination to the safe in his bedroom at their request; and at no time did defendant withdraw his consent to the search. State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

Obtaining a search warrant does not negate prior consent to a search. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Person Without Title Without Standing to Object to Search of Car. — Burglary defendant had no standing to object to the search of a car from which evidence was taken by the FBI, where, although defendant had paid $3,500 of the $4,000 purchase price, the owner of the car dealership retained title and had given his consent to the search. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Applied in State v. Kellam, 48 N.C. App. 391, 269 S.E.2d 197 (1980); State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991); State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Cited in State v. Howard, 56 N.C. App. 41, 286 S.E.2d 853 (1982); State v. Williams, 67 N.C. App. 519, 313 S.E.2d 236 (1984); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Smith, 346 N.C. 794, 488 S.E.2d 210 (1997); State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

§ 15A-222. Person from whom effective consent may be obtained.

The consent needed to justify a search and seizure under G.S. 15A-221 must be given:

(1) By the person to be searched;

(2) By the registered owner of a vehicle to be searched or by the person in apparent control of its operation and contents at the time the consent is given;

(3) By a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises. (1973, c. 1286, s. 1.)

CASE NOTES

Consent by Person in Possession of Automobile. — Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972); State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Where defendant gave consent to the search of defendant's vehicle while defendant was seated in the patrol car with the officer who was writing defendant's traffic citation, the consent was validly given pursuant to G.S. 15A-222, N.C. Const. art. I, § 20, and U.S. Const. amend. IV; the officer read a consent form to defendant which defendant signed, and defendant stated that defendant believed defendant was free to leave after the citation was issued. State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

Registered Owner as Proper Person to Give Consent. — Defendant's mother, registered owner of car, and not defendant, who contended that as the "actual" owner/purchaser of the car, his consent was necessary as long as he was present, was the proper party to consent to search of automobile under this section. State v. Washington, 86 N.C. App. 235, 357 S.E.2d 419 (1987).

Tenant in possession of the premises is a person entitled to give consent to a search of the premises under subdivision (3) of this section. State v. Reagan, 35 N.C. App. 140, 240 S.E.2d 805 (1978).

The lessee of an apartment was a person authorized to give consent to a search of the premises. State v. McNeill, 33 N.C. App. 317, 235 S.E.2d 274 (1977).

Standing of Person "in Charge" of Premises. — Defendant, as agent of the lessee of the premises, and as a joint venturer with him in operating a gambling establishment thereon, was the person in charge of the premises at the time the search was made, and had sufficient standing to invoke protection against an unlawful search of the premises. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973), decided under prior law.

This statute places no express restriction on the authority of a wife to consent to a search of the premises she shares with her husband. Nor can such a restriction fairly be read into the broad language, since a wife clearly is "a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises" she shares with her husband. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Third Party Must Possess Common Authority or Other Sufficient Relationship. — Permission to justify a search and seizure under G.S. 15A-221 may be obtained from a third party who possessed common authority or other sufficient relationship to the premises or effects sought to be inspected. State v. Kellam, 48 N.C. App. 391, 269 S.E.2d 197 (1980).

A person may consent to a search of premises he or she jointly uses or occupies with another, and evidence found pursuant to such a search may constitutionally be used against the other if the person giving consent to the search has rights of use or occupation at least equal to those of the other. State v. Sturke, 91 N.C. App. 249, 371 S.E.2d 288, cert. denied, 323 N.C. 369, 479, 373 S.E.2d 297 (1988).

Owner's Consent to Search of Safe. — Handgun, cocaine, and several thousand dollars in cash found in a safe in the bedroom of defendant's apartment were admissible because the contents of the safe were discovered as the result of a valid consent search, pursuant to G.S. 15A-221 and G.S. 15A-222; defendant was arrested outside his apartment building after a confidential police informant made a controlled purchase of cocaine from defendant; defendant was taken in handcuffs to his apartment; defendant, without being advised of his Miranda rights, consented to a search of rooms his apartment; defendant gave the officers the combination to the safe in his bedroom at their request; and at no time did defendant withdraw his consent to the search. State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

Consent of Spouse to Search Hotel Room. — Officer reasonably accepted consent from defendant's wife to search the hotel room where the two were staying, as the wife was found outside the room, identified herself, and explained that the wife was staying in the subject room with defendant. State v. Toney, 187 N.C. App. 465, 653 S.E.2d 187, 2007 N.C.

App. LEXIS 2448 (2007).

Expectation of Privacy Not Relinquished by Lack of Possession. — In a prosecution for a drug offense where defendant entrusted the safekeeping of his suitcase with codefendant and codefendant told police he could not consent to the search of defendant's suitcase because it was not codefendant's, defendant had not relinquished his expectations of privacy in the contents of the suitcase through his lack of actual possession. State v. Cooke, 54 N.C. App. 33, 282 S.E.2d 800 (1981), aff'd, 306 N.C. 132, 291 S.E.2d 618 (1982).

Person Without Title Without Standing to Object to Search of Car. — Burglary defendant had no standing to object to the search of a car from which evidence was taken by the FBI, where, although defendant had paid $3,500 of the $4,000 purchase price, the owner of the car dealership retained title and had given his consent to the search. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Valid Third Party Consent for Search Shown. — Finding by the trial court that there was valid third party consent to search defendant's residence was supported by evidence where defendant's mother, who owned residence and lived there with him, gave police permission to search residence, including defendant's bedroom, and when asked if defendant was paying rent, she replied "No" but also said that defendant was "paying his way". State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Trial court did not err in denying defendant's motion to suppress evidence seized during a warrantless entry into the residence he shared with his mother because the facts supported the trial court's conclusion that implied consent to search was given; once defendant's mother told police officers that defendant had a gun in the residence, and defendant confirmed the presence of a gun in the residence and where it could be located, the officers were justified in entering the residence and seizing the weapon, and defendant and his mother, both co-habitants of the residence, gave consent through their words and actions for the officers to enter the residence and seize the weapon. State v. McLeod, — N.C. App. —, 682 S.E.2d 396, 2009 N.C. App. LEXIS 1067 (2009).

Applied in State v. Carter, 56 N.C. App. 435, 289 S.E.2d 46 (1982); State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991).

Cited in State v. Howard, 56 N.C. App. 41, 286 S.E.2d 853 (1982); State v. Moore, 316 N.C. 328, 341 S.E.2d 733 (1986); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002); State v. Doe, — N.C. App. —, 661 S.E.2d 272, 2008 N.C. App. LEXIS 1085 (2008).

§ 15A-223. Permissible scope of consent search and seizure.

(a) Search Limited by Scope of Consent. — A search conducted pursuant to the provisions of this Article may not exceed, in duration or physical scope, the limits of the consent given.

(b) Items Seizable as Result of Consent Search. — The things subject to seizure in the course of a search pursuant to this Article are the same as those specified in G.S. 15A-242. Upon completion of the search, the officer must make a list of the things seized, and must deliver a receipt embodying the list to the person who consented to the search and, if known, to the owner of the vehicle or premises searched. (1973, c. 1286, s. 1.)

Legal Periodicals. — For note on the Supreme Court's stance on plain view searches and seizures, see 10 Campbell L. Rev. 331 (1988).

CASE NOTES

Failure to comply with subsection (b) has no constitutional significance within the meaning of G.S. 15A-974(1). State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Police officer's delivery of seizure inventory form to defendant was not an "initiation" of conversation. Indeed, law-enforcement authorities are required to make a list of the things seized, and deliver a receipt embodying the list to the person who consented to the search. The fact that delivery of the receipt was made after a request for the presence of an attorney does not alter the routineness of such a delivery nor does it thereby constitute the initiation of questioning. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Seizure of Contraband in Plain View. — In a prosecution for drug offenses where defendant consented to the search of his aircraft and during the search contraband was found in plain view, seizure of the contraband was not unconstitutional. State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981), aff'd, 305 N.C. 383, 289 S.E.2d 354 (1982).

Broadening of Consent. — Where the consent signed by defendant applied only to a search of his vehicle, the consent could not be broadened to include the defendant's person; thus, the search of defendant was unlawful. State v. Pearson, 348 N.C. 272, 498 S.E.2d 599 (1998).

Applied in State v. Williams, 67 N.C. App. 519, 313 S.E.2d 236 (1984).

§§ 15A-224 through 15A-230: Reserved for future codification purposes.

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

Constitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina are not prohibited. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This Article makes clear that common-law search powers not regulated by the General Statutes are not thereby prohibited. Among the search powers not regulated are searches incident to arrest, frisks incident to lawful confrontation, and emergency searches.

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For note on the Supreme Court stance on plain view searches and seizures, see 10 Campbell L. Rev. 331 (1988).

CASE NOTES

I. General Consideration.
II. Search Incident to Arrest or Other Detention.
III. Search of Vehicle.
IV. Evidence in Plain View or Inadvertently Discovered.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

Probable cause to seize may be defined as a reasonable ground to believe that the object seized will aid in the apprehension or conviction of the offender. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

Test Is Whether Warrant Would Issue. — One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Probable Cause Determined from Factual and Practical Considerations. — The existence of "probable cause," justifying a search without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

Reasonableness of Search Determined from Facts. — Whether a search is unreasonable is determined by the court upon the facts of each individual case. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

The reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the criteria laid down by U.S. Const., Amend. IV and opinions which apply that amendment. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Subjective Opinion and Mistaken Conclusion of Officer. — The officer's subjective opinion is not material, nor are the courts bound by an officer's mistaken legal conclusion as to the existence or nonexistence of probable cause or reasonable grounds for his actions; a search or seizure is valid when the objective facts known to the officer meet the standard required. State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982).

Actions Not Constituting Search. — Where a petitioner's privacy was not invaded, and where there was no inspection or examination of his household, there was no search either in an actual or legal sense. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Where the circumstances require no search the constitutional immunity never arises, and the guarantee against unreasonable searches and seizures does not prohibit a warrantless seizure where the contraband subject matter is fully disclosed and open to the eye and hand. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

When Exclusionary Rule Applies. — Evidence is not rendered incompetent under the exclusionary rule unless it is obtained in the course of an illegal search. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Seizure and Introduction of Evidence Not Prohibited Where No Search Required. — The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

The constitutional guarantee against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant where no search is required. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Warrantless Search Must Fall Within Well-Delineated Exception. — The governing premise of U.S. Const., Amend. IV is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable, unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

Warrantless Search Never Required. — The laws of this State provide for searches made pursuant to a warrant and do not require a warrantless search under any circumstances. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Burden of Justifying Warrantless Search. — One who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970).

When the State seeks to admit evidence discovered by way of a warrantless search in a criminal prosecution, it must first show how the former intrusion was exempted from the general constitutional demand for a warrant. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

Standing to Contest Warrantless Search. — Where victim's pocketbook was found in defendant's car and searched pursuant to a warrantless probable cause search, the contents of the pocketbook should not have been suppressed at trial since one may not object to a search or seizure of the premises or property of another because immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed; thus, absent ownership or possessory interest in the premises or property, a person has no standing to contest the validity of a search. State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981).

Reasonable Cause for Seizure of Contraband Without Warrant. — When officers saw liquid in containers generally used to contain and transport nontaxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained nontaxpaid liquor to justify the seizure of the contraband without a search warrant. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Border Searches. — Searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border. State v. Rivard, 57 N.C. App. 672, 292 S.E.2d 174 (1982).

The single fact that the person or item in question has entered the United States from outside suffices to endow border searches with the reasonableness required by U.S. Const., Amend. IV; there is no additional requirement that there be a showing of probable cause or the prior procurement of a search warrant. State v. Rivard, 57 N.C. App. 672, 292 S.E.2d 174 (1982).

Searches of Open Fields. — There was no merit in defendant's contention that a search warrant was invalid on the ground that the affidavit for the warrant revealed that the affiant had illegally searched a cornfield in which marijuana was growing some distance behind defendant's residence prior to issuance of the warrant, since the constitutional guaranties against unreasonable search and seizure do not apply to open fields or other lands not an immediate part of the dwelling site. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Persons stopped pursuant to § 20-183 may not be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Applied in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971); State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972); State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981); State v. Peck, 54 N.C. App. 302, 283 S.E.2d 383 (1981).

II. SEARCH INCIDENT TO ARREST OR OTHER DETENTION.

Search Incident to Lawful Arrest. — A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. State v. Parker, 11 N.C. App. 648, 182 S.E.2d 264 (1971); State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972); State v. Hughes, 27 N.C. App. 164, 218 S.E.2d 211 (1975); State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976).

A warrantless search and seizure may be made when it is incident to a valid arrest. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Having every reason to believe that a defendant was an armed robber, fleeing from the scene of a crime just perpetrated, it is lawful for the officer, as an incident of the arrest, to search a defendant then and there for weapons and for the fruits of the robbery. State v. Woody, 277 N.C. 646, 178 S.E.2d 407 (1971).

Property Which May Be Taken in Course of Search Incident to Lawful Arrest. — In the course of a search incident to an arrest, an officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof; if such article is otherwise competent, it may properly be introduced in evidence by the State. State v. Parker, 11 N.C. App. 648, 182 S.E.2d 264 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

An arresting officer has the authority to seize and hold articles which he sees the accused trying to hide. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971), dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972).

Weapon Need Not Be on Person Arrested. — In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Officer May Search Person Temporarily Detained. — When an officer temporarily detains a person because of suspicious circumstances and has reason to believe that the suspect is armed, he may conduct a weapons search which is limited to the protective purpose. State v. Streeter, 17 N.C. App. 48, 193 S.E.2d 347 (1972), aff'd, 283 N.C. 203, 195 S.E.2d 502 (1973).

And Other Evidence Found Need Not Be Disregarded. — If, in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime. State v. Streeter, 17 N.C. App. 48, 193 S.E.2d

347 (1972), aff'd, 283 N.C. 203, 195 S.E.2d 502 (1973).

Items So Obtained Are Not Excluded. — When law officers stopped to learn defendant's identity and his reason for being on deserted street near business establishments at 2:45 A.M., and the officers saw a bulge protruding from beneath defendant's shirt which appeared to be a gun, it was reasonable for the officers to conduct a limited protective search for weapons immediately, even if the officers had no probable cause to arrest defendant, and burglary tools necessarily exposed by the limited weapons search were lawfully obtained and not excluded by either U.S. Const., Amend. 4 or the State statute. State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Absence of a stop-and-frisk statute is not fatal to the authority of law-enforcement officers in North Carolina to stop suspicious persons for questioning and to search those persons for dangerous weapons, since those practices are valid under the common law. State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Arrest Without Warrant Must Be Valid for Search to Be Valid. — Although a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, the arrest must be made with probable cause. State v. Harris, 9 N.C. App. 649, 177 S.E.2d 445 (1970), aff'd, 279 N.C. 307, 182 S.E.2d 364 (1971).

Evidence Obtained Following Illegal Warrantless Arrest. — Nothing in State law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant. Defendant may, if so advised, redress his grievance for the warrantless arrest by a civil action for damages. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Search and Seizure Must Be Substantially Contemporaneous with Arrest. — For a search and seizure incident to a lawful arrest to be constitutionally permissible, it must be substantially contemporaneous with the arrest. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Search Made After Defendant Is in Custody Is Not Incident to Arrest. — A search yielding burglary tools cannot be justified as a search incident to defendant's arrest where the search was made after defendant was under arrest and in custody at the police station. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Search Held Not Remote in Time or Place. — Neither the removal of a female defendant to the jail nor the delay of 30 to 45 minutes waiting for the matron to search her made a search too remote in time or place to be invalid as a search incident to a lawful arrest. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Officer May Continue Search After Interruption by Hostile Crowd. — Where the officers cut short that initial search because of a growing and hostile crowd, and the danger from possible concealed weapons was not entirely eliminated by the initial quick search, it was reasonable to continue the search at the police station. State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

Search of Prison Escapees. — Once prison escapees are apprehended, it is entirely reasonable for the police to search them, and the fruits of that search are admissible in evidence in the case. State v. White, 21 N.C. App. 173, 203 S.E.2d 644, dismissed, 285 N.C. 595, 205 S.E.2d 726 (1974).

Arrest Held Complete for Purposes of Search Incident Thereto. — Where it was not clear whether the arresting officers stated to the defendant that he was under arrest when they took him into custody, but where it was clear that defendant was deprived of his liberty when he was detained and later taken to jail, then his arrest was complete for purposes of making a search incident to the arrest. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

Search Incident to Warrantless Arrest Held Proper. — Where facts fully support the conclusion that the arresting officers had reasonable grounds to believe that defendant had committed a felony and unless defendant was apprehended, he might escape and destroy any narcotic drugs he had on his person, the arrest without a warrant was justified, and a search incident to the arrest was proper. State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971).

III. SEARCH OF VEHICLE.

Warrantless Searches of Automobiles Not Regulated by General Statutes. — Warrantless searches of automobiles and seizures of contraband therefrom without consent are not per se regulated by the North Carolina General Statutes. State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732, cert. denied, 294 N.C. 739, 244 S.E.2d 157 (1978).

When Vehicle May Be Searched Without Warrant. — Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971); State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

A warrantless search of a vehicle capable of movement out of the location or jurisdiction may be conducted by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732, cert. denied, 294 N.C. 739, 244 S.E.2d 157 (1978); State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office; however, the officers conducting the search must have reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

In recognition of the mobility of automobiles, a search of an automobile without a warrant is constitutionally permissible if there is probable cause to make the search. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

A warrantless search of an automobile may be constitutionally reasonable if there is probable cause to make the search. State v. Mackey, 56 N.C. App. 468, 291 S.E.2d 663 (1982).

Automobile Search Not Dependent on Right to Arrest. — The right to search an automobile on probable cause and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

And Proceeds on Different Theory. — The search of an automobile on probable cause proceeds on a theory entirely different from that justifying the search incident to an arrest. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

Automobile May Be Searched Without Warrant or Held Pending Issuance. — If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before presenting the probable-cause issue to a magistrate, or he may carry out an immediate search without a warrant. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

Impoundment of Vehicle Pending Issuance of Warrant. — In a prosecution for rape, defendant could not complain that officers chose to afford defendant the protection of impounding his vehicle and keeping it locked and under custody until a search warrant could be obtained rather than seizing a knife which was in plain view on the dashboard of the car at the time the car was impounded. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Reasonable Cause for Stop and Search of Vehicle. — In a prosecution for felonious possession of marijuana, there was no merit to defendants' contention that an officer did not have reasonable suspicions based upon definite facts that defendants were engaged in or had engaged in criminal conduct when he stopped their vehicle, where the evidence tended to show that the officer noticed the defendants late at night in a seasonably unoccupied residential area, that the officer knew only one of the residences was occupied at that time of the year, and that the officer was aware of reports of "fire-lighting" deer in that area on several occasions. State v. Tillett, 50 N.C. App. 520, 274 S.E.2d 361, appeal dismissed, 302 N.C. 633, 280 S.E.2d 448 (1981).

Absence of Connection Between Vehicle Searched and Evidence Sought. — Where from the facts as found by the trial court, officer knew of no connection between defendant's van and marijuana which had apparently been removed from a certain house, trial court properly concluded that officer did not have probable cause to search the van. State v. Mackey, 56 N.C. App. 468, 291 S.E.2d 663 (1982).

IV. EVIDENCE IN PLAIN VIEW OR INADVERTENTLY DISCOVERED.

Section Incorporates Plain View Doctrine. — This section incorporated the United States Supreme Court "plain view" exception to the warrant requirement, which permits inclusion in evidence of the fruit of a legal, warrantless presence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Plain view doctrine is firmly established and consistently supported by both State and federal courts. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

Constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and the hand. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Warrant Not Required Where Article Seized Is in Plain View. — The law does not prohibit a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Parks, 14 N.C. App. 97, 187 S.E.2d 462 (1972); State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976), aff'd, 291 N.C. 505, 231 S.E.2d 663 (1977).

The "plain view" doctrine states that a law-enforcement officer may properly seize evidence in plain view without a search warrant if the officer has prior justification for the intrusion onto the premises being searched, other than observing the object which is later contended to have been in plain view, and the incriminating evidence must be inadvertently discovered by the officer while on the premises. State v. Tillett, 50 N.C. App. 520, 274 S.E.2d 361, appeal dismissed, 302 N.C. 633, 280 S.E.2d 448 (1981).

It is lawful and proper for an officer to seize an article in the discharge of his official duties without a warrant where the article is in plain view. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession. However, a police officer may seize and use what he sees in plain sight if he is at a place where he is lawfully entitled to be. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971), dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972).

Evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); In re Horne, 50 N.C. App. 97, 272 S.E.2d 905 (1980).

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

Under § 15A-253, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Constitutionally permissible seizures under the "plain view" exception to U.S. Const., Amend. IV protection against warrantless searches and seizures have been restricted under G.S. 15A-253 to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Plain view alone is not enough to justify warrantless seizure of evidence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Plain View Doctrine Applicable. — Where officer had legal justification to be at the place and in the position he was when he saw the evidence in plain view, the discovery of the evidence was inadvertent and clearly was not the result of a deliberate search, the evidence was immediately apparent and its discovery under the circumstances clearly would warrant a man of reasonable caution in believing that the defendant was in the possession of drugs and was hiding evidence which would incriminate him, and the officer's observation of the defendant's condition and the sight of part of the plastic bag which contained the white powdery substance was such as to give a reasonable man the belief that there was evidence of criminal activity present, to-wit, the possession of drugs, the trial court correctly denied defendant's motion to suppress, reasoning that the plain view doctrine was applicable and all elements were present. State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982).

Items Inadvertently Uncovered During Search Pursuant to Warrant. — Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime, or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items are discovered "inadvertently." The meaning of the inadvertence requirement is that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Discovery of Other Contraband During Valid Search. — When officers are conducting a valid search for one type of contraband and find other types of contraband, the law is not so unreasonable as to require them to turn their heads. State v. Oldfield, 29 N.C. App. 131, 223 S.E.2d 569, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

Failure to Arrest for Crime Under Investigation When Evidence Is Discovered. — The failure of an officer to actually arrest a defendant for a traffic violation did not render inadmissible the evidence of possession of marijuana which was in plain view while the officer was investigating, before arrest, a crime that he had probable cause to believe had been committed in his presence. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971), dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972).

Evidence Exposed in Attempt to Hide It. — Where the defendant, in an apparent attempt to voluntarily dispose of heroin, unintentionally exposed it to the view of the officers, who then obtained it, it was not obtained in the course of an illegal search. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of Car Found in Plain View. — A car reasonably believed to be the fruit, instrumentality or evidence of a crime can be seized whenever found in plain view. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

§§ 15A-232 through 15A-240: Reserved for future codification purposes.

ARTICLE 11.

Search Warrants.

OFFICIAL COMMENTARY

The goal of the Commission in drafting the search warrant Article was to provide a set of search warrant application and execution procedures that would make the search warrant an effective and efficient investigative device while insuring that the Fourth Amendment "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," would continue to be respected in North Carolina.

Section 15A-242 replaces and expands upon the list of items subject to seizure under former G.S. 15-25(a). The old North Carolina statute provided that a warrant may be issued "to search for any *contraband, evidence, or instrumentality of crime* ...." (Emphasis added.) The new provision expands upon "contraband" by making subject to seizure items which are contraband or unlawfully possessed, stolen or embezzled. The word "instrumentality" is expanded to encompass any item which "has been used or is possessed for the purpose of being used to commit or conceal the commission of a crime." The new proposed statute makes it clear that items may be seized if they constitute evidence either of an offense or of the identity of a person participating in an offense.

Section 15A-244, setting forth contents of a search warrant, is essentially a codification of present law and practice. Section 15A-245 provides that the official who issued the search warrant may consider information other than that contained in the affidavit, however, may not be considered unless it is either "recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." This last provision is necessary in order to comply with one of the central functions of the warrant process: the maintaining of a factual record of the basis for the search recorded before the search occurs. Section 15A-245 also introduces a new provision requiring the issuing official to make a copy of the warrant and application and file it with the clerk soon after issuance of the warrant.

Section 15A-246 and G.S. 15A-247, dealing with the form and content of the search warrant and identifying who may execute search warrants, codify existing law and practice.

Section 15A-248 provides that search warrants must be executed within 48 hours after issuance and that warrants not executed within this time must be returned to the issuing court. Formerly, North Carolina law provided no time limit for the execution of search warrants and did not require that unexecuted warrants be returned to the court. The Commission was informed that as a result of the absence of such provisions, there were a number of "stale" but facially valid warrants "floating around." If a search warrant is not promptly executed, there is a serious question whether the probable cause that existed at the time of issuance is still present. If a search warrant is not executed within 48 hours as this section provides, it does not mean that the search may not take place; the only effect of the provision is that the invalid warrant must be returned. A new warrant may then be obtained if the grounds for it can be demonstrated.

Section 15A-249 and G.S. 15A-251 deal with an issue to which the most serious and close attention was given: whether search warrants may be executed without giving notice of the officer's identity and purpose. Section 15A-249 simply states the general rule: An officer executing a search warrant must, before entering the premises, give notice of his identity and purpose. The only exception is contained in G.S. 15A-251(2). There was general agreement that an officer should have the authority to execute a warrant without notice and with the use of force whenever he had probable cause, either at the time of applying for or at the time of executing the warrant, to believe that notice would endanger the life or safety of any person. Under the terms of G.S. 15A-251(1) the officer can also use force to enter, if after announcing his identity and purpose, he reasonably believes admittance is being denied or delayed.

Section 15A-253 deals with the question of whether an officer executing a search warrant may seize items not named in the warrant. In Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), the Supreme Court indicated that only items named in the warrant could be seized. The weight of recent court decisions, however, appears to permit such seizures. The Commission provided that both contraband and noncontraband items not named in the warrant may be seized if inadvertently discovered in the course of a lawful search. The word "inadvertently" is incorporated to comply with the requirements of Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). This is the same rule as that which obtains when a search is incident to an arrest: "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely unreasonable to say that he must return it because it was not one of the things it was his business to look for." Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). Of course, as the first sentence of G.S. 15A-253 states, the scope of any search under a warrant must be limited to that which is reasonably necessary to discover the items specified in the warrant. Under a search warrant describing a refrigerator as the sole item sought, it would not be reasonable to look in small boxes and drawers. Any items discovered while searching outside the reasonable scope of the warrant could not be lawfully seized under this provision.

Section 15A-255 and G.S. 15A-256 deal with the officer's authority with respect to persons present in the place to be searched. Under G.S. 15A-255, a police officer may frisk any person present in the place designated in the warrant if he reasonably believes that his safety or that of others requires the frisk. And, of course, the officer may fully search any person who is designated in the warrant as an object of the search. But should persons not named in the warrant be subject to a full personal search if they happen to be present in a place that is the object of a search warrant? To forbid such searches would allow the search to be frustrated by quick transferring of small objects to persons present. To allow such searches, however, is arguably an undue infringement on the privacy of a person who happens to be in a particular place. The Commission sought to resolve these conflicting concerns by allowing searches of persons not named in the warrant only when two conditions are satisfied. First, the officers must have unsuccessfully searched the premises and persons designated in the warrant before searching those present who were not named in the warrant. And second, the authority to detain and search persons present who were not named in the warrant applies only to those present in private premises or vehicles. This second limitation is based upon the Commission's conclusion that it would be unreasonable to subject all those present in a public department store or on a common carrier to detention and searching. This concern is not sufficient, however, to immunize those who are present in a nonpublic place, such as a friend's residence where there is probable cause to believe that items subject to seizure are located. Section 15A-256 also denies the admissibility of evidence found in such a search of bystanders if the evidence is not of the "type" described in the warrant (but permitting its use of evidence the same type even though not specifically referred to in the warrant). Controlled substances (in Chapter 90, Article 5) are singled out as a class of things all of which are of the same type.

The search warrant Article also contains several miscellaneous provisions. Section 15A-252 provides that a copy of the warrant must be given to the person in control of the premises searched, or a copy left affixed to the premises. Section 15A-254 provides that the officers must leave a signed receipt of items taken with the person in control or leave one affixed to the premises. Section 15A-258 provides for the disposition of seized property. Section 15A-259 provides that the Article applies to all search warrants except those issued under the previously enacted statutes dealing with inspection warrants and warrants to inspect vehicles in certain riots or emergencies.

Editor's Note. — The "Official Commentary" set out above appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-241. Definition of search warrant.

A search warrant is a court order and process directing a law-enforcement officer to search designated premises, vehicles, or persons for the purpose of seizing designated items and accounting for any items so obtained to the court which issued the warrant. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C.S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

Legal Periodicals. — For article discussing limits to search and seizure, see 15 N.C.L. Rev. 101 and 229 (1937).

For note on requisites for a valid warrant to search for unlawfully possessed liquor, see 35 N.C.L. Rev. 424 (1957).

For article "An Inquiry into Mapp v. Ohio in North Carolina," see 45 N.C.L. Rev. 119 (1966).

For survey of search and seizure cases, see 45 N.C.L. Rev. 931 (1967).

For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

CASE NOTES

Editor's Note. — *Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

No Difference Between State Law and Requirements of U.S. Const., Amend. IV. — With regard to search warrants, there is no variance between the law of this State as declared by the decisions of the Supreme Court, and the requirements of U.S. Const., Amend. IV, as interpreted by the Supreme Court of the United States. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874, 38 L. Ed. 2d 114, 94 S. Ct. 157 (1973); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

Same Requirements for Federal and State Warrants. — The same probable-cause standards under U.S. Const., Amends. IV and XIV apply to both federal and State warrants. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

"Search". — The term "search," as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (1973).

The term "search" implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

A search implies some sort of force, either actual or constructive, much or little. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

A "search" implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search." State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

A "search" implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action and implies exploratory investigation or quest. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

It is not a "search" when a police officer, investigating a violation of the traffic laws, opens the door of the vehicle involved when necessary to see the occupants thereof. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971), appeal dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972).

Applied in State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754; State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972); State v. Parks, 14 N.C. App. 97, 187 S.E.2d 462 (1972); State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972); State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); State v. Johnson, 29 N.C. App. 534, 225 S.E.2d 113 (1976).

Cited in In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984); In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (1998).

§ 15A-242. Items subject to seizure under a search warrant.

An item is subject to seizure pursuant to a search warrant if there is probable cause to believe that it:

(1) Is stolen or embezzled; or
(2) Is contraband or otherwise unlawfully possessed; or
(3) Has been used or is possessed for the purpose of being used to commit or conceal the commission of a crime; or
(4) Constitutes evidence of an offense or the identity of a person participating in an offense. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C.S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Section Codifies Federal Constitutional Requirements. — Provisions of Chapter 15A, particularly this section and G.S. 15A-253, are codifications of federal constitutional requirements. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Nontestimonial Identification Evidence. — In addition to a nontestimonial identification order pursuant to G.S. 15A-272 and this section, a search warrant is a proper method to obtain nontestimonial identification evidence from a defendant. State v. McLean, 47 N.C. App. 672, 267 S.E.2d 695 (1980).

Trial court did not err in denying defendant's motion to suppress, as probable cause existed to seize videotapes from his bedroom closet that police discovered during a search of his residence after a confidential informant told police that drug offenses were occurring at defendant's residence; defendant admitted that he was pictured on the videotape having sex with women and the videotapes tended to show that defendant was in control of the residence where the evidence of criminal offenses was found. State v. Adams, 159 N.C. App. 676, 583 S.E.2d 689, 2003 N.C. App. LEXIS 1513 (2003), appeal dismissed, 357 N.C. 659, 590 S.E.2d 272 (2003).

Photographs and Letters Held Admissible as Evidence of Identity. — Where deputies searched a mobile home pursuant to a validly issued "occupant warrant" which specified heroin as the object of the search, and from the trailer's bathroom, a substance later determined to be heroin was seized, and after the heroin was discovered, letters and photographs which had been seen earlier were also taken from the adjoining bedroom, the photographs and letters were admissible into evidence pursuant to G.S. 15A-253 since under subdivision (4) of this section they constituted evidence of the identity of a person participating in an offense. State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980).

"Probable Cause" Defined. — Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Where probable cause existed to support issuance of the search warrant for defendant's hair, saliva, and blood pursuant to this section, the State did not violate the defendant's rights, under N.C. Const., Art. I, § 20, by failing to obtain a nontestimonial identification order, pursuant to G.S. 15A-273, or to provide defendant with the right to counsel during the execution of the search warrant, under G.S. 15A-279(d). State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895

(2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a "reasonable" time may have elapsed. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Year-Old Information as to Possession of Marijuana. — As marijuana is a substance which can be easily concealed and moved about and which is likely to be disposed of or used, year-old information, which was the only evidence of residential possession by defendants was too stale to establish probable cause to search defendant's residence, even though the affidavit on which the search warrant was based also presented more recent information concerning defendant's drug activities. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Recent Possession of Stolen Items. — If the informant had stated to the affiant that recently he personally had seen stolen items in defendant's possession at his residence, affidavit would clearly suffice. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

Evidence Seized Was Properly Within Scope of Warrant. — In defendant's prosecution for two counts of first degree murder, a notebook and rap lyrics contained therein referring to the shootings were properly not suppressed as the search warrant for defendant's vehicle expressly stated pursuant to G.S. 15A-242(4) that the police were looking for documents showing ownership, control, and access that constituted evidence of a crime and the identity of the persons participating in a crime; the notebook contained identifying information on the front, and the rap lyrics were evidence of the crime. State v. Bryant, — N.C. App. —, 674 S.E.2d 753, 2009 N.C. App. LEXIS 364 (2009).

Applied in State v. Armstrong, 45 N.C. App. 40, 262 S.E.2d 370 (1980); State v. Tate, 58 N.C. App. 494, 294 S.E.2d 16 (1982); State v. Hyleman, 89 N.C. App. 424, 366 S.E.2d 530 (1988).

Cited in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646, 2007 N.C. App. LEXIS 1947 (2007).

§ 15A-243. Who may issue a search warrant.

(a) A search warrant valid throughout the State may be issued by:
(1) A Justice of the Supreme Court.
(2) A judge of the Court of Appeals.
(3) A judge of the superior court.

(b) Other search warrants may be issued by:
(1) A judge of the district court as provided in G.S. 7A-291.
(2) A clerk as provided in G.S. 7A-180 and 7A-181.
(3) A magistrate as provided in G.S. 7A-273. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C.S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

CASE NOTES

Applied in State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979); State v. Holloway, 66 N.C. App. 491, 311 S.E.2d 707 (1984).

Cited in State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984); State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

§ 15A-244. Contents of the application for a search warrant.

Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question. (1973, c. 1286, s. 1.)

Legal Periodicals. — For comment on testing the credibility of search warrant affidavits, see 54 N.C.L. Rev. 477 (1976).

For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, Hobgood, I-95A/K/A The Drug Trafficker's Freeway, and Its Impact on State Constitutional Law, see 21 Campbell L. Rev. 237 (1999).

CASE NOTES

I. General Consideration.
II. Probable Cause.
III. Affidavits and Informants.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

Language of Application for Warrant. — Because applications are normally submitted by police officers who do not have legal training, the language is to be construed in a commonsensical, nontechnical and realistic way. State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982).

Applications for search warrants, written by police officers often in haste, need not be drawn with syntactical precision which would try even the more learned grammarians. State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982), aff'd, 307 N.C. 461, 298 S.E.2d 388 (1983).

The warrant should describe with particularity the place to be searched since general warrants are repugnant to U.S. Const., Amend. IV, which has been applied to the states through incorporation in U.S. Const., Amend. XIV. State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

Warrant May Be Based on Information Not Competent as Evidence. — A valid search warrant may be issued on the basis of an affidavit setting forth information which may not be competent as evidence in a criminal trial. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

The good faith exception to the exclusionary rule only arises upon the exclusion of evidence based upon federal constitutional grounds. State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989).

Warrant held valid despite absence of magistrate's signature. See State v. Flynn, 33 N.C. App. 492, 235 S.E.2d 424, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977).

Applied in State v. Stinson, 39 N.C. App. 313, 249 S.E.2d 891 (1979).

Cited in State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978); State v. Mavrogianis, 57 N.C. App. 178, 291 S.E.2d 163 (1982); State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986); State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988); State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999).

II. PROBABLE CAUSE.

A search warrant can only be issued upon a determination of probable cause. The person who makes that determination must be a neutral and detached magistrate instead of the officer engaged in the often competitive enterprise of ferreting out crime. State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

The requirement that a search warrant be based on probable cause is grounded in both constitutional and statutory authority. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

"Probable Cause" Defined. — Probable cause for a search can be defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Probable cause means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976), motion for reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977); State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. Bell, 36 N.C. App. 629, 244 S.E.2d 714 (1978); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982); State v. Horne, 59 N.C. App. 576, 297 S.E.2d 788 (1982), overruled on other grounds, 320 N.C. 589, 359 S.E.2d 776 (1987); State v. Crawford, 104 N.C. 591, 410 S.E.2d 499 (1991); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Within the meaning of G.S. 15A-243 through 15A-245, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Probable cause, as used in U.S. Const., Amend. IV, subdivision (2) of this section, and G.S. 15A-245, means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Harris, 43 N.C. App. 184, 258 S.E.2d 415 (1979).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

"Probable cause" and "reasonable ground to believe" are substantially equivalent terms. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Question Is Existence of Reasonable Grounds for Affiant's Belief. — The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Probable Cause Determined in Light of Particular Circumstances. — Probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Observations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

Probable cause does not deal in certainties, but deals rather in probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Probable cause is concerned with probabilities, the practical considerations of everyday life upon which reasonable and prudent men act. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

Sworn Statement Required for Probable Cause Warrant. — A magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. The necessity of a sworn statement is consistent with existing case law. State v. Heath, 73 N.C. App. 391, 326 S.E.2d 640 (1985).

Probable cause may be based upon hearsay evidence. The officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

In applying the "totality of the circumstances" test, great deference should be paid a magistrate's determination of probable cause and after-the-fact scrutiny should not take the form of a de novo review. State v. Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988).

When Evidence of Previous Criminal Activity Supports Warrant. — Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support search warrant: (1) the amount of the criminal activity, and (2) the time period over which the activity occurred. Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best. However, where affidavit properly recites facts indicating activity of protracted and continuous nature, a course of conduct, the passage of time becomes less significant. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Determination of Whether Evidence Is Stale. — When evidence of previous criminal activity is advanced to support a finding of probable cause, further examination must be made to determine if the evidence of prior activity is stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Continuity of offense may be the most important factor in determining whether probable cause is valid or stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

There was sufficient probable cause where search warrant was issued in reliance upon recitation in affidavit of a controlled purchase of cocaine six days prior to the date of application. State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

There was probable cause to issue warrants where affidavits were submitted by police officers and volunteers who played bingo and observed payoffs for bingo and slot machines. State v. Crabtree, 126 N.C. App. 729, 487 S.E.2d 575 (1997).

Evidence as a whole provided the magistrate with a substantial basis for concluding that probable cause existed at the time the search warrant was issued; although the alleged victims did not provide specific dates, the allegations of inappropriate sexual touching by defendant allowed a reasonably inference that defendant's criminal activity was protracted and continuing in nature. State v. Pickard, 178 N.C. App. 330, 631 S.E.2d 203, 2006 N.C. App. LEXIS 1413 (2006), review denied, appeal dismissed, 361 N.C. 177, 640 S.E.2d 59 (2006).

As to sufficiency of information concerning location of objects, see State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Inference Upheld. — Where suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and at two of those locations he had sold cocaine, based on these facts, it was reasonable to infer that when suspect occupied third room, he still possessed the cocaine. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Sufficiency of Probable Cause. — For resolving questions arising under N.C. Const., Art. I, § 20 with regard to the sufficiency of probable cause to support the issuance of a search warrant, the Supreme Court of North Carolina adopts the totality of circumstances test of Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) and Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) and rejects the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984); State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987), aff'd in part and rev'd in part, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988), modified on other grounds, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988).

Where magistrate had before him evidence (1) that suspect had a pound of marijuana in her home a week earlier, (2) that suspect had sold marijuana the day warrant was issued, and (3) that suspect had a prior history of involvement with drugs (and was still on probation for violation of the Controlled Substances Act), there was a substantial basis to support a finding of probable cause for issuance of a search warrant. State v. Beam, 325 N.C. 217, 381 S.E.2d 327 (1989).

Facts were sufficient under the "totality of the circumstances" test to support a finding of probable cause when officers received information from an informant who admitted past use of cocaine and who had previously given information that led to the arrest of at least six people, since the information provided a substantial basis for the probability that cocaine was present in the described residence and had been sold there within the preceding 48 hours. State v. Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988).

A trained law-enforcement officer need not swear to his ability to recognize an illegal substance in order for his observation to be deemed reliable by the issuing magistrate. State v. Leonard, 87 N.C. App. 448, 361 S.E.2d 397 (1987).

III. AFFIDAVITS AND INFORMANTS.

Sufficiency of Affidavit Generally. — The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. English, 27 N.C. App. 545, 219 S.E.2d 549 (1975); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976), motion for reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977); State v. Armstrong, 33 N.C. App. 52, 234 S.E.2d 197 (1977); State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982); State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982); State v. Warren, 59 N.C.

App. 264, 296 S.E.2d 671, modified on other grounds, 309 N.C. 224, 306 S.E.2d 446 (1983); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

Although an affidavit did not include any indication, other than the amount of blood, that would suggest a search of defendant's computer would lead to information regarding a potential homicide, and the affidavit only included a wholly conclusory statement that the affiant had probable cause to search the computers in defendant's house, the state met its burden; the evidence and testimony admitted in defendant's trial pursuant to the warrant did not prejudice defendant in light of other properly admitted evidence. State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

Affidavit Must Indicate Underlying Circumstances. — To supply reasonable cause to believe the objects sought are on the described premises, the affidavit supporting a search warrant must provide the magistrate with underlying circumstances from which to judge the validity of the informant's conclusion that the articles sought are at the place to be searched. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

Affidavit need not contain all the evidence properly presented to the issuing official. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Bandy, 15 N.C. App. 175, 189 S.E.2d 771, appeal dismissed, 281 N.C. 759, 191 S.E.2d 357 (1972); State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

But It Should Contain Material and Essential Facts. — The better practice would be for the issuing official to require that the affidavit contain the material and essential facts (but not all the evidentiary details) necessary to support the finding of probable cause before issuing a search warrant. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, cert. denied, 279 N.C. 728, 184 S.E.2d 885 (1971).

Section Does Not Require Separate Writing Labelled "Affidavit." — Although a separate paper identified as an affidavit was not submitted with officers' sworn application, statutory requirements were met and search warrant was properly issued; this section does not require that an officer submit a separate sworn writing labelled "Affidavit" even when its contents would be a verbatim duplication of the sworn statement in the application. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Purely Conclusory Affidavit Insufficient. — Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976).

Probable cause cannot be shown by affidavits which are purely conclusory and do not set forth any of the underlying circumstances upon which that conclusion is based. State v. English, 27 N.C. App. 545, 219 S.E.2d 549 (1975).

A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched. State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982).

Probable cause cannot be shown by affidavits which are purely conclusory. An affidavit which merely states the affiant's belief that probable cause exists without detailing any of the underlying circumstances is insufficient. A recital of some of the underlying circumstances in the affidavit is necessary if the magistrate is to perform his proper function. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

The application for the warrant must allege facts by which the magistrate can determine whether there is probable cause to support the warrant. Mere conclusions of the officer applying for the warrant or of the informant are not sufficient. State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982), aff'd, 307 N.C. 461, 298 S.E.2d 388 (1983).

Affidavit in support of application for a search warrant did not comply with the standard in G.S. 15A-244(2) where it made mere conclusions that probable cause existed and was unsupported by particular facts. State v. McHone, 158 N.C. App. 117, 580 S.E.2d 80, 2003 N.C. App. LEXIS 940 (2003).

There is a presumption of validity with respect to the affidavit supporting a search warrant. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

The application for a search warrant submitted to the judge by a detective in the murder investigation, which eventually implicated the defendant, met the requirements of this section; although the application itself did not state on its face that it was sworn, the trial court found that the detective was sworn and signed the attached sworn affidavit in the judge's presence. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Issuing Officer May Not Rely on Mere Conclusions. — The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Affidavits Must Establish a Nexus Between the Objects Sought and the Place to be Searched. — Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that fruits of a crime that occurred elsewhere are observed at certain place. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Affidavit in support of a warrant to search a North Carolina home satisfied G.S. 15A-244(3) because the affidavit indicated that, in addition to a first-hand sighting, the informant also knew the name and address of the person with whom defendant was staying, and the police also independently verified that telephone calls from the address were going to someone known to defendant (his girlfriend); thus, under either the Aguilar-Spinelli or the totality of the circumstances test, the affidavit demonstrated both a basis of knowledge and police corroboration more than sufficient to establish probable cause that defendant was at the address. Commonwealth v. Jackmon, 63 Mass. App. Ct. 47, 822 N.E.2d 754, 2005 Mass. App. LEXIS 155 (2005).

Application for a search warrant failed to comply with this section where the affiant failed to state what information he received from informants during and after purchase of cocaine; and where the affidavit failed to disclose any facts that would lead affiant or a magistrate to reasonably believe that identified currency and contraband were at defendant's residence. State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989).

Requirements Where Affidavit Based on Hearsay. — The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer was credible and his information reliable. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

If the affidavit is based on hearsay information, then it must contain the circumstances underlying the informer's reliability and the basis for the informer's belief that a search will recover the objects sought by the police. State v. Crawford, 104 N.C. 591, 410 S.E.2d 499 (1991).

Insufficient Affidavit Invalidates Warrant. — The failure of the affidavit to establish reasonable grounds to believe that the crime was occurring on the premises to be searched invalidates the warrant issued thereon. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Establishment of Informant's Reliability. — An officer's statement in an affidavit to obtain a search warrant that a reliable and confidential informant who furnished information to him has been used by (another named officer) in the past and that information given by the source has proven correct in all cases met the minimum standard for setting forth the circumstances from which the affiant concluded that the informant was reliable. State v. Williams, 49 N.C. App. 184, 270 S.E.2d 604 (1980), appeal dismissed, 301 N.C. 726, 276 S.E.2d 287 (1981).

Where the affidavit contained information to establish that the informant had been to defendants' residence within 48 hours before the application for the warrant was presented to the magistrate and had personally observed defendants' brother in possession of cocaine, and where the affidavit revealed that the informant was familiar with the appearance of cocaine prepared for sale, and where the informant was known to the affiants for a period of six months to one and one-half years and had provided reliable information which had resulted in numerous drug arrests, the affidavit contained sufficient details to support informant's credibility and a finding of probable cause. State v. King, 92 N.C. App. 75, 373 S.E.2d 566 (1988).

Police officer's affidavit, based on information from an informant the officer had known for years, was sufficient for the issuance of a search warrant under G.S. 15A-244 because under the totality of the circumstances the affidavit provided a magistrate with probable cause for the issuance of a search warrant for defendant's home under U.S. Const., Amend. IV, and N.C. Const., Art. I, § 20. State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646, 2007 N.C. App. LEXIS 1947 (2007).

Police Officer May Rely on Information Reported by Other Officers. — The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d

917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

The police officer may state in his affidavit reports made to him by competent experts, such as the personnel of the FBI laboratories, concerning their examinations of materials forwarded by him to them for such examination and report. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

What Tip Must Show. — It is essential that the informant's tip reveal that the objects sought are on the premises to be searched. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

When the application for a search warrant is based on an informant's tip, however, it must meet the two-prong test developed by the Supreme Court in Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). First, the affidavit must set forth sufficient underlying circumstances to permit a neutral and detached magistrate to understand how the informant reached his conclusion. Second, the affidavit must establish the reliability of the informant. This can be done by showing prior use and reliability of the informant, a declaration against his penal interest, clear and precise details in the tip indicating personal observation and knowlege of the location of the evidence, or membership of the informant in a reliable group like the clergy. State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983), but see State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

Absent a statement claiming personal observation or otherwise detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor or an accusation based merely on an individual's general reputation. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

If the informant has recently personally seen stolen items in defendant's possession at his residence, and states this to the affiant, the affidavit would clearly suffice. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

Bad Faith Required to Contest Validity of Warrant. — A claim is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements; rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Affidavit Insufficient. — Evidence seized pursuant to a search warrant was properly suppressed because, inter alia, the affidavit supporting the search warrant merely stated that the confidential informant had visited the described location and made controlled purchases of cocaine at the location, without particularly stating which, if any, of the two dwellings the informant entered to make the purchases. In addition, the special agent had only been working in law-enforcement for two years at the time the agent applied for the search warrant, and failed to include facts regarding whether the agent observed the transactions between the confidential informant and the seller, thereby failing to establish the identity of the seller as defendant. State v. Taylor, 191 N.C. App. 587, 664 S.E.2d 421, 2008 N.C. App. LEXIS 1504 (2008).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or more of the following:

(1) Affidavit; or

(2) Oral testimony under oath or affirmation before the issuing official; or

(3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the

Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.

(b) If the issuing official finds that the application meets the requirements of this Article and finds there is probable cause to believe that the search will discover items specified in the application which are subject to seizure under G.S. 15A-242, he must issue a search warrant in accordance with the requirements of this Article. The issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. If he does not so find, the official must deny the application. (1973, c. 1286, s. 1; 2005-334, s. 1.)

CASE NOTES

I. General Consideration.
II. Probable Cause.
III. Affidavits.
IV. Informants.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

Former § 15-26 Compared. — It was not necessary under former G.S. 15-26 that the affidavit contain within itself all the evidence properly presented to the magistrate. State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492, cert. denied, 288 N.C. 396, 218 S.E.2d 469 (1975).

Sworn Statement Required for Probable Cause Warrant. — A magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. The necessity of a sworn statement is consistent with existing case law. State v. Heath, 73 N.C. App. 391, 326 S.E.2d 640 (1985).

Magistrate is required to determine presence or absence of probable cause upon the information before him. State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982).

Independent Determination by Issuing Official Required. — A magistrate, by simply signing without reading the paper which a police officer places before him, utterly fails to perform the important judicial function which it is his duty to perform as a neutral and detached magistrate of making his own independent determination from the affidavit submitted to him whether probable cause exists for issuance of the search warrant. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Sufficiency of Affidavit Not Determined by Affiant. — Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Facts Outside Written Affidavit May Be Considered. — The judicial officer's attention is not limited to those facts recited in a written affidavit taken under oath. State v. Howell, 18 N.C. App. 610, 197 S.E.2d 616 (1973).

When Testimony of Witnesses Necessary. — If the affidavit indicates the basis for the finding of probable cause, but is not in itself sufficient to establish probable cause, testimony of witnesses will be necessary to establish whether there was in fact sufficient evidence before the magistrate to justify his finding of probable cause to issue the search warrant. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973), cert. denied and appeal dismissed, 285 N.C. 666, 207 S.E.2d 752 (1974), overruled on other grounds, State v. Harris, 25 N.C. App. 404, 213 S.E.2d 414 (1975).

Evidence Properly Heard Under Subsection (a). — Albeit subsection (a) of this section places restrictions upon what information can be used by the magistrate in finding probable cause, the trial judge did not go beyond the permissible scope of inquiry when he heard evidence on the issue of a typographical error in the year date. State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

Magistrate's determination of probable cause should be paid great deference by reviewing court. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Reviewing courts are to pay deference to judicial determinations of probable cause. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

And Will Be Sustained Where There Was a Substantial Basis for It. — When a search is based upon a magistrate's rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for the magistrate to conclude that the articles searched for were probably present. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

The scope of the court's review of the magistrate's determination of probable cause is not confined to the affidavit alone. State v. Hicks, 60 N.C. App. 116, 298 S.E.2d 180 (1982), cert. denied, 300 N.C. 579, 300 S.E.2d 553 (1983).

It is always appropriate for the trial court to conduct a hearing on a motion to suppress. In such hearing the burden of proof is on the State. The State is not relegated to producing or introducing the search warrant alone, but may offer other evidence to show probable cause existed at the time of the issuing of the search warrant, if in truth it has any to offer. State v. Hicks, 60 N.C. App. 116, 298 S.E.2d 180 (1982), cert. denied, 300 N.C. 579, 300 S.E.2d 553 (1983).

Ordinarily, a search warrant will be presumed regular on appeal if irregularity does not appear on the face of the record, and when the search warrant does not appear of record, it is assumed in all respects regular on appeal. Furthermore, the wording of U.S. Const., Amend. IV would indicate that a valid search warrant is prima facie evidence of the reasonableness of the search. State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318, cert. denied, 304 N.C. 199, 285 S.E.2d 106 (1981), modified, 306 N.C. 594, 295 S.E.2d 399 (1982).

Corporations have never possessed the kind of protection under U.S. Const., Amend. IV accorded to persons and their homes. Corporations' special status as creatures of the state exposes them to exhaustive state scrutiny in exchange for the privilege of state recognition. In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Failure to File with Clerk Did Not Require Suppression. — Although application and search warrant were not filed with the clerk as required by statute, the violation did not require that the seized evidence be suppressed; the failure to timely file these documents with the clerk after the warrant was issued did not rise to the level of a constitutional violation that would require suppression under G.S. 15A-974(2). State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Anticipatory Warrant. — An anticipatory warrant must set out, on its face, conditions that are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents. State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996).

Triggering Event of Anticipatory Warrant. — An anticipatory warrant must minimize the officer's discretion in deciding whether or not the "triggering event" has occurred to almost ministerial proportions. State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996).

Sure Course Rule. — The sure course rule is a stand-in for the actual presence of the illegal item at the locus to be searched. This proxy for actual presence ensures that no undue delegation of the power to find probable cause passes from magistrate to government agent. State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996).

Under the sure and irreversible course to destination rule, the contraband must be on a sure, irreversible course to the situs of the intended search, and any future search of the destination must be made expressly contingent upon the contraband's arrival there. State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996).

Applied in State v. Oldfield, 29 N.C. App. 131, 223 S.E.2d 569 (1976); State v. Armstrong, 33 N.C. App. 52, 234 S.E.2d 197 (1977); State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983); State v. Schiffer, 132 N.C. App. 22, 510 S.E.2d 165 (1999).

Cited in State v. Mavrogianis, 57 N.C. App. 178, 291 S.E.2d 163 (1982); United States v. Edwards, 798 F.2d 686 (4th Cir. 1986); State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999); State v. McHone, 158 N.C. App. 117, 580 S.E.2d 80, 2003 N.C. App. LEXIS 940 (2003).

II. PROBABLE CAUSE.

"Probable Cause" Defined. — Probable cause under U.S. Const., Amend. IV exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, cert. denied, 279 N.C. 728, 184 S.E.2d 885 (1971).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972);

State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Within the meaning of U.S. Const., Amend. IV, and G.S. 15A-243 through this section, probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976), motion for reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Probable cause, as used in U.S. Const., Amend. IV, G.S. 15A-244(2) and this section, means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Harris, 43 N.C. App. 184, 258 S.E.2d 415 (1979).

The probable cause prerequisite to the issuance of a search warrant exists when there is reasonable ground to believe that the proposed search will reveal the presence of objects which will aid in the apprehension or conviction of an offender. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997); State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Probable cause to search and seize requires facts and circumstances within the police officer's knowledge based on reasonable and trustworthy information that a search of a particular area will reveal objects being sought in connection with criminal activity or objects which will aid the police in apprehending and convicting a criminal offender. State v. Cooke, 54 N.C. App. 33, 282 S.E.2d 800 (1981), aff'd, 306 N.C. 132, 291 S.E.2d 618 (1982).

Probable cause deals with probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. Horne, 59 N.C. App. 576, 297 S.E.2d 788 (1982), overruled on other grounds, 320 N.C. 589, 359 S.E.2d 776 (1987).

In dealing with probable cause, as the very name implies, the Supreme Court deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Probable Cause Depends on Circumstances. — Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

The standard for determining probable cause for issuance of a search warrant based on information from informants is the totality of the circumstances analysis that traditionally has informed probable cause determinations. State v. Craver, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

The totality of the circumstances analysis mandates a practical, common sense determination of probable cause. State v. Craver, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

Question Is Existence of Reasonable Grounds for Belief. — The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

When Facts Furnish Sufficient Basis for Issuance of Warrant. — If the facts before the magistrate supply reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender, it is sufficient basis for the issuance of the search warrant. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976), motion for reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Resolution of Doubtful Cases. — Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Each case must be decided on its own facts and reviewing courts are to pay deference to judicial determinations of probable cause. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

When Evidence of Previous Criminal Activity Supports Warrant. — Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support search warrant: (1) the amount of the criminal activity, and (2) the time period over which the activity occurred. Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best. However, where affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Need to Determine If Evidence Is Stale. — When evidence of previous criminal activity is advanced to support finding of probable cause, further examination must be made to determine if evidence of prior activity is stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Continuity of offense may be the most important factor in determining whether probable cause is valid or stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Inference Upheld. — Where suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and at two of those locations he had sold cocaine, based on these facts, it was reasonable to infer that when suspect occupied third room, he still possessed the cocaine. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Probable cause must be based on facts gathered in close enough proximity to the time of the issuance of the warrant as to justify a finding of probable cause at that time; but whether this test is met is to be determined on the facts of each case. State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982).

Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a "reasonable" time may have elapsed. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Common sense is the ultimate criterion in determining the degree of evaporation of probable cause. The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property's nature, and should be contemplated in view of the practical consideration of everyday life. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Double Hearsay in Application. — Where the application for a warrant contained "double hearsay," but did not adequately explain why this "double hearsay" was credible, the information contained in the affidavit and on the face of the warrant was inadequate to establish that probable cause existed for the issuance of the warrant. State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385, petition denied, 339 N.C. 620, 454 S.E.2d 265 (1995).

Twenty-four hour span between informant's contact with defendant and issuance of warrant did not render the information so stale as to fail to establish probable cause. State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982).

Year-Old Information as to Possession of Marijuana. — As marijuana is a substance which can be easily concealed and moved about and which is likely to be disposed of or used, year-old information, which was the only evidence of residential possession by defendants was too stale to establish probable cause to search defendant's residence, even though the affidavit on which the search warrant was based also presented more recent information concerning defendant's drug activities. State v. Lindsey, 58 N.C. App. 564, 293 S.E.2d 833 (1982).

Probable Cause May Be Based on Evidence Not Competent in Trial. — A finding of probable cause for the issuance of search warrants may rest upon evidence which is not competent in a criminal trial. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, cert. denied, 279 N.C. 728, 184 S.E.2d 885 (1971).

A valid search warrant may be issued upon the basis of an affidavit setting forth information which may not be competent as evidence. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977);

State v. Horne, 59 N.C. App. 576, 297 S.E.2d 788 (1982), overruled on other grounds, 320 N.C. 589, 359 S.E.2d 776 (1987).

As to use of electronic tracking beepers to establish probable cause, see State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979), cert. denied, 299 N.C. 123, 262 S.E.2d 6 (1980).

Probable Cause to Be Based Solely on Affidavit Where Witness Did Not Recall Speaking to Judge. — Where the sole witness who appeared before district judge at the time search warrant was issued had no independent recollection of speaking with the judge about this warrant, a finding of probable cause had to be based solely upon the allegations in the affidavit. State v. Campbell, 14 N.C. App. 493, 188 S.E.2d 560, aff'd, 282 N.C. 125, 191 S.E.2d 752 (1972).

Triggering Events for Anticipatory Warrant. — The magistrate must ensure that the "triggering events" for an anticipatory warrant, those events which form the basis for probable cause, are both ascertainable and preordained. State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996).

III. AFFIDAVITS.

Sufficiency of Affidavit. — The test to determine the sufficiency of affidavits upon which search warrants are issued is that the magistrate must be informed of some of the underlying circumstances from which the informant concluded that what he stated to the affiant was correct, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed was "credible" or his information "reliable." State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975).

In an application for a search warrant, the affidavit is deemed sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Hamlin, 36 N.C. App. 605, 244 S.E.2d 481 (1978); State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

The affidavit upon which a search warrant is issued is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980); State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

To supply reasonable cause to believe the objects sought are on the described premises, the affidavit supporting a search warrant must provide the magistrate with underlying circumstances from which to judge the validity of the informant's conclusion that the articles sought are at the place to be searched. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

The affidavit must furnish reasonable cause to believe that the search will reveal the presence of the articles sought on the premises described in the application of the warrant and that such objects will aid in the apprehension or conviction of the offender. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Purely Conclusory Affidavit Insufficient. — A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded. Further, there must be facts or circumstances in the affidavit which implicate the premises to be searched. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Probable cause for a search warrant cannot be established by affidavits which are purely conclusory in nature, and therefore, the affidavit must set forth enough of the underlying facts and circumstances so that the magistrate can perform his detached judicial function as a check upon intrusions by law-enforcement officials into the privacy of individuals. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

When Affidavit Is Sufficient in Itself. — If the facts set out in the affidavit are sufficient within themselves to justify the finding of probable cause, the affidavit is sufficient. State v. Wooten, 20 N.C. App. 139, 201 S.E.2d 89 (1973), cert. denied, 284 N.C. 623, 202 S.E.2d 277 (1974), overruled on other grounds, State v. Harris, 25 N.C. App. 404, 213 S.E.2d 414 (1975).

When Testimony of Witnesses Necessary. — Where the affidavit indicates the basis for the finding of probable cause, but is not in itself sufficient to establish probable cause, testimony of witnesses will be necessary to establish whether there was in fact sufficient evidence before the magistrate to justify his finding of probable cause to issue the search warrant. State v. Hicks, 60 N.C. App. 116, 298 S.E.2d 180 (1982), cert. denied, 300 N.C. 579, 300 S.E.2d 553 (1983).

Common-Sense Interpretation of Affidavits. — Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, cert. denied, 279 N.C. 728, 184 S.E.2d 885 (1971); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Because applications are normally submitted by police officers who do not have legal training, the language is to be construed in a commonsensical, nontechnical and realistic way. State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982).

Affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in this area. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, cert. denied, 279 N.C. 728, 184 S.E.2d 885 (1971); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The commands of U.S. Const., Amend. IV, like all constitutional requirements, are practical and not abstract. If the teachings of the cases are to be followed and the constitutional policy served, affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for (the magistrate) to conclude that narcotics were probably present. State v. Hicks, 60 N.C. App. 116, 298 S.E.2d 180 (1982), cert. denied, 300 N.C. 579, 300 S.E.2d 553 (1983).

Affidavit Must Implicate Premises. — It is necessary that an affidavit for a search warrant implicate the premises to be searched. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Affidavit failed to furnish an adequate basis for the finding of probable cause where nothing in the affidavit supported the conclusion that any of the events referred to occurred on or in connection with the premises to be searched. State v. Campbell, 14 N.C. App. 493, 188 S.E.2d 560, aff'd, 282 N.C. 125, 191 S.E.2d 752, defendant's petition for cert. denied and appeal dismissed, 281 N.C. 624, 190 S.E.2d 467 (1972).

Affidavit was held insufficient to support a finding of probable cause for issuance of a warrant to search defendant's premises for LSD, where the affidavit contained no allegation that either the affiant or the confidential informant had personal knowledge that LSD was on defendant's premises. State v. Graves, 16 N.C. App. 389, 192 S.E.2d 122 (1972).

Issuing Official May Rely on Sworn Statement of Affiant Appearing in Person. — A judicial official is entitled to rely upon the sworn statement of affiant, an A.B.C. officer, who appears before him in person, in concluding that the affiant is correctly reciting what has been told him by an informer. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

A magistrate is entitled to rely upon the sworn statement of an affiant police officer who appears before the magistrate in person, in concluding that the affiant is correctly reciting what has been told him by his informant. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

Affidavit Held Sufficient to Establish Probable Cause. — Affidavit describing the property to be seized, giving defendant's name and address, making reference to a confidential informer and his reliability, and stating the information given affiant by the informer was sufficient to establish probable cause to issue a search warrant as required by subsection (b) of this section. State v. Davis, 20 N.C. App. 739, 203 S.E.2d 91, cert. denied, 285 N.C. 375, 205 S.E.2d 726 (1974).

Where affidavit clearly stated that the residence to be searched was occupied by defendant and his brothers, that witnesses had identified one of defendant's brothers, and that a reliable informant had stated that a shotgun was at the residence, the affidavit disclosed sufficient information for a reviewing magistrate to determine that there was probable cause. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

Affidavit Held Sufficient Notwithstanding Erroneous Statement. — Statement in an affidavit given to obtain a search warrant concerning defendant's prior narcotics conviction was error because it was based on erroneous information, though the error was not known to the officer making the affidavit; however, the error was immaterial because the trial court found that the affidavit was nevertheless sufficient on its face to support a finding of probable cause for the issuance of the search warrant for narcotics, and evidence obtained as a result of the search under the warrant was properly admitted. State v. Steele, 18 N.C. App. 126, 196 S.E.2d 379 (1973).

Affidavit may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the articles to be searched for were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was "credible" or his information "reliable." State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

The affidavit may be based on hearsay from an undisclosed informant and need not reflect the personal observations of affiant, but the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were present and some of the underlying circumstances from which the affiant concluded that the informant was credible and reliable. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972); State v. Horne, 59 N.C. App. 576, 297 S.E.2d 788 (1982), overruled on other grounds, 320 N.C. 589, 359 S.E.2d 776 (1987).

While an affidavit does not have to reflect the personal observations of the affiant, a two-pronged test is required to sustain a search warrant. The first requirement is that the magistrate be informed of some of the underlying circumstances from which the informant drew his conclusions. The second standard is that the magistrate be informed of the underlying circumstances from which affiant concluded that the informant was credible and reliable. State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972), cert. denied, 282 N.C. 584, 193 S.E.2d 744 (1973).

Admission into Evidence of Warrant and Affidavit Containing Hearsay Held Erroneous. — Where the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime, the admission into evidence of the search warrant and the accompanying affidavit was erroneous and resulted in error prejudicial to defendant. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

Typographical Error Held Not Fatal. — Where the year had recently changed, a typographical error in the year date was not fatal to the sufficiency of the affidavit. State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

IV. INFORMANTS.

Mere characterization of informant as reliable might not, in itself, provide a sufficient factual basis for the magistrate to credit the report of the informer; there must be facts, recited and sworn to in the affidavit as being within the personal knowledge of the affiant, which furnish a sufficiently substantial basis to support the magistrate's independent finding crediting the report of the unidentified informer. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

If an unidentified informant has supplied all or part of the information contained in the affidavit supplementing all application for a search warrant, some of the underlying facts and circumstances which show the informant is credible or that the information is reliable must be set forth before the issuing officer. State v. Craver, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

Previous Reliability Need Not Be Averred. — In issuing a search warrant based upon the information of an informant, an averment of previous reliability of the informant is not necessary, but the inquiry is whether the informant's present information is truthful or reliable. State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975).

Statement of Past Reliability Is Not Mere Conclusion. — But the statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793, cert. denied, 281 N.C. 759, 191 S.E.2d 362 (1972).

And Tends to Show That Informer Is Credible. — Where the affidavit stated that the informer had furnished information in the past which had resulted in the seizure of narcotic drugs and subsequent conviction, that tended to show that the informer was credible and his information reliable. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The statement in the affidavit that the informant had furnished reliable information in the past which had in fact led to the arrest of several persons and the testimony of the officer prior to the issuance of the warrant were sufficient to show the reliability of the informer.

State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

And Meets Minimum Standards. — The statement that the informant has proven reliable in the past meets minimum standards. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793, cert. denied, 281 N.C. 759, 191 S.E.2d 362 (1972); State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972), cert. denied, 282 N.C. 584, 193 S.E.2d 744 (1973).

Where the circumstances set forth in support of the informant's reliability were that he "has proven reliable and credible in the past," those circumstances were the irreducible minimum on which a warrant could be sustained. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793, cert. denied, 281 N.C. 759, 191 S.E.2d 362 (1972); State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972), cert. denied, 282 N.C. 584, 193 S.E.2d 744 (1973).

An affiant's statement that a confidential informant had given this agent good and reliable information in the past that had been checked by the affiant and found to be true meets the minimum standard to sustain a warrant. State v. McKoy, 16 N.C. App. 349, 191 S.E.2d 897 (1972), cert. denied, 282 N.C. 584, 193 S.E.2d 744 (1973).

An affidavit indicating the reliability of its information by naming an informant, indicating the value of his past assistance and corroborating that information with statements from other officers was sufficient to support the issuance of a search warrant for defendant's premises. State v. McCuien, 17 N.C. App. 109, 193 S.E.2d 349 (1972).

What Tip Must Reveal. — It is essential that the informant's tip reveal that the objects sought are on the premises to be searched. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

Absent a statement claiming personal observation or otherwise detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor or an accusation based merely on an individual's general reputation. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

Personal and recent observations by an unidentified informer of criminal activity show that the information was gained in a reliable manner and are more than a bald and unilluminating assertion of suspicion. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Observation of Stolen Property in Defendants' Premises. — Information contained in affidavits was sufficient for the magistrate to find probable cause for issuance of search warrants for defendants' premises where such information included a statement that a reliable informer had seen part of the stolen property in defendants' premises. State v. Shanklin, 16 N.C. App. 712, 193 S.E.2d 341 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

If the informant has recently seen stolen items in defendant's possession at his residence, and he states this to the affiant, affidavit would clearly suffice. State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

§ 15A-246. Form and content of the search warrant.

A search warrant must contain:

(1) The name and signature of the issuing official with the time and date of issuance above his signature; and

(2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and

(3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and

(4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and

(5) A description or a designation of the items constituting the object of the search and authorized to be seized. (1868-9, c. 178, subch. 3, s. 39; Code, s. 1172; Rev., s. 3164; C.S., s. 4530; 1961, c. 1069; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former G.S. 15-26.*

Constitutional Requirements. — A search warrant and affidavit meet the requirements of this section, as well as the requirements of U.S. Const., Amend. IV, where (1) the warrant describes with reasonable certainty the premises to be searched and the contraband for which the search was to be made, (2) the affidavit indicates the basis for a finding of probable cause, and (3) the warrant is signed by the magistrate and bears the date and hour of its issuance. State v. Bush, 10 N.C. App. 247, 178 S.E.2d 313, appeal dismissed, 277 N.C. 726, 178 S.E.2d 830 (1970).

Search warrant will be presumed regular if irregularity does not appear on the face of the record. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

When Presumption of Regularity Applicable. — The presumption of regularity of a search warrant will operate only when the facts in the record do not indicate the occurrence of any irregularities and no objection to the validity of the warrant has been raised in a timely fashion. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

The presumption of regularity of a search warrant is applicable only in situations where the defendant challenges the validity of a search warrant that was not introduced into evidence on the ground that the warrant itself does not conform to technical statutory requirements. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

If nothing else appears and if no objection to the validity of the warrant had been raised in the superior court, an appellate court would be justified in presuming the officers of the law performed their legal duties and that the warrant was legal and valid. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

Common Sense Interpretation. — Search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion, as they are normally drafted by nonlawyers in the midst and haste of a criminal investigation. State v. Hansen, 27 N.C. App. 459, 219 S.E.2d 641 (1975), cert. denied, 289 N.C. 453, 223 S.E.2d 161 (1976).

Technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place now in the area of search warrants. State v. Hansen, 27 N.C. App. 459, 219 S.E.2d 641 (1975), cert. denied, 289 N.C. 453, 223 S.E.2d 161 (1976).

Incorporation of Affidavit by Reference. — Under this section, it was permissible to incorporate the description of the items to be searched for and the place to be searched in the warrant by reference to the affidavit. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, cert. denied, 279 N.C. 728, 184 S.E.2d 885 (1971); State v. Shanklin, 16 N.C. App. 712, 193 S.E.2d 341 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

Where an affidavit complied with the provisions of this section and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. State v. Murphy, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

Anticipatory search warrant sufficiently incorporated by reference the attached affidavit that clearly identified the triggering event for execution of the warrant, which was any attempt to deliver the subject package suspected of containing illegal drugs. The warrant and incorporated affidavit could be read together to provide the specificity and particularity required under the United States and North Carolina Constitutions and G.S. 15A-246. State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219, 2004 N.C. App. LEXIS 707 (2004).

Purpose of Particularity Requirement. — The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972); State v. Shanklin, 16 N.C. App. 712, 193 S.E.2d 341 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

Particularity Requirement Where Books Are Seized. — The particularity requirement is to be accorded the most scrupulous exactitude when the things are books, and the basis for the seizure is the ideas which they contain. But when rights under U.S. Const., Amend. I are not involved, the specificity requirement is more flexible. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Warrant Authorizing Seizure of Limited Class of Things Is Not Prohibited. — A warrant empowering officers to seize a limited class of things, i.e., unlawfully possessed narcotic drugs, is not prohibited. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Description of Drugs to Be Seized Held Sufficiently Particular. — The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of U.S. Const., Amend. IV and of N.C. Const., Art. I, § 20, where the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of U.S. Const., Amend. IV and of N.C. Const., Art. I, § 20. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

Description of Premises Held Sufficient. — A description of the premises to be searched was not rendered uncertain by the fact that the affidavit incorrectly described the premises as "a brick structure" when in fact it was made of stone. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

A description of a mobile home to be searched was not fatally defective when the warrant named the son as owner when in fact it was rented to the son by his father or when there was another mobile home of the same color as that described in the warrant but which was not owned by either of these parties or occupied by the defendant. State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492, cert. denied, 288 N.C. 396, 218 S.E.2d 469 (1975).

Search warrant's description of the type and color of the residence in which defendant resided, with a map to the residence attached, which listed defendant's first name only, and stated that an informant had observed defendant at the residence searched, but stated an incorrect address for the premises, was adequate, under G.S. 15A-246(4) and 15A-246(5). State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

Trial court properly denied defendant's motion to suppress evidence pursuant to G.S. 15A-972 in a prosecution on drug charges, as an anticipatory search warrant under which the evidence in question was seized complied with state requirements for such a warrant, and G.S. 15A-246(4) did not require that the address listed in the warrant be listed in a city directory. State v. Phillips, 160 N.C. App. 549, 586 S.E.2d 540, 2003 N.C. App. LEXIS 1832 (2003).

Search of Outbuildings. — The search of defendant's premises did not exceed the scope of the warrant by including a tool shed as well as the house itself. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

Notation of Time of Issuance. — The search warrant failed to meet the requirements of subsection (1) where the time of issuance was not found above the signature of the magistrate. Such an omission could be significant, but in this case there is no prejudice since the time of issuance was noted elsewhere on the face of the warrant. State v. Hyleman, 89 N.C. App. 424, 366 S.E.2d 530 (1988), rev'd on other grounds, 324 N.C. 506, 379 S.E.2d 830 (1989).

Applied in State v. Leonard, 87 N.C. App. 448, 361 S.E.2d 397 (1987).

Cited in State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Banks, 88 N.C. App. 737, 364 S.E.2d 452 (1988); State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988).

§ 15A-247. Who may execute a search warrant.

A search warrant may be executed by any law-enforcement officer acting within his territorial jurisdiction, whose investigative authority encompasses the crime or crimes involved. (1868-9, c. 178, subch. 3, s. 38; Code, s. 1171; Rev., s. 3163; C.S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8; 1973, c. 1286, s. 1.)

CASE NOTES

Applied in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Cited in State v. Treants, 60 N.C. App. 203, 298 S.E.2d 438 (1982); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983).

§ 15A-248. Time of execution of a search warrant.

A search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked "not executed" and returned without unnecessary delay to the clerk of the issuing court. (1973, c. 1286, s. 1.)

CASE NOTES

Substantial Compliance. — A search warrant was not invalid, even though it was not executed within 48 hours, where the warrant was served on a bank within 48 hours, but the documents were not produced within that period because that the bank needed to locate and assemble the records. State v. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (1998).

§ 15A-249. Officer to give notice of identity and purpose.

The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present. (1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1009 (1979).

CASE NOTES

Purpose of Notice Requirement. — The notice requirement is for the protection of the officers as well as the protection of the occupants and their constitutional rights. State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

One of the purposes of this section is to protect the public from unreasonable searches and seizures and to guard the right to privacy in homes. State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Officers to Give Notice and Demand Entry Absent Invitation or Permission. — Even though police officers have a valid search or arrest warrant, absent invitation or permission, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973), decided under prior law; State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

Where police officer, in executing search warrant for drugs, simultaneously announced his presence and entered residence, violating the provisions of G.S. 15A-249, under G.S. 15A-974(2), the violation was not substantial and did not require that the evidence be suppressed; no one on the premises objected, the occupants, as drug dealers, were likely to be armed, and entry prevented destruction of drugs. State v. Sumpter, 150 N.C. App. 431, 563 S.E.2d 60, 2002 N.C. App. LEXIS 493 (2002).

Time Between Notice and Entry. — The amount of time required to be given between notice and entry must depend on the particular circumstances. State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977).

Where police officer, in executing search warrant for drugs, simultaneously announced his presence and entered the residence, the officer violated G.S. 15A-249. State v. Sumpter, 150 N.C. App. 431, 563 S.E.2d 60, 2002 N.C. App. LEXIS 493 (2002).

Effect of Exigent Circumstances. — In a search and seizure case, where the exigent circumstances are adequate to justify the warrantless search of defendant's house by officers under the plain view doctrine, they would also be sufficient to excuse the officers from the knock and announce requirement. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), appeal dismissed, 299 N.C. 124, 261 S.E.2d 925, cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980).

Notice Held Sufficient. — See State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977); State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125, cert. denied, 295 N.C. 93, 244 S.E.2d 261 (1978); State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680, appeal dismissed, 301 N.C. 405, 273 S.E.2d 450 (1980), cert. denied, 451 U.S. 997, 101 S. Ct. 2338, 68 L. Ed. 2d 856 (1981).

Police officers who wore search and raid jackets which identified them and their purpose when they entered defendant's business yelling "police officers, search warrant" complied with the requirements of this section. State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990), discretionary review denied, 328 N.C. 575, 403 S.E.2d 519 (1991).

Applied in State v. Tate, 58 N.C. App. 494, 294 S.E.2d 16 (1982); State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982); State v. Edwards, 70 N.C. App. 317, 319 S.E.2d 613 (1984); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977); State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344 (1987); State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995); State v. Vick, 130 N.C. App. 207, 502 S.E.2d 871 (1998).

§ 15A-250: Reserved for future codification purposes.

§ 15A-251. Entry by force.

An officer may break and enter any premises or vehicle when necessary to the execution of the warrant if:

(1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or

(2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person. (1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Effect of Exigent Circumstances on Announcement Requirement. — In a search and seizure case, where the exigent circumstances are adequate to justify the warrantless search of defendant's house by officers under the plain view doctrine, they would also be sufficient to excuse the officers from the knock and announce requirement. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), appeal dismissed, 299 N.C. 124, 261 S.E.2d 925, cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980).

Announcement by Police Facing Exigent Circumstances. — The fact that officers did announce their identity and purpose does not mean entry by force cannot be justified; there is nothing in the statute to forbid an announcement of police presence and purpose when officers also face exigent circumstances. State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

Search Conducted in Accordance with Section. — The trial court had a reasonable basis for concluding that search was conducted in accordance with this section; where testimony from officer was that during time between announcement and opening of door, he heard the sounds of people running and faintly heard the word "police," and where officer testified that he ordered the door opened "because evidence of this nature … is easily disposed of, and quick entry is safer for the officers," as such evidence indicated circumstances under which the officers could have reasonably believed that they were being denied access and that evidence could be destroyed. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Entry by force justified where officers knocked and announced, waited a few seconds before again knocking and announcing, and waited 10-15 seconds before forcing entry after hearing no sound from the interior of the apartment, and where the officers knew the defendant was in the apartment. State v. Vick, 130 N.C. App. 207, 502 S.E.2d 871 (1998).

Based upon the fact that the police officers were executing a warrant to search for narcotics which could be easily disposed of, forcing entry after six to eight seconds did not violate defendant's statutory and constitutional rights. State v. Reid, 151 N.C. App. 420, 566 S.E.2d 186, 2002 N.C. App. LEXIS 758 (2002).

Contraband was not obtained "as a result of" an improper entry where the search was conducted sometime after the forced entry and the contraband would have likely been located even in the absence of the forced entry. State v. White, 184 N.C. App. 519, 646 S.E.2d 609, 2007 N.C. App. LEXIS 1475 (2007).

Notice Held Sufficient. — See State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680, appeal dismissed, 301 N.C. 405, 273 S.E.2d 450 (1980), cert. denied, 451 U.S. 997, 101 S. Ct. 2338, 68 L. Ed. 2d 856 (1981).

Where method of entry renders search illegal, evidence obtained is not competent at defendants' trial. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Applied in State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978); State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982); State v. Edwards, 70 N.C. App. 317, 319 S.E.2d 613 (1984); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-252. Service of a search warrant.

Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched. If no one in apparent and responsible control is occupying the premises or vehicle, the officer must leave a copy of the warrant affixed to the premises or vehicle. (1973, c. 1286, s. 1.)

CASE NOTES

This section must be construed with reference to other provisions of Chapter 15A relating to search warrants, as where possible statutes dealing with the same subject matter must be harmonized to give effect to each. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Precautionary Measures Prior to Service of Warrant Not Proscribed. — To require officers to serve a warrant prior to taking the precautionary measures authorized by G.S. 15A-255 and G.S. 15A-256 would frustrate the purposes of the statutes; accordingly, this section does not prevent officers from locating, detaining, or frisking individuals on the premises prior to serving the warrant. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

As to compliance where actual reading of search warrant is rendered impossible because of active obstruction of officers, see State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979).

Suppression of Evidence Not Required For Failure to Comply. — Violation of this section did not require suppression of evidence, where officers who found cocaine in the defendant's apartment merely left a copy of the search warrant in the apartment after the search, rather than giving defendant a copy of the warrant application and affidavit before the search, because the evidence was not obtained "as a result" of the officers' failure to strictly comply with the language of this section. State v. Vick, 130 N.C. App. 207, 502 S.E.2d 871 (1998).

Applied in State v. Copeland, 64 N.C. App. 612, 307 S.E.2d 574 (1983); State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990).

Cited in State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978); State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990); State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

The scope of the search may be only such as is authorized by the warrant and is reasonably necessary to discover the items specified therein. Upon discovery of the items specified, the officer must take possession or custody of them. If in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered. (1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

I. General Consideration.
II. Plain View.

I. GENERAL CONSIDERATION.

Section Codifies Federal Constitutional Requirements. — Provisions of Chapter 15A, particularly G.S. 15A-242 and this section, are codifications of federal constitutional requirements. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Exercise of Judgment by Investigators. — Investigators conducting a search will exercise some judgment and "discretion" in separating the innocuous from the incriminating. State v. Louchheim, 36 N.C. App. 271, 244 S.E.2d 195 (1978), aff'd, 296 N.C. 314, 250 S.E.2d 630, cert. denied, 444 U.S. 836, 100 S. Ct. 71, 62 L. Ed. 2d 47 (1979).

Places Held to Be Within Defendant's Premises. — The search of defendant's premises did not exceed the scope of the warrant by including a tool shed as well as the house itself. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

The trial court in a prosecution for possession of heroin did not err in allowing testimony with respect to a box and its contents found in the trunk of defendant's automobile which was parked in defendant's driveway, since a search warrant authorized a search of the premises of defendant. State v. Logan, 27 N.C. App. 150, 218 S.E.2d 213 (1975).

Seizure of Weapons. — In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Applied in State v. Armstrong, 45 N.C. App. 40, 262 S.E.2d 370 (1980); State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980); State v. White, 322 N.C. 770, 370 S.E.2d 390 (1988).

II. PLAIN VIEW.

Section Restricts "Plain View" Exception to U.S. Const., Amend. IV. — Constitutionally permissible seizures under the "plain view" exception to U.S. Const., Amend. IV, protection against warrantless searches and seizures have been restricted under this section to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under this section, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

When Items in Plain View May Be Seized. — Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime, or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items are discovered "inadvertently." State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

An item is lawfully seized even though it is not listed in the warrant if the officer is at a place where he has a legal right to be and if the item seized is in plain view. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976), motion for reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977).

While conducting a lawful search where officers found in plain view property identified as that reported missing, these items were lawfully seized. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

Plain view alone is not enough to justify warrantless seizure of evidence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Inadvertent Discovery. — The North Carolina General Assembly has imposed an additional requirement, not mandated by the Constitution of the United States, that the evidence discovered in plain view must be discovered inadvertently. State v. Mickey, 347 N.C. App. 508, 495 S.E.2d 669 (1998).

Section requires inadvertence of discovery of items not specified in a search warrant. State v. Absher, 34 N.C. App. 197, 237 S.E.2d 749, cert. denied, 293 N.C. 741, 241 S.E.2d 514 (1977).

Meaning of the inadvertence requirement is that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Mere suspicion of a thing's existence is clearly not destructive of inadvertence. Knowledge, presumable such as would generate probable cause, is required and a positive intent to search. State v. Absher, 34 N.C. App. 197, 237 S.E.2d 749, cert. denied, 293 N.C. 741, 241 S.E.2d 514 (1977).

A padlock found under telephone book on bedside table, which was relevant to murder case, was lawfully seized from motel room pursuant to a warrant authorizing search for bloody clothing. State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

Seizure of Photographs Where Pornography Suspected. — Where defendant was engaged in illegal drug activity, it was reasonable that the officers could conclude that the large quantity of the photographs, showing women in various stages of dress and undress, could have been connected to pornography, and were properly seized under the plain view doctrine. State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994), cert. denied and appeal dismissed, 336 N.C. 75, 445 S.E.2d 39 (1994).

§ 15A-254. List of items seized.

Upon seizing items pursuant to a search warrant, an officer must write and sign a receipt itemizing the items taken and containing the name of the court by which the warrant was issued. If the items were taken from a person, the receipt must be given to the person. If items are taken from a place or vehicle, the receipt must be given to the owner, or person in apparent control of the premises or vehicle if the person is present; or if he is not, the officer must leave the receipt in the premises or vehicle from which the items were taken. (1973, c. 1286, s. 1.)

CASE NOTES

Cited in State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990).

§ 15A-255. Frisk of persons present in premises or vehicle to be searched.

An officer executing a warrant directing a search of premises or of a vehicle may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of the clothing of those present. If in the course of such a frisk he feels an object which he reasonably believes to be a dangerous weapon, he may take possession of the object. (1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Frisk of Lounge Patron. — Frisk procedure engaged in by alcohol law-enforcement agents and deputy sheriffs in the course of the search of a lounge pursuant to a valid search warrant did not violate the constitutional rights of patron of the lounge. State v. Davis, 94 N.C. App. 358, 380 S.E.2d 378 (1989).

Cited in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched.

For the purpose of this section, all controlled substances are the same type of property. (1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For note dealing with warrant to search premises as authorizing search and detention of occupants of premises, see 4 Campbell L. Rev. 191 (1981).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

CASE NOTES

Section Complies with Requirements of U.S. Const., Amend. IV. — Probable cause "particularized" to those present on the premises being searched, as required by U.S. Const., Amend. IV, can be clearly inferred from the circumstances under which the limited search pursuant to this section is authorized: Police officers have reason to believe that criminal activity has been or is occurring on the premises, the search pursuant to the warrant fails to uncover any evidence of such activity, and such evidence of the criminal activity could be concealed upon the person of those present at the time of the officer's entry. State v. Brooks, 51 N.C. App. 90, 275 S.E.2d 202, cert. denied, 302 N.C. 630, 280 S.E.2d 441 (1981).

The limited searches authorized by this section do not violate U.S. Const., Amend. IV. State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186, appeal dismissed, 290 N.C. 666, 228 S.E.2d 457 (1976).

All Buildings Within Curtilage Included in "Premises." — So long as probable cause exists to search buildings within curtilage, then those buildings must be included within the term "premises" under this section, especially where the warrant explicitly authorizes the search of the outbuildings. State v. Cutshall, 136 N.C. App. 756, 526 S.E.2d 187, 2000 N.C. App. LEXIS 141 (2000).

Search of Persons Present for Concealed Contraband Is Reasonable. — Where police officers have a warrant authorizing the search of a vehicle or premises, it is reasonable to permit a search of persons found in the vehicle or on the premises, within the restrictions of this section, to prevent those persons from concealing the contraband subject matter described in the search warrant. State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186, appeal dismissed, 290 N.C. 666, 228 S.E.2d 457 (1976).

Defendant, who arrived on the premises while officers were executing warrant, was subject to detention under this section. State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988).

Seizure Upheld. — Where officers were lawfully on the premises pursuant to a valid search warrant, and were authorized under this section to initially detain defendant in house, their discovery of a packet of cocaine which fell out of defendant's clothing was the result of their lawful detention and the seizure of that packet was authorized under the "plain view" doctrine. Moreover, once this packet had been discovered, the officers had probable cause to arrest defendant without benefit of a warrant under G.S. 15A-401(b), and thus, second packet of cocaine found as a result of a search incident to defendant's arrest was properly seized and admissible at trial. State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988).

Seizure Illegal. — In the absence of probable cause or other warrant exception, the trial court should have suppressed evidence officers seized during search of defendant's person, because the officers' search yielded crack cocaine, the exact object of the investigation, and after the officers discovered cocaine in the outbuilding, their statutory authority to search the non-resident defendant ceased to exist. State v. Cutshall, 136 N.C. App. 756, 526 S.E.2d 187, 2000 N.C. App. LEXIS 141 (2000).

Applied in State v. Crabtree, 126 N.C. App. 729, 487 S.E.2d 575 (1997).

Cited in State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978); State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

§ 15A-257. Return of the executed warrant.

An officer who has executed a search warrant must, without unnecessary delay, return to the clerk of the issuing court the warrant together with a written inventory of items seized. The inventory, if any, and return must be signed and sworn to by the officer who executed the warrant. (1973, c. 1286, s. 1.)

CASE NOTES

Primary purpose of the requirement that the return be sworn to by the officer who executed the warrant is to better insure the accuracy of the inventory of the property seized. This requirement has little, if anything, to do with protecting persons from unreasonable searches and seizures since the search and seizure already will have taken place. State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982).

Statute does not state particular time for return of the inventory, and a delay of three and one-half days between execution and return of the inventory of items seized was not an undue delay in violation of this section. State v. Hyleman, 89 N.C. App. 424, 366 S.E.2d 530 (1988), rev'd on other grounds, 324 N.C. 506, 379 S.E.2d 830 (1989).

Cited in State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990); State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

§ 15A-258. Disposition of seized property.

Property seized shall be held in the custody of the person who applied for the warrant, or of the officer who executed it, or of the agency or department by which the officer is employed, or of any other law-enforcement agency or person for purposes of evaluation or analysis, upon condition that upon order of the court the items may be retained by the court or delivered to another court. (1973, c. 1286, s. 1.)

CASE NOTES

Release of Currency to Federal Drug Enforcement Administration. — This section does not require that a court order be obtained prior to any release of seized property, and it expressly authorizes property to be held by any law-enforcement agency; therefore, the release of currency to Federal Drug Enforcement Administration did not violate this section. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

OPINIONS OF ATTORNEY GENERAL

Necessity of Court Order. — In the absence of a pre-existing valid court order directing that property seized pursuant to a search warrant or other lawful authority be retained by the court or delivered to another court, a law-enforcement agency in possession of the property is not required to obtain a court order prior to releasing it. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

§ 15A-259. Application of Article to all warrants; exception as to inspection warrants and special riot situations.

The requirements of this Article apply to search warrants issued for any purpose, except that the contents of and procedure relating to inspection warrants are to be governed by the provisions of Article 4A of Chapter 15 and warrants to inspect vehicles in riot areas or approaching municipalities during emergencies are subject to the special procedures set out in G.S. 14-288.11. Nothing in this Article is intended to alter or affect the emergency search doctrine. (1957, c. 496; 1969, c. 869, s. 8; 1971, c. 872, s. 4; 1973, c. 1286, s. 1.)

CASE NOTES

Requirements of this Article apply only to searches made under warrants. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), appeal dismissed, 299 N.C. 124, 261 S.E.2d 925, cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980).

Article 12.

Pen Registers; Trap and Trace Devices.

§ 15A-260. Definitions.

As used in this Article:

(1) "Electronic communication," "electronic communication service," and "wire communication" shall have the meaning as set forth in Section 2510 of Title 18 of the United States Code;

(2) "Pen register" means a device which records or decodes electronic or other impulses which identify numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but the term does not include any device used by a provider or customer of a wire or electronic service for billing, or recording as an incident to billing, for communication services provided by the provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business, nor shall the term include any device which allows the listening or recording of communications transmitted on the telephone line to which the device is attached;

(3) "Trap and trace device" means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted. (1987 (Reg. Sess., 1988), c. 1104, s. 1.)

CASE NOTES

Cited in United States v. Suarez, 906 F.2d 977 (4th Cir. 1990); State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995).

§ 15A-261. Prohibition and exceptions.

(a) In General. — Except as provided in subsection (b) of this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order as provided in this Article.

(b) Exception. — The prohibition of subsection (a) of this section does not apply to the use of a pen register or a trap and trace device by a provider of wire or electronic communication service:

(1) Relating to the operation, maintenance, or testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service; or

(2) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(3) With the consent of the user of that service.

(c) Penalty. — A person who willfully and knowingly violates subsection (a) of this section is guilty of a Class 1 misdemeanor. (1987 (Reg. Sess., 1988), c. 1104, s. 1; 1993, c. 539, s. 297; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 15A-262. Application for order for pen register or trap and trace device.

(a) Application. — A law enforcement officer may make an application for an order or an extension of an order under G.S. 15A-263 authorizing or approving the installation and use of a pen register or a trap and trace device, in writing under oath or affirmation, to a superior court judge.

(b) Contents of Application. — An application under subsection (a) of this section shall include:

(1) The identity of the law enforcement officer making the application and the identity of the law enforcement agency conducting the investigation; and

(2) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency. (1987 (Reg. Sess., 1988), c. 1104, s. 1.)

§ 15A-263. Issuance of order for pen register or trap and trace device.

(a) In General. — Following application made under G.S. 15A-262, a superior court judge may enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the State if the judge finds:

(1) That there is reasonable suspicion to believe that a felony offense, or a Class A1 or Class 1 misdemeanor offense has been committed;

(2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense, if that person is known and can be named or described; and

(3) That the results of procedures involving pen registers or trap and trace devices will be of material aid in determining whether the person named in the affidavit committed the offense.

(b) Contents of Order. — An order issued under this section:

(1) Shall specify:

a. The identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached;

b. The identity, if known, of the person who is the subject of the criminal investigation;

c. The number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order; and

d. The offense to which the information likely to be obtained by the pen register or trap and trace device relates; and

(2) Shall direct, upon request of the applicant, the furnishing of information, facilities, or technical assistance necessary to accomplish the installation of the pen register or trap and trace device under G.S. 15A-264.

(c) Time Period and Extension.

(1) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed 60 days.

(2) An extension of an order issued under this section may be granted, but only upon an application for an order under G.S. 15A-262 and upon the judicial finding required by subsection (a) of this section. The period of extension shall not exceed 60 days.

(d) Nondisclosure of Existence of Pen Register or a Trap and Trace Device. — An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

(1) The order be sealed until otherwise ordered by the judge; and
(2) The person owning or leasing the line to which the pen register or a trap and trace device is attached, or who has been ordered by the judge to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any person, unless otherwise ordered by the judge.

The provisions of G.S. 15A-903 and 15A-904 shall apply to this Article. (1987 (Reg. Sess., 1988), c. 1104, s. 1; 1997-80, s. 13.)

§ 15A-264. Assistance in installation and use of a pen register or a trap and trace device.

(a) Pen Registers. — Upon the request of a law enforcement officer authorized to install and use a pen register under this Article, a provider of wire or electronic communication service, a landlord, a custodian, or other person shall furnish the officer promptly with all information, facilities, or technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the communication services, if the assistance is directed by a court order as provided in G.S. 15A-263(b)(2).

(b) Trap and Trace Devices. — Upon the request of a law enforcement officer authorized to receive the results of a trap and trace device under this Article, a provider of a wire or electronic communication service, a landlord, a custodian, or other person shall install the device immediately on the appropriate line and shall furnish the officer all additional information, facilities, or technical assistance, including installation and operation of the device unobtrusively and with a minimum of interference with the communication services, if the installation and assistance are directed by court order as provided in G.S. 15A-263(b)(2). Unless otherwise ordered by the judge, the results of the trap and trace device shall be furnished to the law enforcement officer designated in the court order at reasonable intervals during regular business hours for the duration of the order.

(c) Compensation. — A provider of a wire or electronic communication service, a landlord, a custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be compensated for the reasonable expenses incurred in providing the facilities and assistance.

(d) No Cause of Action Against a Provider Giving Information or Assistance Under this Article. — No cause of action shall be allowed in any court against any provider of a wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order under this Article.

(e) Defense. — A good faith reliance on a court order or a statutory authorization is a complete defense against any civil or criminal action brought under this Article or any other law. (1987 (Reg. Sess., 1988), c. 1104, s. 1.)

CASE NOTES

Cited in State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995).

§ 15A-265: Reserved for future codification purposes.

ARTICLE 13.

DNA Database and Databank.

§ 15A-266. Short title.

This Article may be cited as the DNA Database and Databank Act of 1993. (1993, c. 401, s. 1.)

Cross References. — For Law Enforcement Support Services Division's functions, including storage and management of DNA evidence, see G.S. 143B-508.

Editor's Note. — Session Laws 1993, c. 401, s. 2 makes this Article effective December 1, 1993, only if the General Assembly appropriates funds to implement the purposes of the act. Funds have been appropriated.

Legal Periodicals. — For comment, "DNA Databases: The Case for the Combined DNA Index System," see 29 Wake Forest L. Rev. 889 (1994).

For article, "DNA Databanks: Law Enforcement's Greatest Surveillance Tools?," see 34 Wake Forest L. Rev. 767 (1999).

For article, "Genetic Testing, Genetic Medicine, And Managed Care," see 34 Wake Forest L. Rev. 849 (1999).

For article, "The Use of Genetic Testing in the Courtroom," see 34 Wake Forest L. Rev. 889 (1999).

§ 15A-266.1. Policy.

It is the policy of the State to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person. Identification, detection, and exclusion are facilitated by the analysis of biological evidence that is often left by the perpetrator or is recovered from the crime scene. The analysis of biological evidence can also be used to identify missing persons and victims of mass disasters. (1993, c. 401, s. 1; 2003-376, s. 1; 2009-203, s. 1.)

Effect of Amendments. — Session Laws 2009-203, s. 1, effective December 1, 2009, substituted "are facilitated" for "is facilitated" in the second sentence.

CASE NOTES

Drawing Blood for DNA Testing Constitutional. — Drawing of blood from prison inmates for deoxyribonucleic acid (DNA) sampling did not violate the fourth amendment's prohibition of unreasonable search and seizure. Sanders v. Coman, 864 F. Supp. 496 (E.D.N.C. 1994).

Force Used to Obtain DNA Samples Was Not Excessive. — Ensuring compliance with a lawful order, such as the deoxyribonucleic acid (DNA) sampling procedure, was a matter of institutional security and discipline; therefore, the actual force used did not constitute cruel and unusual punishment simply because it caused pain to the inmates involved. There were no facts or allegations that the force being used to obtain DNA samples from inmates was being applied with the intention of harming the inmates. Sanders v. Coman, 864 F. Supp. 496 (E.D.N.C. 1994).

§ 15A-266.2. Definitions.

As used in this Article, unless another meaning is specified or the context clearly requires otherwise, the following terms have the meanings specified:

(1) "CODIS" means the FBI's national DNA identification index system that allows the storage and exchange of DNA records submitted by State and local forensic DNA laboratories. The term "CODIS" is derived from Combined DNA Index System.

(1a) "Custodial Agency" means the governmental entity in possession of evidence collected as part of a criminal investigation or prosecution. This term includes a central evidence storage facility operated by a State agency.

(2) "DNA" means deoxyribonucleic acid. DNA is located in the nucleus of cells and provides an individual's personal genetic blueprint. DNA encodes genetic information that is the basis of human heredity and forensic identification.

(3) "DNA Record" means DNA identification information stored in the State DNA Database or CODIS for the purpose of generating investigative leads or supporting statistical interpretation of DNA test results. The DNA record is the result obtained from the DNA typing tests. The DNA record is comprised of the characteristics of a DNA sample which are of value in establishing the identity of individuals. The results of all DNA identification tests on an individual's DNA sample are also collectively referred to as the DNA profile of an individual.

(4) "DNA Sample" in this Article means a blood, buccal, or any other sample provided by any person convicted of offenses covered by this Article or submitted to the SBI Laboratory for analysis pursuant to a criminal investigation.

(5) "FBI" means the Federal Bureau of Investigation.

(5a) "NDIS" means the National DNA Index System that is the system of DNA profile records which meet federal standards.

(6) "SBI" means the State Bureau of Investigation. The SBI is responsible for the policy management and administration of the State DNA identification record system to support law enforcement, and for liaison with the FBI regarding the State's participation in CODIS.

(7) "State DNA Database" means the SBI's DNA identification record system to support law enforcement. It is administered by the SBI and provides DNA records to the FBI for storage and maintenance in CODIS. The SBI's DNA Database system is the collective capability provided by computer software and procedures administered by the SBI to store and maintain DNA records related to forensic casework, to convicted offenders required to provide a DNA sample under this Article, and to anonymous DNA records used for research or quality control.

(8) "State DNA Databank" means the repository of DNA samples collected under the provisions of this Article. (1993, c. 401, s. 1; 2009-203, s. 2.)

Editor's Note. — Session Laws 2005-276, s. 15.7(a), provides: "Of the funds appropriated by this act to the Department of Justice, the sum of two hundred fifty thousand dollars ($250,000) for the 2005-2006 fiscal year and the sum of two hundred fifty thousand dollars ($250,000) for the 2006-2007 fiscal year shall be used to contract with private entities to reduce the backlog of rape kits in storage in local law enforcement agencies and to expedite other forensic DNA analysis. The Department shall contract with private entities to analyze bodily fluids, DNA evidence, as 'DNA' is defined in G.S. 15A-266.2, or both, in cases in which a suspect has not been identified. The Department shall maximize the use of federal grant funds to expedite the elimination of the backlog."

Session Laws 2005-276, s. 15.7(b), provides: "The Department of Justice shall report, on or before February 1, 2006, and annually thereafter to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the number of rape kits analyzed by private entities and how many of those analyses resulted in arrests or convictions. The Department shall also report on the number of rape kits analyzed by the SBI Crime Lab, the amount of the remaining backlog, and the estimated time left to eliminate the backlog."

Session Laws 2005-276, s. 15.7(c), provides: "Except as provided otherwise by this subsection, the Department of Justice shall hire only nonsworn personnel to fill vacant positions in the State Bureau of Investigation laboratory. A position may be filled with a sworn agent in any of the following circumstances: (i) the position is a promotion for a sworn agent who was employed at the State Bureau of Investigation laboratory prior to July 1, 2005, (ii) the position is a forensic drug chemist position that has as a primary duty 'responding to clandestine methamphetamine laboratories,' or (iii) the position is a forensic impressions analyst position that has as a primary duty 'responding to clandestine methamphetamine laboratories.'"

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-203, s. 2, effective December 1, 2009, added subdivisions (1a) and (5a), and substituted "a blood, buccal, or any other sample" for "a blood sample" in subdivision (4).

Legal Periodicals. — For comment, "DNA Databases: The Case for the Combined DNA Index System," see 29 Wake Forest L. Rev. 889 (1994).

§ 15A-266.3. Procedural compatibility with the FBI.

The DNA identification system as established by the SBI shall be compatible with the procedures specified by the FBI, including use of comparable test procedures, laboratory equipment, supplies, and computer software. (1993, c. 401, s. 1.)

Legal Periodicals. — For article, "DNA Databanks: Law Enforcement's Greatest Surveillance Tools?," see 34 Wake Forest L. Rev. 767 (1999).

§ 15A-266.4. Blood sample required for DNA analysis upon conviction or finding of not guilty by reason of insanity.

(a) Unless a DNA sample has previously been obtained by lawful process and stored in the State DNA database, and that sample has not been expunged pursuant to G.S. 15A-148, on or after December 1, 2003, a person who is convicted of any of the crimes listed in subsection (b) of this section or who is found not guilty of any of these crimes by reason of insanity and committed to a mental health facility in accordance with G.S. 15A-1321 shall have a DNA sample drawn upon intake to jail, prison, or the mental health facility. In addition, every person convicted on or after December 1, 2003, of any of these crimes, but who is not sentenced to a term of confinement, shall provide a DNA sample as a condition of the sentence. A person who has been convicted and incarcerated as a result of a conviction of one or more of these crimes prior to December 1, 2003, or who was found not guilty of any of these crimes by reason of insanity and committed to a mental health facility in accordance with G.S. 15A-1321 before December 1, 2003, shall have a DNA sample drawn before parole or release from the penal system or before release from the mental health facility.

(b) Crimes covered by this Article include all of the following:

(1) All felonies.
(2) G.S. 14-32.1 — Assaults on handicapped persons.
(3) G.S. 14-277.3A or former G.S. 14-277.3 — Stalking.
(4) G.S. 14-27.5A — Sexual battery.

(1993, c. 401, s. 1; 2001-487, s. 46; 2003-376, s. 2; 2005-130, s. 2; 2009-58, s. 2.)

Editor's Note. — Subdivision (b)(4), added by Session Laws 2005-130, s. 2, effective December 1, 2005, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2009-58, s. 2, effective June 5, 2009, substituted "G.S. 14-277.3A or former G.S. 14-277.3" for "G.S. 14-277.3" in subdivision (b)(3).

CASE NOTES

Cited in State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001).

§ 15A-266.5. Tests to be performed on blood sample.

(a) The tests to be performed on each blood sample are:

- (1) To analyze and type the genetic markers contained in or derived from the DNA.
- (2) For law enforcement identification purposes.
- (3) For research and administrative purposes, including:
  - a. Development of a population database when personal identifying information is removed.
  - b. To support identification research and protocol development of forensic DNA analysis methods.
  - c. For quality control purposes.
  - d. To assist in the recovery or identification of human remains from mass disasters or for other humanitarian purposes, including identification of missing persons.

(b) The DNA record of identification characteristics resulting from the DNA testing shall be stored and maintained by the SBI in the State DNA Database. The DNA sample itself will be stored and maintained by the SBI in the State DNA Databank. (1993, c. 401, s. 1.)

Legal Periodicals. — For comment, "DNA Databases: The Case for the Combined DNA Index System," see 29 Wake Forest L. Rev. 889 (1994).

§ 15A-266.6. Procedures for withdrawal of blood sample for DNA analysis.

(a) Each DNA sample required to be drawn pursuant to G.S. 15A-266.4 from persons who are incarcerated shall be drawn at the place of incarceration. DNA samples from persons who are not sentenced to a term of confinement shall be drawn immediately following sentencing. The sentencing court shall order any person not sentenced to a term of confinement to report immediately following sentencing to the location designated by the sheriff. If the sample cannot be taken immediately, the sheriff shall inform the court of the date, time, and location at which the sample shall be taken, and the court shall enter that date, time, and location into its order. A copy of the court order indicating the date, time, and location the person is to appear to have a sample taken shall be given to the sheriff. If a person not sentenced to a term of confinement fails to appear immediately following sentencing or at the date, time, and location designated in the court order, the sheriff shall inform the court of the failure to appear and the court may issue an order to show cause pursuant to G.S. 5A-15 and may issue an order for arrest pursuant to G.S. 5A-16.

(b) Only a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, laboratory technician, phlebotomist, or other health care worker with phlebotomy training shall draw any DNA sample to be submitted for analysis. No civil liability shall attach to any person authorized to draw blood by this section as a result of drawing blood from any person if the blood was drawn according to recognized medical procedures. No person shall be relieved from liability for negligence in the drawing of any DNA sample.

(c) The SBI shall provide to the sheriff the materials and supplies necessary to draw a DNA sample from a person not sentenced to a term of confinement. Any DNA sample drawn from a person not sentenced to a term of confinement shall be taken using the materials and supplies provided by the SBI. (1993, c. 401, s. 1; 2003-376, s. 3.)

CASE NOTES

Applied in State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001).

§ 15A-266.7. Procedures for conducting DNA analysis of blood sample.

The SBI shall adopt rules governing the procedures to be used in the submission, identification, analysis, and storage of DNA samples and typing results of DNA samples submitted under this Article. The DNA sample shall be securely stored in the State Databank. The typing results shall be securely stored in the State Database. These procedures shall also include quality assurance guidelines to insure that DNA identification records meet standards and audit standards for laboratories which submit DNA records to the State Database. Records of testing shall be retained on file at the SBI. (1993, c. 401, s. 1.)

§ 15A-266.8. DNA database exchange.

(a) It shall be the duty of the SBI to receive DNA samples, to store, to analyze or to contract out the DNA typing analysis to a qualified DNA laboratory that meets the guidelines as established by the SBI, classify, and file the DNA record of identification characteristic profiles of DNA samples submitted pursuant to G.S. 15A-266.7 and to make such information available as provided in this section. The SBI may contract out DNA typing analysis to a qualified DNA laboratory that meets guidelines as established by the SBI. The results of the DNA profile of individuals in the State Database shall be made available to local, State, or federal law enforcement agencies, approved crime laboratories which serve these agencies, or the district attorney's office upon written or electronic request and in furtherance of an official investigation of a criminal offense. These records shall also be available upon receipt of a valid court order directing the SBI to release these results to appropriate parties not listed above, when the court order is signed by a superior court judge after a hearing. The SBI shall maintain a file of such court orders.

(b) The SBI shall adopt rules governing the methods of obtaining information from the State Database and CODIS and procedures for verification of the identity and authority of the requester.

(c) The SBI shall create a separate population database comprised of blood samples obtained under this Article, after all personal identification is removed. Nothing shall prohibit the SBI from sharing or disseminating population databases with other law enforcement agencies, crime laboratories that serve them, or other third parties the SBI deems necessary to assist the SBI with statistical analysis of the SBI's population databases. The population database may be made available to and searched by other agencies participating in the CODIS system. (1993, c. 401, s. 1.)

§ 15A-266.9. Cancellation of authority to exchange DNA records.

The SBI is authorized to revoke the right of a forensic DNA laboratory within the State to exchange DNA identification records with federal, State, or local criminal justice agencies if the required control and privacy standards specified by the SBI for the State DNA Database are not met by these agencies. (1993, c. 401, s. 1.)

§ 15A-266.10: Repealed by Session Laws 2001-282, s. 3, effective October 1, 2001.

Cross References. — As to expungement of DNA records, see now G.S. 15A-146(b1), (b2) and G.S. 15A-148.

§ 15A-266.11. Unauthorized uses of DNA Databank; penalties.

(a) Any person who, by virtue of employment, or official position, has possession of, or access to, individually identifiable DNA information contained in the State DNA Database or Databank and who willfully discloses it in any manner to any person or agency not entitled to receive it is guilty of a Class 1 misdemeanor in accordance with G.S. 14-3.

(b) Any person who, without authorization, willfully obtains individually identifiable DNA information from the State DNA Database or Databank is guilty of a Class 1 misdemeanor in accordance with G.S. 14-3. (1993, c. 401, s. 1; 1994, Ex. Sess., c. 14, s. 15.)

§ 15A-266.12. Confidentiality of records.

(a) All DNA profiles and samples submitted to the SBI pursuant to this Article shall be treated as confidential except as provided in G.S. 15A-266.8.

(b) Only DNA records and samples that directly relate to the identification of individuals shall be collected and stored. These records and samples shall solely be used as a part of the criminal justice system for the purpose of facilitating the personal identification of the perpetrator of a criminal offense; provided that in appropriate circumstances such records may be used to identify potential victims of mass disasters or missing persons. (1993, c. 401, s. 1; 2003-376, s. 4.)

§ 15A-267. Access to DNA samples from crime scene.

(a) A criminal defendant shall have access before trial to the following:

(1) Any DNA analyses performed in connection with the case in which the defendant is charged.

(2) Any biological material, that has not been DNA tested, that was collected from the crime scene, the defendant's residence, or the defendant's property.

(3) A complete inventory of all physical evidence collected in connection with the investigation.

(b) Access as provided for in subsection (a) of this section shall be governed by G.S. 15A-902 and G.S. 15A-952.

(c) Upon a defendant's motion made before trial in accordance with G.S. 15A-952, the court shall order the SBI or any approved vendor that meets SBI contracting standards to perform DNA testing and, if the data meets NDIS criteria, order the SBI to search and/or upload to CODIS any profiles obtained from the testing upon a showing of all of the following:

(1) That the biological material is relevant to the investigation.

(2) That the biological material was not previously DNA tested or that more accurate testing procedures are now available that were not available at the time of previous testing and there is a reasonable possibility that the result would have been different.

(3) That the testing is material to the defendant's defense.

(d) The defendant shall be responsible for bearing the cost of any further testing and comparison of the biological materials, including any costs associated with the testing and comparison by the SBI in accordance with this section, unless the court has determined the defendant is indigent, in which event the State shall bear the costs. (2001-282, s. 4; 2007-539, s. 1; 2009-203, s. 3.)

Editor's Note. — Session Laws 2001-282, s. 6, made this section effective July 13, 2001, and applicable to persons charged with crimes on or after that date.

Effect of Amendments. — Session Laws 2007-539, s. 1, effective March 1, 2008, deleted "but not DNA tested" following "biological material collected" in subsection (c); and substituted "tested or that more accurate testing procedures are now available that were not available at the time of previous testing and there is a reasonable possibility that the result would have been different" for "tested" in subdivision (c)(2).

Session Laws 2009-203, s. 3, effective December 1, 2009, added subdivision (a)(3); and, in subsection (c), in the introductory language, substituted "shall order " for "may order", inserted "or any approved vendor that meets SBI contracting standards" and substituted "and, if the data meets NDIS criteria, order the SBI to search and/or upload to CODIS any profiles obtained from the testing" for "and DNA Database comparisons of any biological material collected in connection with the case in which the defendant is charged."

CASE NOTES

No Right to Appeal. — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-268. Preservation of biological evidence.

(a) As used in this section, the term "biological evidence" includes the contents of a sexual assault examination kit or any item that contains blood, semen, hair, saliva, skin tissue, fingerprints, or other identifiable human biological material that may reasonably be used to incriminate or exculpate any person in the criminal investigation, whether that material is catalogued separately on a slide or swab, in a test tube, or some other similar method, or is present on clothing, ligatures, bedding, other household materials, drinking cups, cigarettes, or any other item of evidence.

(a1) Notwithstanding any other provision of law and subject to subsection (b) of this section, a custodial agency shall preserve any physical evidence that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution. Evidence shall be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence.

(a2) The SBI shall promulgate and publish minimum guidelines that meet the requirements for retention and preservation of biological evidence under subsection (a1) of this section. Guidelines shall be published no later than January 1, 2010, and shall be reviewed and updated biennially thereafter. Law enforcement agencies and the Conference of Clerks of Superior Court shall ensure the guidelines are distributed to all employees with responsibility for maintaining custody of evidence.

(a3) When physical evidence is offered or admitted into evidence in a criminal proceeding of the General Court of Justice, the presiding judge shall inquire of the State and defendant as to the identity of the collecting agency of the evidence and whether the evidence in question is reasonably likely to contain biological evidence and if that biological evidence is relevant to establishing the identity of the perpetrator in the case. If either party asserts that the evidence in question may have biological evidentiary value, and the court so finds, the court shall instruct that the evidence be so designated in the court's records and that the evidence be preserved pursuant to the requirements of this section.

(a4) If evidence has been designated by the court as biological evidence pursuant to subsection (a3) of this section, the clerk of superior court that takes custody of evidence pursuant to the rules of practice and procedure for the superior and district courts as adopted by the Supreme Court pursuant to G.S. 7A-34 shall preserve such evidence consistent with subsection (a1) of this section. Upon conclusion of the clerk's role as custodian, as provided in the applicable rules of practice, the clerk shall return such evidence to the collecting agency, as determined in subsection (a3) of this section, in a manner that ensures the chain of custody is maintained and documented.

(a5) The duty to preserve may not be waived knowingly and voluntarily by a defendant, without a court proceeding.

(a6) The evidence described by subsection (a1) of this section shall be preserved for the following period:

(1) For conviction resulting in a sentence of death, until execution.

(2) For conviction resulting in a sentence of life without parole, until the death of the convicted person.

(3) For conviction of any homicide, sex offense, assault, kidnapping, burglary, robbery, arson or burning, for which a Class B1-E felony punishment is imposed, the evidence shall be preserved during the period of incarceration and mandatory supervised release, including sex offender registration pursuant to Article 27A of Chapter 14 of the General Statutes, except in cases where the person convicted entered and was convicted on a plea of guilty, in which case the evidence shall be preserved for the earlier of three years from the date of conviction or until released.

(4) Biological evidence collected as part of a criminal investigation of any homicide or rape, in which no charges are filed, shall be preserved for the period of time that the crime remains unsolved.

(5) A custodial agency in custody of biological evidence unrelated to a criminal investigation or prosecution referenced by subdivision (1), (2), (3), or (4) of this subsection may dispose of the evidence in accordance with the rules of the agency.

(a7) Upon written request by the defendant, the custodial agency shall prepare an inventory of biological evidence relevant to the defendant's case that has been preserved pursuant to this section.

(b) The custodial agency required to preserve evidence pursuant to subsection (a1) of this section may dispose of the evidence prior to the expiration of the period of time described in subsection (a6) of this section if all of the following conditions are met:

(1) The custodial agency sent notice of its intent to dispose of the evidence to the district attorney in the county in which the conviction was obtained.

(2) The district attorney gave to each of the following persons written notification of the intent of the custodial agency to dispose of the evidence: any defendant convicted of a felony who is currently incarcerated in connection with the case, the defendant's counsel of record for that case, and the Office of Indigent Defense Services. The notice shall be consistent with the provisions of this section, and the district attorney shall send a copy of the notice to the custodial agency. Delivery of written notification from the district attorney to the defendant was effectuated by the district attorney transmitting the written notification to the superintendent of the correctional facility where the defendant was assigned at the time and the superintendent's personal delivery of the written notification to the defendant. Certification of delivery by the superintendent to the defendant in accordance with this subdivision was in accordance with subsection (c) of this section.

(3) The written notification from the district attorney specified the following:

a. That the custodial agency would destroy the evidence collected in connection with the case unless the custodial agency received a written request that the evidence not be destroyed.

b. The address of the custodial agency where the written request was to be sent.

c. That the written request from the defendant, or his or her representative, must be received by the custodial agency within 90 days of the date of receipt by the defendant of the district attorney's written notification.

d. That the written request must ask that the evidence not be destroyed or disposed of for one of the following reasons:

1. The case is currently on appeal.
2. The case is currently in postconviction proceedings.
3. The defendant will file a motion for DNA testing pursuant to G.S. 15A-269 within 180 days of the postmark of the defendant's response to the district attorney's written notification of the custodial agency's intent to dispose of the evidence, unless a request for extension is requested by the defendant and agreed to by the custodial agency.

(4) The custodial agency did not receive a written request in compliance with the conditions set forth in sub-subdivision (3)d. of this subsection within 90 days of the date of receipt by the defendant of the district attorney's written notification.

(c) Upon receiving a written notification from a district attorney in accordance with subdivision (b)(3) of this section, the superintendent shall personally deliver the written notification to the defendant. Upon effectuating personal delivery on the defendant, the superintendent shall sign a sworn written certification that the written notification had been delivered to the defendant in compliance with this subsection indicating the date the delivery was made. The superintendent's certification shall be sent by the superintendent to the custodial agency that intends to dispose of the sample of evidence. The custodial agency may rely on the superintendent's certification as evidence of the date of receipt by the defendant of the district attorney's written notification.

(d) After a hearing held in response to a defendant's written request that the evidence not be destroyed in response to notice pursuant to subsection (b) of this section, the court may enter an order authorizing the custodial agency to dispose of the evidence if the court determines by the preponderance of the evidence that the evidence:

(1) Has no significant value for biological analysis and should be returned to its rightful owner, destroyed, used for training purposes, or otherwise disposed of as provided by law; or

(2) Repealed by Session Laws 2009-203, s. 4, effective December 1, 2009.

(3) May have value for biological analysis but is of a size, bulk, or physical character as to render retention impracticable or should be returned to its rightful owner.

(e) The court order allowing the disposition of the evidence pursuant to subdivision (d)(3) of this section shall require the custodial agency to return such evidence to the collecting agency. The collecting agency shall take reasonable measures to remove or preserve portions of evidence likely to contain biological evidence related to the offense through cuttings, swabs, or other means consistent with SBI minimum guidelines in a quantity sufficient to permit DNA testing before returning or disposing of the evidence. The court may provide the defendant an opportunity to take reasonable measures to preserve the evidence.

(f) An order regarding the disposition of evidence pursuant to this section shall be a final and appealable order. The defendant shall have 30 days from the entry of the order to file notice of appeal. The custodial agency shall not dispose of the evidence while the appeal is pending.

(g) If an entity is asked to produce evidence that is required to be preserved under the provisions of this section and cannot produce the evidence, the chief evidence custodian of the custodial agency shall provide an affidavit in which he or she describes, under penalty of perjury, the efforts taken to locate the evidence and affirms that the evidence could not be located. If the evidence that is required to be preserved pursuant to this section has been destroyed, the court may conduct a hearing to determine whether obstruction of justice and contempt proceedings are in order. If the court finds the destruction violated the defendant's due process rights, the court shall order an appropriate remedy, which may include dismissal of charges.

(h) All records documenting the possession, control, storage, and destruction of evidence related to a criminal investigation or prosecution of an offense referenced in subdivision (1), (2), (3), or (4) of subsection (a6) of this section shall be retained.

(i) Whoever knowingly and intentionally destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section, with the intent to impair the integrity of that evidence, prevent that evidence from being subjected to DNA testing, or prevent production or use of that evidence in an official proceeding, shall be punished as follows:

(1) If the evidence is for a noncapital crime, then a violation of this subsection is a Class I felony.

(2) If the evidence is for a crime of first degree murder, then a violation of this subsection is a Class H felony. (2001-282, s. 4.; 2007-539, s. 2; 2009-203, s. 4; 2009-570, s. 30(a), (b).)

Editor's Note. — Session Laws 2001-282, s. 6, made this section effective October 1, 2001, and applicable to evidence, records, and sampies in the possession of a governmental entity on or after that date.

Subdivisions (a6)(1a), (1b), (5), and (6), as enacted by Session Laws 2009-203, s. 4, were redesignated as subdivisions (a6)(2) through (5), respectively, at the direction of the Revisor of Statutes. Also at the direction of the Revisor of Statutes, in subdivision (a6)(6) and in subsection (h), the internal reference "subdivision (1), (2), (3), or (5)" was substituted for "subdivision (1), (1a), (1b), or (5)."

Session Laws 2009-86, ss. 1 through 3, provide: "SECTION 1. The Administrative Office of the Courts shall revise the 'Transcript of Plea' form that is provided to a defendant who enters a plea of guilty or no contest to a criminal offense so that the form more clearly informs the defendant that G.S. 15A-1444 imposes limitations on the right of appeal when a defendant pleads guilty or no contest to a criminal offense with which the defendant is charged, and that also assists a judge in determining whether the defendant's plea is a product of informed choice as required by G.S. 15A-1022(b). In revising the form, the Administrative Office of the Courts shall insert to the list of items that currently appear on the form a new item that reads as follows: 'Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?'.

"SECTION 2. The Administrative Office of the Courts shall revise the 'Transcript of Plea' form that is provided to a defendant who decides to enter a plea of guilty to a criminal offense so that the form more clearly informs the defendant that under G.S. 15A-268 there may be a shorter preservation period for biological evidence when a defendant pleads guilty to a criminal offense than if the defendant had been tried and convicted by a jury for the same offense, and that also assists a judge in determining whether a defendant's plea is a product of informed choice as required by G.S. 15A-1022(b). In revising the form, the Administrative Office of the Courts shall insert to the list of items that currently appear on the form a new item that reads as follows: 'Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?'.

"SECTION 3. The Administrative Office of the Courts shall revise the form pursuant to this act by September 1, 2009, and the revised form shall be made available for pleas of guilty or no contest that are entered on or after October 1, 2009."

Session Laws 2009-203, s. 7, as amended by Session Laws 2009-570, s. 30(c), provides: "(a) The Joint Select Study Committee on the Preservation of Biological Evidence is established. The membership shall be as follows:

"(1) Three members of the Senate appointed by the President Pro Tempore of the Senate.

"(2) Three members of the House of Representatives appointed by the Speaker of the House of Representatives.

"(3) The Attorney General or the Attorney General's designee.

"(4) The Director of the SBI or the Director's designee.

"(5) The Director of the Administrative Office of the Courts or the Director's designee.

"(6) The President of the Conference of Clerks of Superior Court or the President's designee.

"(7) The President of the North Carolina Association of Chiefs of Police or the President's designee.

"(8) The President of the North Carolina Sheriffs' Association or the President's designee.

"(9) The President of North Carolina Advocates for Justice or the President's designee.

"(10) One North Carolina district attorney appointed by the Speaker of the House of Representatives.

"(11) One North Carolina district attorney appointed by the President Pro Tempore of the Senate.

"(12) One public member appointed by the Speaker of the House of Representatives.

"(13) One public member appointed by the President Pro Tempore of the Senate.

"The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each appoint one legislative member of the Committee to serve as cochair. The Committee shall meet upon the call of the cochairs. A quorum of the Committee shall be a majority of its members.

"(b) Committee shall review matters related to the preservation of DNA and biological evidence, including:

"(1) The costs associated with the promulgation of minimum guidelines for the retention and preservation of biological evidence.

"(2) Emerging technologies with regard to the retention and preservation of biological evidence.

"(3) Procedures for the interagency transfer of biological evidence.

"(4) Any other topic the Committee believes is related to its purpose.

"(c) Members of the Committee shall receive per diem, subsistence, and travel allowance as provided in G.S. 120-3.1, 138-5, or 138-6, as appropriate. The expenses of the Committee shall be considered expenses incurred for the joint operation of the General Assembly. All expenses of the Committee shall be paid from the Legislative Services Commission's Reserve for Studies. The Legislative Services Officer shall assign professional and clerical staff to assist the Committee in its work.

"(d) The Committee shall submit a final report on the results of its study, including any proposed legislation, to the General Assembly on or before April 1, 2010. The Committee shall file a copy of its report with the President Pro Tempore's office, the Speaker's office, and the Legislative Library. The Committee shall terminate on April 1, 2010, or upon the filing of its final report, whichever occurs first."

Effect of Amendments. — Session Laws 2007-539, s. 2, effective March 1, 2008, rewrote the section heading; redesignated and rewrote former subsection (a) as subsection (a1); added subsections (a), (a2), and (d) through (f); and rewrote subsection (b).

Session Laws 2009-203, s. 4, effective December 1, 2009, substituted "custodial agency" for "governmental entity" throughout the section; in subsection (a), inserted "fingerprints," "human" material that may reasonably be used to incriminate or exculpate any person in the criminal investigation," "any" and "item of"; in subsection (a1), substituted "custodial agency" for "governmental entity in custody of evidence" in the first sentence; added present subsections (a2) through (a5); renumbered former subsection (a2) as subsection (a6) and rewrote subsection (a6); added subsection (a7); in subsection (b), in the introductory language, substituted "dispose" for "petition the court for an order allowing for disposition" and "subsection (a6)" for "subsection (a2)"; in subdivision (b)(2), substituted "counsel of record for that case, and the Office of Indigent Defense Services" for "current counsel of record, the Office of Indigent Defense Services, and the Attorney General"; in subdivision (b)(3)c., inserted "from the defendant, or his or her representative"; in subdivision (b)(3)d., in the introductory language, substituted "evidence" for "material" and rewrote subdivision (b)(3)d.3.; in subsection (d), in the introductory language, substituted "a hearing held in response to a defendant's written request that the evidence not be destroyed in response to notice pursuant to subsection (b) of this section," for "a hearing", deleted subdivision (d)(2), and in subdivision (d)(3), substituted "character as to render retention impracticable or should be returned to its rightful owner" for "characteristic not usually retained by the governmental entity and cannot practically be retained by the governmental entity"; rewrote subsection (e); and added subsections (g) through (i).

Session Laws 2009-570, s. 30(a) and (b), effective August 28, 2009, substituted "custodial agency's intent" for "governmental entity's intent" in subdivision (b)(3)d.3., and substituted "The custodial agency" for "The governmental entity" at the beginning of the last sentence in subsection (f).

CASE NOTES

No Right to Appeal. — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-269. Request for postconviction DNA testing.

(a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence meets all of the following conditions:

(1) Is material to the defendant's defense.

(2) Is related to the investigation or prosecution that resulted in the judgment.

(3) Meets either of the following conditions:

a. It was not DNA tested previously.

b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(b) The court shall grant the motion for DNA testing and, if testing complies with FBI requirements, the run of any profiles obtained from the testing, upon its determination that:

(1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;

(2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and

(3) The defendant has signed a sworn affidavit of innocence.

(b1) If the court orders DNA testing, such testing shall be conducted by an SBI-approved testing facility, mutually agreed upon by the petitioner and the State and approved by the court. If the parties cannot agree, the court shall designate the testing facility and provide the parties with reasonable opportunity to be heard on the issue.

(c) The court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

(d) The defendant shall be responsible for bearing the cost of any DNA testing ordered under this section unless the court determines the defendant is indigent, in which event the State shall bear the costs.

(e) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that DNA testing is necessary in the interests of justice, the court shall order a delay of the proceedings or execution of the sentence pending the DNA testing.

(f) Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.

(g) Upon receipt of a motion for postconviction DNA testing, the State shall, upon request, reactivate any victim services for the victim of the crime being investigated during the reinvestigation of the case and pendency of the proceedings.

(h) Nothing in this Article shall prohibit a convicted person and the State from consenting to and conducting postconviction DNA testing by agreement of the parties, without filing a motion for postconviction testing under this Article. (2001-282, s. 4; 2007-539, s. 3; 2009-203, s. 5.)

Editor's Note. — Session Laws 2001-282, s. 6, made this section effective October 1, 2001, and applicable to evidence, records, and samples in the possession of a governmental entity on or after that date.

Effect of Amendments. — Session Laws 2007-539, s. 3, effective March 1, 2008, added subdivision (b)(3), and made minor stylistic changes.

Session Laws 2009-203, s. 5 effective December 1, 2009, in subsection (a), in the introductory language, substituted "and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence meets" for "of any biological evidence that meets"; in subsection (b), in the introductory language, substituted "if testing complies with FBI requirements, the run of any profiles obtained from the testing" for "of the evidence"; added subsection (b1); in subsection (c), added the last sentence; and added subsections (f) through (h).

CASE NOTES

No Right to Appeal. — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

No statutory right of appeal exists from a trial court's denial of a motion for post-conviction DNA testing. State v. Brown, 170 N.C. App.

601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-270. Post-test procedures.

(a) Notwithstanding any other provision of law, upon receiving the results of the DNA testing conducted under G.S. 15A-269, the court shall conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant.

(b) If the results of DNA testing conducted under this section are unfavorable to the defendant, the court shall dismiss the motion and, in the case of a defendant who is not indigent, shall assess the defendant for the cost of the testing.

(c) If the results of DNA testing conducted under this section are favorable to the defendant, the court shall enter any order that serves the interests of justice, including an order that does any of the following:

(1) Vacates and sets aside the judgment.
(2) Discharges the defendant, if the defendant is in custody.
(3) Resentences the defendant.
(4) Grants a new trial. (2001-282, s. 4.)

Editor's Note. — Session Laws 2001-282, s. 6, made this section effective October 1, 2001, and applicable to evidence, records, and samples in the possession of a governmental entity on or after that date.

CASE NOTES

No Right to Appeal. — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-270.1. Right to appeal denial of defendant's motion for DNA testing.

The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel upon a finding of indigency. (2007-539, s. 4; 2009-203, s. 6.)

Editor's Note. — Session Laws 2007-539, s. 5, made this section effective March 1, 2008.

Effect of Amendments. — Session Laws 2009-203, s. 6, effective December 1, 2009, added the last sentence.

ARTICLE 14.

Nontestimonial Identification.

OFFICIAL COMMENTARY

This Article provides an important investigative procedure not presently available under North Carolina statutes. Under this Article, a solicitor may make application to a judge for an order requiring suspects to submit to certain nontestimonial identification procedures such as fingerprints, measurements, blood and urine specimens, saliva, hair and voice samples, handwriting exemplars, photographs and lineups. To obtain such an order the solicitor must show that there is probable cause to believe that a crime punishable by more than one year's imprisonment has been committed and that there are reasonable grounds to suspect that one or more persons committed the offense. If a specific nontestimonial identification procedure will be of material aid in determining if the suspect committed the offense, the judge may issue an order requiring the person named to appear and submit to designated procedures. If the person named in the order either fails to appear or refuses to submit to the designated procedures, he may be punished for contempt of the court which issued the order.

The Commission inserted a number of significant safeguards to accompany this procedure, including the following:

(1) The order must be served at least 72 hours in advance of the time designated for the procedures (unless the judge finds that the nature of the evidence makes it likely that the delay will adversely affect its probative value). G.S. 15A-274.

(2) The person named may seek modification of the time and place designated in the order. G.S. 15A-275.

(3) No one may be detained longer than is necessary to accomplish the procedures. G.S. 15A-279(c).

(4) Extraction of any bodily fluid must be conducted by a qualified member of the health professions; the judge may order medical supervision for any of the other procedures. G.S. 15A-279(a).

(5) No unreasonable or unnecessary force may be used in conducting the procedures. G.S. 15A-279(b).

(6) The person named has the right to have counsel present during any procedures conducted under this section and to have counsel appointed if he cannot afford to retain one. G.S. 15A-279(d). The order must inform the named person of these rights. G.S. 15A-278(5).

(7) No statement made by the named person while the procedures are being conducted may be used in evidence against him unless his attorney was actually present at the time the statement was made. G.S. 15A-279(d).

(8) The subject of the procedures must be given a copy of the results as soon as they are available. G.S. 15A-282.

In two recent decisions, the Supreme Court of the United States held that the compelled production of handwriting specimens and voice samples under orders of a grand jury do not infringe any legitimate Fourth or Fifth Amendment interests. United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973), and United States v. Mara, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973). These decisions contain substantial indications that procedures such as those recommended by the Commission in the nontestimonial identification Article are constitutionally sound, and Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) contains a dictum inviting use of a procedure similar to this. The Article also permits defendants charged with serious crimes to initiate such procedures by the State.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-271. Authority to issue order.

A nontestimonial identification order authorized by this Article may be issued by any judge upon request of a prosecutor. As used in this Article, "nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a suspect. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Legal Periodicals. — For critical analysis of this article, see 12 Wake Forest L. Rev. 387 (1976).

For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

This Article was enacted in response to dictum contained in Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) inviting the use of narrowly circumscribed procedures for obtaining the fingerprints of individuals for whom there is no probable cause to arrest. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986).

Purpose of Article. — The obvious purpose and intent of this Article, assuming its constitutionality, is to permit the examination of a suspect pursuant to nontestimonial identification order only if the results of such examination will be of material aid in determining whether such suspect actually committed the offense charged, assuming that a crime punishable by imprisonment for more than one year had been committed by some person. Manifestly, the focus of these statutes is identification of the suspect as the perpetrator, not a determination of whether the crime has been committed. State v. Whaley, 58 N.C. App. 233, 293 S.E.2d 284, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

Article Inapplicable to In-Custody Accused. — A construction of G.S. 15A-272, 15A-274, 15A-276 and 15A-502 so as to achieve a logical relationship and to effectuate apparent legislative intent mandates that this Article applies only to suspects and accused persons before arrest, and persons formally charged and arrested who have been released from custody pending trial. The Article does not apply to an in-custody accused. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Thompson, 37 N.C. App. 651, 247 S.E.2d 235 (1978); State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

This Article does not apply to an in-custody accused and this restrictive interpretation applies even to a defendant in custody on other charges at the time of the lineup. State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48, appeal dismissed, 300 N.C. 561, 270 S.E.2d 115 (1980).

Although this section does not apply to an in-custody defendant, it does not follow that a trial judge is without authority to issue a nontestimonial identification order where the defendant is in custody. State v. Vereen, 312 N.C. 499, 324 S.E.2d 250 (1985), cert. denied, 471 U.S. 1094, 105 S. Ct. 2170, 85 L. Ed. 2d 526 (1985).

This Article applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in-custody accused. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

Article Permits Investigation Where Basis for Lawful Arrest Lacking. — This Article provides an investigative procedure, not previously available in this State, for use in cases where there are reasonable grounds to suspect that a particular person committed an offense punishable by imprisonment for more than one year but where there is yet lacking a sufficient basis for making a lawful arrest. State v. McDonald, 32 N.C. App. 457, 232 S.E.2d 467, cert. denied, 292 N.C. 469, 233 S.E.2d 925 (1977).

The thrust of this Article is to provide the State with a valuable new investigative tool to compel the presence of unwilling suspects for nontestimonial identification procedures, even though insufficient probable cause exists to permit their arrest. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Consent of Defendant to Identification Procedures. — It was unnecessary for the police to utilize the procedures in this Article allowing involuntary detention for nontestimonial identification where the defendant voluntarily participated in the pretrial confrontation. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Express Waiver of Right to Counsel Held Not Required. — In a prosecution for first-degree murder, the trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendants head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provisions under this Article, by not procuring an express waiver from defendant, as the statute does not require an express waiver of the right to have counsel present at a nontestimonial identification procedure. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's right under U.S. Const., Amend. IV to be free from unreasonable searches and seizures was violated when sample of his blood was drawn pursuant to this order in the absence of a search warrant. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of U.S. Const., Amend. IV.

While gunshot residue evidence is nontestimonial identification, the evidence was still admissible where probable cause—based on the behavior and comments of the defendant coupled with the officer's knowledge of her stormy marriage—and exigent circumstances—the need for testing within four hours of the homicide—existed at the time of the gunshot residue test, and the warrantless search was, therefore, valid. State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313, 2000 N.C. App. LEXIS 544 (2000).

Hair Sample Admitted. — Trial court did not err in denying defendant's motion to suppress evidence of hair samples taken in compliance with a nontestimonial identification order entered pursuant to this section. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Applied in State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

Cited in State v. Fisher, 321 N.C. 19, 361 S.E.2d 551 (1987); State v. Pearson, 145 N.C. App. 506, 551 S.E.2d 471, 2001 N.C. App. LEXIS 733 (2001); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001).

OPINIONS OF ATTORNEY GENERAL

Article Not Exclusive of Other Procedures. — After arrest of a defendant based upon probable cause, a law-enforcement officer may utilize normal investigative procedures including fingerprinting, photographing, lineups, etc., and need not follow exclusively the nontestimonial identification procedures of this Article. See opinion of Attorney General to Mr. Anthony Brannon, 45 N.C.A.G. 60 (1975).

§ 15A-272. Time of application; additional investigative procedures not precluded.

A request for a nontestimonial identification order may be made prior to the arrest of a suspect or after arrest and prior to trial. Nothing in this Article shall preclude such additional investigative procedures as are otherwise permitted by law. (1973, c. 1286, s. 1.)

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Juvenile Procedure Compared. — Under this section, the adult statute, time of application focuses on the arrest of the suspect, while G.S. 7A-597 [see now G.S. 7B-2104] focuses on taking the juvenile into custody, indicating an expanded time period when procedural protection of juveniles is necessary. State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

Search Warrants. — In addition to a nontestimonial identification order pursuant to this section and G.S. 15A-242, a search warrant is a proper method to obtain nontestimonial identification evidence from a defendant. State v. McLean, 47 N.C. App. 672, 267 S.E.2d 695 (1980).

While gunshot residue evidence is nontestimonial identification, the evidence was still admissible where probable cause—based on the behavior and comments of the defendant coupled with the officer's knowledge of her stormy marriage—and exigent circumstances—the need for testing within four hours of the homicide—existed at the time of the gunshot residue test, and the warrantless search was, therefore, valid. State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313, 2000 N.C. App. LEXIS 544 (2000).

Applied in State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978).

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15A-273. Basis for order.

An order may issue only on an affidavit or affidavits sworn to before the judge and establishing the following grounds for the order:

(1) That there is probable cause to believe that a felony offense, or a Class A1 or Class 1 misdemeanor offense has been committed;
(2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and
(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense. (1973, c. 1286, s. 1; 1997-80, s. 14.)

Legal Periodicals. — For a discussion of this article in the context of constitutional requirements, see 12 Wake Forest L. Rev. 387 (1976).

For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's right under U.S. Const., Amend. IV to be free from unreasonable searches and seizures was violated when the sample of his blood was drawn pursuant to this order in the absence of a search warrant. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of U.S. Const., Amend. IV.

Construction with § 15A-242(4). — Where probable cause existed to support issuance of the search warrant for defendant's hair, saliva, and blood pursuant to G.S. 15A-242(4), the State did not violate the defendant's rights, under N.C. Const., Art. I, § 20, by failing to obtain a nontestimonial identification order, pursuant to this section, or to provide defendant with the right to counsel during the execution of the search warrant, under G.S. 15A-279(d). State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Sufficient Affidavit. — Affidavit submitted to obtain an order for non-testimonial identification evidence from defendant was sufficient because it was reasonable to infer that defendant met the physical description of the perpetrator given by the victims, a Peeping Tom was reported at the location of one of the rapes, an officer saw a man squatting next to an air conditioner unit there wearing a light gray or blue windbreaker and blue jeans who ran when he saw the officer, and defendant was stopped nearby wearing a light blue windbreaker and blue jeans; therefore, defendant was a suspect based on more than a minimal amount of objective justification and more than an unparticularized hunch. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Applied in State v. Pearson, 89 N.C. App. 620, 366 S.E.2d 895 (1988); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

Cited in State v. McDonald, 32 N.C. App. 457, 232 S.E.2d 467 (1977); State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); State v. Pearson, 145 N.C. App. 506, 551 S.E.2d 471, 2001 N.C. App. LEXIS 733 (2001).

§ 15A-274. Issuance of order.

Upon a showing that the grounds specified in G.S. 15A-273 exist, the judge may issue an order requiring the person named or described with reasonable certainty in the affidavit to appear at a designated time and place and to submit to designated nontestimonial identification procedures. Unless the nature of the evidence sought makes it likely that delay will adversely affect its probative value, or when it appears likely that the person named in the order may destroy, alter, or modify the evidence sought or may not appear, the order must be served at least 72 hours before the time designated for the nontestimonial identification procedure. (1973, c. 1286, s. 1; 1977, c. 832, s. 1.)

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's right under U.S. Const., Amend. IV to be free from unreasonable searches and seizures was violated when the sample of his blood was drawn pursuant to this order in the absence of a search warrant. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of U.S. Const., Amend. IV.

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980); State v. Vereen, 312 N.C. 499, 324 S.E.2d 250 (1985); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); State v. Pearson, 89 N.C. App. 620, 366 S.E.2d 895 (1988); State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 15A-275. Modification of order.

At the request of a person ordered to appear, the judge may modify the order with respect to time and place of appearance whenever it appears reasonable under the circumstances to do so. (1973, c. 1286, s. 1.)

§ 15A-276. Failure to appear.

Any person who fails without adequate excuse to obey an order to appear served upon him pursuant to this Article may be held in contempt of the court which issued the order. (1973, c. 1286, s. 1.)

CASE NOTES

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 15A-277. Service of order.

An order to appear pursuant to this Article may be served by a law-enforcement officer. The order must be served upon the person named or described in the affidavit by delivery of a copy to him personally. The order must be served at least 72 hours in advance of the time of compliance, unless the judge issuing the order has determined, in accordance with G.S. 15A-274, that delay will adversely affect the probative value of the evidence sought or when it appears likely that the person named in the order may destroy, alter, or modify the evidence sought, or may not appear. (1973, c. 1286, s. 1; 1977, c. 832, s. 2.)

CASE NOTES

Service of Order. — Under this section, an order to submit to nontestimonial identification procedures must be served at least 72 hours in advance of the time of compliance and may be served by a law-enforcement officer. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Fact that service of a nontestimonial identification order occurs subsequent to invocation of right to counsel does not affect the routine nature of the service of the order, nor does it constitute the initiation of conversation. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Applied in State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984).

§ 15A-278. Contents of order.

An order to appear must be signed by the judge and must state:

(1) That the presence of the person named or described in the affidavit is required for the purpose of permitting nontestimonial identification procedures in order to aid in the investigation of the offense specified therein;

(2) The time and place of the required appearance;

(3) The nontestimonial identification procedures to be conducted, the methods to be used, and the approximate length of time such procedures will require;

(4) The grounds to suspect that the person named or described in the affidavit committed the offense specified therein;

(5) That the person is entitled to be represented by counsel at the procedure, and to the appointment of counsel if he cannot afford to retain one;

(6) That the person will not be subjected to any interrogation or asked to make any statement during the period of his appearance except that required for voice identification;

(7) That the person may request the judge to make a reasonable modification of the order with respect to time and place of appearance, including a request to have any nontestimonial identification procedure other than a lineup conducted at his place of residence; and

(8) That the person, if he fails to appear, may be held in contempt of court. (1973, c. 1286, s. 1.)

Legal Periodicals. — For discussion of this article in the context of constitutional requirements, see 12 Wake Forest L. Rev. 387 (1976).

For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Subdivision (5) Inapplicable Where Defendant Arrested on Misdemeanor Charge. — The provisions of subdivision (5) of this section were not applicable where the defendant was legally arrested on a misdemeanor charge, and therefore could be photographed without the aid of the nontestimonial order. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

Applied in State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984).

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

§ 15A-279. Implementation of order.

(a) Nontestimonial identification procedures may be conducted by any law-enforcement officer or other person designated by the judge issuing the order. The extraction of any bodily fluid must be conducted by a qualified member of the health professions and the judge may require medical supervision for any other test ordered pursuant to this Article when he considers such supervision necessary.

(b) In conducting authorized identification procedures, no unreasonable or unnecessary force may be used.

(c) No person who appears under an order of appearance issued under this Article may be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures, and in no event for longer than six hours, unless he is arrested for an offense.

(d) Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

(e) Any person who resists compliance with the authorized nontestimonial identification procedures may be held in contempt of the court which issued the order pursuant to the provisions of G.S. 5A-12(a) and G.S. 5A-21(b).

(f) A nontestimonial identification order may not be issued against a person previously subject to a nontestimonial identification order unless it is based on different evidence which was not reasonably available when the previous order was issued.

(g) Resisting compliance with a nontestimonial identification order is not itself grounds for finding probable cause to arrest the suspect, but it may be considered with other evidence in making the determination whether probable cause exists. (1973, c. 1286, s. 1; 1977, c. 711, s. 20; 2000-144, s. 28.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Legal Periodicals. — For discussion of this article in the context of constitutional requirements, see 12 Wake Forest L. Rev. 387 (1976).

For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Nontestimonial identification procedures are those procedures by which a suspect's fingerprints, palm prints, footprints, measurements, blood specimen, urine specimen, saliva sample, hair sample, handwriting exemplar, voice sample or photographs are obtained. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Showing to Obtain Suppression of Statement. — In order to obtain the suppression of his statement under subsection (d) of this section, a defendant must show: (1) That the statement was made during nontestimonial identification procedures, and (2) that the statement was made without the presence of counsel. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Statement When Served with Order. — Suppression of statement made by defendant when he was merely being served with a copy of an order requiring his submission to nontestimonial identification procedures, and not made during any nontestimonial identification procedure, was not required by subsection (d) of this section. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Admission of evidence that defendant did not submit a blood sample did not violate defendant's rights under subsection (d) of this section. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Failure to Remind Defendant of Right to Counsel. — Given advance notice of his right to counsel in a nontestimonial identification order served on defendant three days before the withdrawal of fluid samples from defendant, any failure to remind defendant of his right to counsel prior to the taking of the fluid samples would not likely constitute a "substantial" violation of subsection (d) of this section requiring suppression of the evidence obtained. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

The defendant's right to counsel under this section was not violated by the administering of the gunshot residue kit. No order was required in that probable cause and exigent circumstances existed which justified the search and the defendant sought to suppress the results of the test, not statements made during the procedure. State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313, 2000 N.C. App. LEXIS 544 (2000).

As to right to have counsel present during gunshot residue test by virtue of subsection (d), see State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

Evidence Admissible Despite Absence of Counsel. — Defendant who complied with a nontestimonial identification order without legal representation was protected from any statements he made during the procedure, but the results of the tests themselves were not inadmissible solely because he was uncounseled, since there were no allegations of unreasonable force or delay. State v. Pearson, 145 N.C. App. 506, 551 S.E.2d 471, 2001 N.C. App. LEXIS 733 (2001), appeal dismissed, 354 N.C. 369, 557 S.E.2d 532 (2001), aff'd, 356 N.C. 22, 566 S.E.2d 50 (2002).

Evidence obtained pursuant to a non-testimonial identification order was admissible despite the nonobservance of defendant's right to counsel, under G.S. 15A-279(d), because the evidence was not obtained as a result of the violation; as the evidence would have been obtained even if counsel had been provided and present, and the lack of counsel to advise defendant to have the evidence destroyed under G.S. 15A-280 was not determinative since there was sufficient probable cause to obtain a later search warrant without that evidence. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Although it is error to deny defendant counsel during a non-testimonial identification procedure that will be used against him at trial, such error is not prejudicial where a defendant does not attempt to suppress statements made during a gun residue test, but rather attempts to suppress the test results in total; there is no prejudicial error since the physical evidence would have been seized from defendant even if counsel had been present. State v. Page, 169 N.C. App. 127, 609 S.E.2d 432, 2005 N.C. App. LEXIS 514 (2005).

Defendant's conviction for second-degree murder was upheld on appeal, because defendant failed to show any prejudice with regard to the trial court's admission of a gun residue test over defendant's objection, because defendant did not object to the admission of any statements made during the test, only the test results itself, and the trial court's finding that exigent circumstances existed was supported by the evidence in that the test had to have been administered within a few hours of the shooting and defendant admitted he was one of the last to have seen the victim alive. State v. Page, 169 N.C. App. 127, 609 S.E.2d 432, 2005 N.C. App. LEXIS 514 (2005).

This Section Not Applicable to Search Pursuant to § 15A-242(4). — Where probable cause existed to support issuance of the search warrant for defendant's hair, saliva, and blood pursuant to G.S. 15A-242(4), the State did not violate the defendant's rights, under N.C. Const., Art. I, § 20, by failing to obtain a nontestimonial identification order, pursuant to 15A-273, or to provide defendant with the right to counsel during the execution of the search warrant, under this section. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Cited in State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980); State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981); State v. Fisher, 321 N.C. 19, 361 S.E.2d 551 (1987).

§ 15A-280. Return.

Within 90 days after the nontestimonial identification procedure, a return must be made to the judge who issued the order or to a judge designated in the order setting forth an inventory of the products of the nontestimonial identification procedures obtained from the person named in the affidavit. If, at the time of the return, probable cause does not exist to believe that the person has committed the offense named in the affidavit or any other offense, the person named in the affidavit is entitled to move that the authorized judge issue an order directing that the products and reports of the nontestimonial identification procedures, and all copies thereof, be destroyed. The motion must, except for good cause shown, be granted. (1973, c. 1286, s. 1.)

CASE NOTES

Purpose. — Section 15A-280's purposes are twofold: (1) it requires a return to the judge who issued the non-testimonial identification order (NIO) setting forth a product inventory, and (2) it allows the subject of the NIO the opportunity to make a motion to have the NIO products destroyed. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Insubstantial Violation. — Officer's failure to return to the issuing judge an inventory of the evidence seized pursuant to the judge's order for non-testimonial identification evidence did not require the suppression of the evidence seized pursuant to G.S. 15A-974(2);

the collection of the evidence seized was not causally related to the statutory violation, only insignificant interests were violated as defendant was present when the evidence was taken and was aware of what was taken, and defendant did not move for destruction of the evidence after the expiration of the time within which the inventory was to be filed. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Applied in State v. Pearson, 145 N.C. App. 506, 551 S.E.2d 471, 2001 N.C. App. LEXIS 733 (2001).

Cited in State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); State v. Pearson, 89 N.C. App. 620, 366 S.E.2d 895 (1988).

§ 15A-281. Nontestimonial identification order at request of defendant.

A person arrested for or charged with a felony offense, or a Class A1 or Class 1 misdemeanor offense may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judge to whom the request was directed must order the State to conduct the identification procedures. (1973, c. 1286, s. 1; 1997-80, s. 15.)

CASE NOTES

Defendant has no statutory right to demand a lineup when charges are no longer pending against him. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

Failure to Hold Lineup after Voluntary Dismissal by State. — There was no impropriety in the State's failure to hold the lineup as ordered by the district court judge, where the State, for whatever reason, decided to take a voluntary dismissal in the case. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

Defendant Had No Right to Order Directed Against Another Person. — G.S. 15A-281 did not give a defendant the right to have a nontestimonial identification order directed against another individual; thus, defendant could not use the statute to require deoxyribonucleic acid tests on another person present at the crime scene. State v. Ryals, — N.C. App. —, 635 S.E.2d 470, 2006 N.C. App. LEXIS 2161 (2006).

The unannounced, unexpected presence of robbery victim at defendant's arraignment did not deny the defendant the right to a neutral line up procedure. The defendant made no request for such a procedure, nor did he ask the trial court to find that he intended to request such a procedure and that the procedure could not be fairly conducted. State v. Latta, 75 N.C. App. 611, 331 S.E.2d 213, cert. denied, 314 N.C. 334, 333 S.E.2d 494 (1985).

Applied in State v. Yancey, 58 N.C. App. 52, 293 S.E.2d 298 (1982); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); State v. Abdullah, 66 N.C. App. 173, 310 S.E.2d 413 (1984); State v. Welch, 316 N.C. 342, 342 S.E.2d 789 (1986).

§ 15A-282. Copy of results to person involved.

A person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available. (1973, c. 1286, s. 1.)

CASE NOTES

Insubstantial Violation. — Officer's failure to provide defendant with a copy of any test results on the evidence seized from him pursuant to a non-testimonial identification order did not require the suppression of the evidence pursuant to G.S. 15A-974(2); the interest protected was insignificant because the samples had already been taken and the deviation from the statute was an unintentional oversight. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Applied in State v. Pearson, 145 N.C. App. 506, 551 S.E.2d 471, 2001 N.C. App. LEXIS 733 (2001).

Cited in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

§§ 15A-283 through 15A-284.49: Reserved for future codification purposes.

ARTICLE 14A.

Eyewitness Identification Reform Act.

§ 15A-284.50. Short title.

This Article shall be called the "Eyewitness Identification Reform Act." (2007-421, s. 1.)

Editor's Note. — Session Laws 2007-421, s. 2, made this Article effective March 1, 2008, and applicable to offenses committed on or after that date.

§ 15A-284.51. Purpose.

The purpose of this Article is to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects. (2007-421, s. 1.)

CASE NOTES

Cited in State v. Washington, — N.C. App. —, 665 S.E.2d 799, 2008 N.C. App. LEXIS 1625 (2008).

§ 15A-284.52. Eyewitness identification reform.

(a) Definitions. — The following definitions apply in this Article:

(1) Eyewitness. — A person whose identification by sight of another person may be relevant in a criminal proceeding.

(2) Filler. — A person or a photograph of a person who is not suspected of an offense and is included in a lineup.

(3) Independent administrator. — A lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.

(4) Lineup. — A photo lineup or live lineup.

(5) Lineup administrator. — The person who conducts a lineup.

(6) Live lineup. — A procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

(7) Photo lineup. — A procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

(b) Eyewitness Identification Procedures. — Lineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:

(1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.

(2) Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in

a previously determined order, and removed after it is viewed before the next individual or photo is presented.

(3) Before a lineup, the eyewitness shall be instructed that:
  a. The perpetrator might or might not be presented in the lineup,
  b. The lineup administrator does not know the suspect's identity,
  c. The eyewitness should not feel compelled to make an identification,
  d. It is as important to exclude innocent persons as it is to identify the perpetrator, and
  e. The investigation will continue whether or not an identification is made.

The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.

(4) In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

(5) The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers. In addition:
  a. All fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features.
  b. At least five fillers shall be included in a photo lineup, in addition to the suspect.
  c. At least five fillers shall be included in a live lineup, in addition to the suspect.
  d. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.

(6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.

(7) In a lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness.

(8) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.

(9) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the lineup.

(10) Only one suspect shall be included in a lineup.

(11) Nothing shall be said to the eyewitness regarding the suspect's position in the lineup or regarding anything that might influence the eyewitness's identification.

(12) The lineup administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator. The lineup administrator shall separate all witnesses in order to discourage witnesses from conferring with one another before or during the procedure. Each witness shall be given instructions regarding the identification procedures without other witnesses present.

(13) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence

statement about the selection. There shall not be anyone present during the live lineup or photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law.

(14) Unless it is not practical, a video record of live identification procedures shall be made. If a video record is not practical, the reasons shall be documented, and an audio record shall be made. If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup.

(15) Whether video, audio, or in writing, the record shall include all of the following information:

a. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.

b. The names of all persons present at the lineup.

c. The date, time, and location of the lineup.

d. The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.

e. Whether it was a photo lineup or live lineup and how many photos or individuals were presented in the lineup.

f. The sources of all photographs or persons used.

g. In a photo lineup, the photographs themselves.

h. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

(c) Alternative Methods for Identification if Independent Administrator Is Not Used. — In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

(1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.

(2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

(3) Any other procedures that achieve neutral administration.

(d) Remedies. — All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.

(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance

to determine the reliability of eyewitness identifications. (2007-421, s. 1.)

Editor's Note. — The definitions in subsection (a) have been set out in alphabetical order at the direction of the Revisor of Statutes.

§ 15A-284.53. Training of law enforcement officers.

Pursuant to its authority under G.S. 17C-6 and G.S. 17E-4, the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission, in consultation with the Department of Justice, shall create educational materials and conduct training programs on how to conduct lineups in compliance with this Article. (2007-421, s. 1.)

ARTICLE 15.

Urgent Necessity.

§ 15A-285. Non-law-enforcement actions when urgently necessary.

When an officer reasonably believes that doing so is urgently necessary to save life, prevent serious bodily harm, or avert or control public catastrophe, the officer may take one or more of the following actions:

(1) Enter buildings, vehicles, and other premises.
(2) Limit or restrict the presence of persons in premises or areas.
(3) Exercise control over the property of others.

An action taken to enforce the law or to seize a person or evidence cannot be justified by authority of this section. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This Article grants specific authority to law-enforcement officers for taking various nonenforcement actions which are expected of them — actions which are necessary for public safety, but which do not necessarily deal with violations of the criminal law. The section would express the authority, for example, for an officer to enter a dwelling from which he heard cries for help from someone in distress or to order people from a building because of an explosive gas leak. The provision seeks to deter any possibility of its authority being used as a "cover" for searching for criminal evidence or suspects by specifying that no action taken to uncover evidence or suspects can be characterized as an action taken under this Article.

CASE NOTES

Officers were authorized to enter the house under G.S. 15A-285 after (1) defendant walked up to a police officer in his cruiser and told the trooper that he had killed his mother, (2) the officers went to the front porch of the mother's house and found what appeared to be blood, (3) and the officers then entered the house presumably to assist anyone who may have been inside. State v. Earwood, 155 N.C. App. 698, 574 S.E.2d 707, 2003 N.C. App. LEXIS 20 (2003).

Article 16.

Electronic Surveillance.

§ 15A-286. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(2) "Attorney General" means the Attorney General of the State of North Carolina, unless otherwise specified.

(3) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(4) "Chapter 119 of the United States Code" means Chapter 119 of Part I of Title 18, United States Code, being Public Law 90-351, the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986.

(5) "Communications common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of Title 47 of the United States Code.

(6) "Contents" when used with respect to any wire, oral, or electronic communication means and includes any information concerning the substance, purport, or meaning of that communication.

(7) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than:

a. Any telephone or telegraph instrument, equipment, or facility, or any component thereof:

1. Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

2. Being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of the officer's duties.

b. A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(8) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce but does not include:

a. Any wire or oral communication;

b. Any communication made through a tone-only paging device; or

c. Any communication from a tracking device (as defined in section 3117 of Title 18 of the United States Code).

(9) "Electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(10) "Electronic communication system" means any wire, radio, electronic, magnetic, photooptical, or photoelectronic facilities for the

transmission of electronic communications, and any computer facilities or related electronic equipment for the storage of such communications.

(11) "Electronic surveillance" means the interception of wire, oral, or electronic communications as provided by this Article.

(12) "Electronic storage" means:
- a. Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
- b. Any storage of such communication by an electronic communication service for the purposes of backup protection of the communication.

(13) "Intercept" means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.

(14) "Investigative or law enforcement officer" means any officer of the State of North Carolina or any political subdivision thereof, who is empowered by the laws of this State to conduct investigations of or to make arrests for offenses enumerated in G.S. 15A-290, and any attorney authorized by the laws of this State to prosecute or participate in the prosecution of those offenses, including the Attorney General of North Carolina.

(15) "Judge" means any judge of the trial divisions of the General Court of Justice.

(16) "Judicial review panel" means a three-judge body, composed of such judges as may be assigned by the Chief Justice of the Supreme Court of North Carolina, which shall review applications for electronic surveillance orders and may issue orders valid throughout the State authorizing such surveillance as provided by this Article, and which shall submit a report of its decision to the Chief Justice.

(17) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but the term does not include any electronic communication.

(18) "Person" means any employee or agent of the United States or any state or any political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

(19) "Readily accessible to the general public" means, with respect to a radio communication, that the communication is not:
- a. Scrambled or encrypted;
- b. Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication;
- c. Carried on a subcarrier or other signal subsidiary to a radio transmission;
- d. Transmitted over a communications system provided by a common carrier, unless the communication is a tone-only paging system communication; or
- e. Transmitted on frequencies allocated under Part 25, Subpart D, E, or F or Part 94 of the Rules of the Federal Communications Commission as provided by 18 U.S.C. § 2510(16)(E).

(20) "User" means any person or entity who:
- a. Uses an electronic communications service; and
- b. Is duly authorized by the provider of the service to engage in the use.

(21) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communica-

tions by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and the term includes any electronic storage of such communication. (1995, c. 407, s. 1; 1997-435, s. 1.)

CASE NOTES

Summary Judgment Properly Granted. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, including a counterclaim for interception of wire communication, the trial court properly granted plaintiff summary judgment on the interception of wire communication counterclaim as plaintiff was the provider of the voicemail and e-mail accounts accessed after defendants had left the company. As the provider of those accounts, plaintiff had the right to access them to retrieve business-related correspondence and protect its rights and property. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Cited in State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002); Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.

(a) Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person:

(1) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.

(2) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:
  a. The device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communications; or
  b. The device transmits communications by radio, or interferes with the transmission of such communications.

(3) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through violation of this Article; or

(4) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Article.

(b) It is not unlawful under this Article for any person to:

(1) Intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public;

(2) Intercept any radio communication which is transmitted:
  a. For use by the general public, or that relates to ships, aircraft, vehicles, or persons in distress;
  b. By any governmental, law enforcement, civil defense, private land mobile, or public safety communication system, including police and fire, readily available to the general public;

c. By a station operating on any authorized band within the bands allocated to the amateur, citizens band, or general mobile radio services; or

d. By any marine or aeronautical communication system; or

(3) Intercept any communication in a manner otherwise allowed by Chapter 119 of the United States Code.

(c) It is not unlawful under this Article for an operator of a switchboard, or an officer, employee, or agent of a provider of electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, provided that a provider of wire or electronic communication service may not utilize service observing or random monitoring except for mechanical or service quality control checks.

(d) It is not unlawful under this Article for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of Chapter 5 of Title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(e) Any person who, as a result of the person's official position or employment, has obtained knowledge of the contents of any wire, oral, or electronic communication lawfully intercepted pursuant to an electronic surveillance order or of the pendency or existence of or implementation of an electronic surveillance order who shall knowingly and willfully disclose such information for the purpose of hindering or thwarting any investigation or prosecution relating to the subject matter of the electronic surveillance order, except as is necessary for the proper and lawful performance of the duties of his position or employment or as shall be required or allowed by law, shall be guilty of a Class G felony.

(f) Any person who shall, knowingly or with gross negligence, divulge the existence of or contents of any electronic surveillance order in a way likely to hinder or thwart any investigation or prosecution relating to the subject matter of the electronic surveillance order or anyone who shall, knowingly or with gross negligence, release the contents of any wire, oral, or electronic communication intercepted under an electronic surveillance order, except as is necessary for the proper and lawful performance of the duties of his position or employment or as is required or allowed by law, shall be guilty of a Class 1 misdemeanor.

(g) Any public officer who shall violate subsection (a) or (d) of this section or who shall knowingly violate subsection (e) of this section shall be removed from any public office he may hold and shall thereafter be ineligible to hold any public office, whether elective or appointed. (1995, c. 407, s. 1.)

CASE NOTES

Overheard Conversation Admissible into Evidence. — Woman's continued listening to a conversation over her cordless telephone between the defendant and the statutory rape victim was not done with a bad purpose or without a justifiable excuse, rather, it was done out of concern for the welfare of a minor; therefore, her testimony as to the conversation which she heard was admissible. State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Defendants' Motion to Dismiss Properly Denied. — Court of Appeals of North Carolina held that Congress abrogated the State's right to claim sovereignty immunity when it amended 18 U.S.C.S. § 2520(a) in 1986, and it upheld the trial court's judgment refusing to dismiss an employee's claim against the North Carolina State University, her former supervisor, and university officials, alleging that her former supervisor violated her rights under federal and state wiretapping laws, U.S. Const. amends. IV and XIV, and N.C. Const. art. I, §§ 19 and 20 when he secretly recorded her personal telephone calls for illicit and personal purposes. Huber v. N.C. State Univ., 163 N.C. App. 638, 594 S.E.2d 402, 2004 N.C. App. LEXIS 569 (2004).

Summary Judgment Properly Granted. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, including a counterclaim for interception of wire communication, the trial court properly granted plaintiff summary judgment on the interception of wire communication counterclaim as plaintiff was the provider of the voicemail and e-mail accounts accessed after defendants had left the company. As the provider of those accounts, plaintiff had the right to access them to retrieve business-related correspondence and protect its rights and property. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Summary Judgment Improperly Granted. — Summary judgment was improperly granted on the husband's claim that the wife illegally videotaped the husband's in-home actions; as the husband did not establish that the videotaping included sound recordings, an issue of fact remained as only oral communications were covered by G.S. 15A-287. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002), cert. denied, 356 N.C. 673, 577 S.E.2d 120 (2003).

Consent Given. — Motion to suppress evidence phone calls that were recorded while defendant was a pre-trial detainee was denied because there was no violation of 18 U.S.C.S. § 2511 or G.S. 15A-287; defendant gave consent by continuing to talk after a message gave notice of a possible recordation. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Recorded Calls Were Admissible Based on Implied Consent. — Two recorded telephone calls defendant made from the detention center were properly admitted, where defendant was aware from two previous calls that telephone communications from the detention center were subject to being recorded and that knowledge was sufficient to find implied consent by defendant. State v. Troy, — N.C. App. —, 679 S.E.2d 498, 2009 N.C. App. LEXIS 1165 (July 21, 2009).

Cited in DIRECTV, Inc. v. Breedlove, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 24694 (E.D.N.C. Mar. 16, 2003); Directv, Inc. v. Jarman, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 9523 (W.D.N.C. May 11, 2005).

§ 15A-288. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited.

(a) Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if the person:

(1) Manufactures, assembles, possesses, purchases, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(2) Places in any newspaper, magazine, handbill, or other publication, any advertisement of:

  a. Any electronic, mechanical, or other device knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

  b. Any other electronic, mechanical, or other device where the advertisement promotes the use of the device for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(b) It is not unlawful under this section for the following persons to manufacture, assemble, possess, purchase, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications:

(1) A communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier,

acting in the normal course of the communications common carrier's business, or

(2) An officer, agent, or employee of, or a person under contract with, the State, acting in the course of the activities of the State, and with the written authorization of the Attorney General.

(c) An officer, agent, or employee of, or a person whose normal and customary business is to design, manufacture, assemble, advertise and sell electronic, mechanical and other devices primarily useful for the purpose of the surreptitious interceptions of wire, oral, or electronic communications, exclusively for and restricted to State and federal investigative or law enforcement agencies and departments. (1995, c. 407, s. 1.)

§ 15A-289. Confiscation of wire, oral, or electronic communication interception devices.

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of G.S. 15A-288 may be seized and forfeited to this State. (1995, c. 407, s. 1.)

§ 15A-290. Offenses for which orders for electronic surveillance may be granted.

(a) Orders authorizing or approving the interception of wire, oral, or electronic communications may be granted, subject to the provisions of this Article and Chapter 119 of the United States Code, when the interception:

(1) May provide or has provided evidence of the commission of, or any conspiracy to commit:

a. Any of the drug-trafficking violations listed in G.S. 90-95(h); or

b. A continuing criminal enterprise in violation of G.S. 90-95.1.

(2) May expedite the apprehension of persons indicted for the commission of, or any conspiracy to commit, an offense listed in subdivision (1) of this subsection.

(b) Orders authorizing or approving the interception of wire, oral, or electronic communications may be granted, subject to the provisions of this Article and Chapter 119 of the United States Code, when the interception may provide, or has provided, evidence of any offense that involves the commission of, or any conspiracy to commit, murder, kidnapping, hostage taking, robbery, extortion, bribery, rape, or any sexual offense, or when the interception may expedite the apprehension of persons indicted for the commission of these offenses.

(c) Orders authorizing or approving the interception of wire, oral, or electronic communications may be granted, subject to the provisions of this Article and Chapter 119 of the United States Code, when the interception may provide, or has provided, evidence of any of the following offenses, or any conspiracy to commit these offenses, or when the interception may expedite the apprehension of persons indicted for the commission of these offenses:

(1) Any felony offense against a minor, including any violation of G.S. 14-27.7 (Intercourse and sexual offenses with certain victims; consent no defense), G.S. 14-41 (Abduction of children), G.S. 14-190.16 (First degree sexual exploitation of a minor), G.S. 14-190.17 (Second degree sexual exploitation of a minor), G.S. 14-190.18 (Promoting prostitution of a minor), G.S. 14-190.19 (Participating in prostitution of a minor), or G.S. 14-202.1 (Taking indecent liberties with children).

(2) Any felony obstruction of a criminal investigation, including any violation of G.S. 14-221.1 (Altering, destroying, or stealing evidence of criminal conduct).

(3) Any felony offense involving interference with, or harassment or intimidation of, jurors or witnesses, including any violation of G.S. 14-225.2 or G.S. 14-226.

(4) Any felony offense involving assault or threats against any executive or legislative officer in violation of Article 5A of Chapter 14 of the General Statutes or assault with a firearm or other deadly weapon upon governmental officers or employees in violation of G.S. 14-34.2.

(5) Any offense involving the manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapons of mass death or destruction in violation of G.S. 14- 288.8 or the adulteration or misbranding of food, drugs, cosmetics, etc., with the intent to cause serious injury in violation of G.S. 14-34.4.

(d) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized, intercepts wire, electronic, or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in G.S. 15A-294(a) and (b). Such contents and any evidence derived therefrom may be used in accordance with G.S. 15A-294(c) when authorized or approved by a judicial review panel where the panel finds, on subsequent application made as soon as practicable, that the contents were otherwise intercepted in accordance with this Article or Chapter 119 of the United States Code.

(e) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this Article or Chapter 119 of the United States Code, shall lose its privileged character. (1995, c. 407, s. 1.)

§ 15A-291. Application for electronic surveillance order; judicial review panel.

(a) The Attorney General or the Attorney General's designee may, pursuant to the provisions of section 2516(2) of Chapter 119 of the United States Code, apply to a judicial review panel for an order authorizing or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, and for such offenses and causes as are enumerated in G.S. 15A-290. A judicial review panel shall be composed of such judges as may be assigned by the Chief Justice of the Supreme Court of North Carolina or an Associate Justice acting as the Chief Justice's designee, which shall review applications for electronic surveillance orders and may issue orders valid throughout the State authorizing such surveillance as provided by this Article, and which shall submit a report of its decision to the Chief Justice. A judicial review panel may be appointed by the Chief Justice or an Associate Justice acting as the Chief Justice's designee upon the notification of the Attorney General's Office of the intent to apply for an electronic surveillance order.

(b) A judicial review panel is hereby authorized to grant orders valid throughout the State for the interception of wire, oral, or electronic communications. Applications for such orders may be made by the Attorney General or the Attorney General's designee. The Attorney General or the Attorney General's designee in applying for such orders, and a judicial review panel in granting such orders, shall comply with all procedural requirements of section 2518 of Chapter 119 of the United States Code. The Attorney General or the Attorney General's designee may make emergency applications as provided by section 2518 of Chapter 119 of the United States Code. In applying section

2518 the word "judge" in that section shall be construed to refer to the judicial review panel, unless the context otherwise indicates. The judicial review panel may stipulate any special conditions it feels necessary to assure compliance with the terms of this act.

(c) No judge who sits as a member of a judicial review panel shall preside at any trial or proceeding resulting from or in any manner related to information gained pursuant to a lawful electronic surveillance order issued by that panel.

(d) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication must be made in writing upon oath or affirmation to the judicial review panel. Each application must include the following information:

(1) The identity of the office requesting the application;
(2) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including:
  a. Details as to the particular offense that has been, or is being committed;
  b. Except as provided in G.S. 15A-294(i), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;
  c. A particular description of the type of communications sought to be intercepted; and
  d. The identity of the person, if known, committing the offense and whose communications are to be intercepted;
(3) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
(4) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter must be added;
(5) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making adjudication, made to a judicial review panel for authorization to intercept, or for approval of interceptions of wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in the application, and the action taken by that judicial review panel on each such application; and
(6) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(e) Before acting on the application, the judicial review panel may examine on oath the person requesting the application or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the panel in determining whether probable cause exists for the issuance of the order unless the information is either recorded or contemporaneously summarized in the record or on the face of the order by the panel. (1995, c. 407, s. 1; 1997-435, s. 2; 2005-207, s. 1.)

CASE NOTES

Cited in Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 15A-292. Request for application for electronic surveillance order.

(a) The head of any municipal, county, or State law enforcement agency or any district attorney may submit a written request to the Attorney General that the Attorney General apply to a judicial review panel for an electronic surveillance order to be executed within the requesting agency's jurisdiction. The written requests shall be on a form approved by the Attorney General and shall provide sufficient information to form the basis for an application for an electronic surveillance order. The head of a law enforcement agency shall also submit a copy of the request to the district attorney, who shall review the request and forward it to the Attorney General along with any comments he may wish to include. The Attorney General is authorized to review the request and decide whether it is appropriate to submit an application to a judicial review panel for an electronic surveillance order. If a request for an application is deemed inappropriate, the Attorney General shall send a signed, written statement to the person submitting the request, and to the district attorney, summarizing the reasons for failing to make an application. If the Attorney General decides to submit an application to a judicial review panel, he shall so notify the requesting agency head, the district attorney, and the head of the local law enforcement agency which has the primary responsibility for enforcing the criminal laws in the location in which it is anticipated the majority of the surveillance will take place, if not the same as the requesting agency head, unless the Attorney General has probable cause to believe that the latter notifications should substantially jeopardize the success of the surveillance or the investigation in general. If a judicial review panel grants an electronic surveillance order, a copy of such order shall be sent to the requesting agency head and the district attorney, and a`summary of the order shall be sent to the head of the local law enforcement agency with primary responsibility for enforcing the criminal laws in the jurisdiction where the majority of the surveillance will take place, if not the same as the requesting agency head, unless the judicial review panel finds probable cause to believe that the latter notifications would substantially jeopardize the success of the surveillance or the investigation.

(b) This Article does not limit the authority of the Attorney General to apply for electronic surveillance orders independent of, or contrary to, the requests of law enforcement agency heads, nor does it limit the discretion of the Attorney General in determining whether an application is appropriate under any given circumstances.

(c) The Chief Justice of the North Carolina Supreme Court shall receive a report concerning each decision of a judicial review panel. (1995, c. 407, s. 1.)

§ 15A-293. Issuance of order for electronic surveillance; procedures for implementation.

(a) Upon application by the Attorney General pursuant to the procedures in G.S. 15A-291, a judicial review panel may enter an ex parte order, as requested or as modified, authorizing the interception of wire, oral, or electronic communications, if the panel determines on the basis of the facts submitted by the applicant that:

(1) There is probable cause for belief that an individual is committing, has committed, or is about to commit an offense set out in G.S. 15A-290;

(2) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(3) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and

(4) Except as provided in G.S. 15A-294(i), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by the individual described in subdivision (1) of this subsection.

(b) Each order authorizing the interception of any wire, oral, or electronic communications must specify:

(1) The identity of the person, if known, whose communications are to be intercepted;

(2) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted, and the means by which such interceptions may be made;

(3) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(4) The identity of the agency authorized to intercept the communications and of the person requesting the application; and

(5) The period of time during which such interception is authorized, including a statement as to whether or not the interception automatically terminates when the described communication has been first obtained.

(c) No order entered under this Article may authorize the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. Such 30-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or 10 days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with G.S. 15A-291 and the panel making the findings required by subsection (a) of this section. The period of extension shall be no longer than the panel determines to be necessary to achieve the purpose for which it was granted and in no event for longer than 30 days. Every order and extension thereof must contain a provision that the authorization to intercept be executed as soon as practicable, be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this Article, and terminate upon attainment of the authorized objective, or in any event in 30 days, as is appropriate. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception. An interception under this Article may be conducted in whole or in part by State or federal government personnel, or by an individual operating under a contract with the State or federal government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(d) Whenever an order authorizing interception is entered pursuant to this Article, the order may require reports to be made to the issuing judicial review panel showing that progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports must be made at such intervals as the panel may require.

(1) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this Article must be recorded on tape, wire, or electronic or other comparable device. The recording of the contents of any wire, electronic, or oral communication under this subsection must be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of

the period of the order, or extensions thereof, the recordings must be made available to the judicial review panel and sealed under its direction. Custody of the recordings is wherever the panel orders. They may not be destroyed except upon an order of the issuing panel and in any event must be kept for 10 years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of G.S. 15A-294(a) and (b) for investigations. The contents of any wire, oral, or electronic communication or evidence derived therefrom may not be disclosed or used under G.S. 15A-294(c) unless they have been kept sealed.

(2) Applications made and orders granted under this Article must be sealed by the panel. Custody of the applications and orders may be disclosed only upon a showing of good cause before the issuing panel and may not be destroyed except on its order and in any event must be kept for 10 years.

(3) Any violation of the provisions of this subsection may be punished as for contempt.

(e) The State Bureau of Investigation shall own or control and may operate any equipment used to implement electronic surveillance orders issued by a judicial review panel and may operate or use, in implementing any electronic surveillance order, electronic surveillance equipment in which a local government or any of its agencies has a property interest.

(f) The Attorney General shall establish procedures for the use of electronic surveillance equipment in assisting local law enforcement agencies implementing electronic surveillance orders. The Attorney General shall supervise such assistance given to local law enforcement agencies and is authorized to conduct statewide training sessions for investigative and law enforcement officers regarding this Article. (1995, c. 407, s. 1; 1997-435, s. 2.1; 2005-207, ss. 2, 3.)

§ 15A-294. Authorization for disclosure and use of intercepted wire, oral, or electronic communications.

(a) Any investigative or law enforcement officer who, by any means authorized by this Article or Chapter 119 of the United States Code, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(b) Any investigative or law enforcement officer, who by any means authorized by this Article or Chapter 119 of the United States Code, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of the officers' official duties.

(c) Any person who has received, by any means authorized by this Article or Chapter 119 of the United States Code, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding in any court or before any grand jury in this State, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(d) Within a reasonable time, but no later than 90 days after the filing of an application for an order or the termination of the period of an order or the extensions thereof, the issuing judicial review panel must cause to be served on the persons named in the order or the application and such other parties as the panel in its discretion may determine, an inventory that includes notice of:

(1) The fact of the entry of the order or the application;

(2) The date of the entry and the period of the authorized interception; and

(3) The fact that during the period wire, oral, or electronic communications were or were not intercepted.

(d1) The notification required pursuant to G.S. 15A-294(d) may be delayed if the judicial review panel has probable cause to believe that notification would substantially jeopardize the success of an electronic surveillance or a criminal investigation. Delay of notification shall be only by order of the judicial review panel. The period of delay shall be designated by the judicial review panel and may be extended from time to time until the jeopardy to the electronic surveillance or the criminal investigation dissipates.

(e) The issuing judicial review panel, upon the filing of a motion, may in its discretion, make available to such person or his counsel for inspection, such portions of the intercepted communications, applications, and orders as the panel determines to be required by law or in the interest of justice.

(f) The contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in any court of this State unless each party, not less than 20 working days before the trial, hearing, or other proceeding, has been furnished with a copy of the order and accompanying application, under which the interception was authorized.

(g) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that:

(1) The communication was unlawfully intercepted;

(2) The order of authorization under which it was intercepted is insufficient on its face; or

(3) The interception was not made in conformity with the order of authorization.

Such motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of this motion. If the motion is granted, the contents of the intercepted wire, oral, or electronic communication, or evidence derived therefrom, must be treated as having been obtained in violation of this Article.

(h) In addition to any other right to appeal, the State may appeal:

(1) From an order granting a motion to suppress made under subdivision (1) of this subsection, if the district attorney certifies to the judge granting the motion that the appeal is not taken for purposes of delay. The appeal must be taken within 30 days after the date the order of suppression was entered and must be prosecuted as are other interlocutory appeals; or

(2) From an order denying an application for an order of authorization, and the appeal may be made ex parte and must be considered in camera and in preference to all other pending appeals.

(i) The requirements of G.S. 15A-293(b)(2) and G.S. 15A-293(a)(4) relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if:

(1) In the case of an application with respect to the interception of an oral communication:

a. The application is by a State investigative or law enforcement officer and is approved by the Attorney General or his designee;

b. The application contains a full and complete statement as to why the specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

c. The judicial review panel finds that the specification is not practical.

(2) In the case of an application with respect to a wire or electronic communication:

a. The application is by a State investigative or law enforcement officer and is approved by the Attorney General or his designee;

b. The application identifies the person believed to be committing the offense and whose communications are to be intercepted, and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

c. The judicial review panel finds that the showing has been adequately made; and

d. The order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which the communication will be or was transmitted.

(j) An interception of a communication under an order with respect to which the requirements of G.S. 15A-293(b)(2) and G.S. 15A-293(a)(4) do not apply by reason of subdivision (i)(1) of this section shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subdivision (i)(2) of this section may move the court to modify or quash the order on the grounds that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously. (1995, c. 407, s. 1; 1997-435, s. 3; 2005-207, s. 4.)

§ 15A-295. Reports concerning intercepted wire, oral, or electronic communications.

In January of each year, the Attorney General of this State must report to the Administrative Office of the United States Court the information required to be filed by section 2519 of Title 18 of the United States Code, as heretofore or hereafter amended, and file a copy of the report with the Administrative Office of the Courts of North Carolina. (1995, c. 407, s. 1.)

§ 15A-296. Recovery of civil damages authorized.

(a) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this Article, has a civil cause of action against any person who intercepts, discloses, uses, or procures any other person to intercept, disclose, or use such communications, and is entitled to recover from any other person:

(1) Actual damages, but not less than liquidated damages, computed at the rate of one hundred dollars ($100.00) a day for each day of violation or one thousand dollars ($1,000), whichever is higher;

(2) Punitive damages; and

(3) A reasonable attorneys' fee and other litigation costs reasonably incurred.

(b) Good faith reliance on a court order or on a representation made by the Attorney General or a district attorney is a complete defense to any civil or criminal action brought under this Article. (1995, c. 407, s. 1.)

CASE NOTES

Cited in Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

§ 15A-297. Conformity to provisions of federal law.

It is the intent of this Article to conform the requirements of all interceptions of wire, oral, or electronic communications conducted by investigative or law enforcement officers in this State to provisions of Chapter 119 of the United States Code, except where the context indicates a purpose to provide safeguards even more protective of individual privacy and constitutional rights. (1995, c. 407, s. 1.)

CASE NOTES

Immunity. — State of North Carolina's wiretapping statute contains no clear intent to waive the State's immunity under USCS Const. Amend. 11; the general reference to federal wiretapping law does not clearly evidence an intent to waive the state's immunity in federal courts. Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

§ 15A-298. Subpoena authority.

Pursuant to rules issued by the Attorney General, the Director of the State Bureau of Investigation or the Director's designee may issue an administrative subpoena to a communications common carrier or an electronic communications service to compel production of business records if the records:

(1) Disclose information concerning local or long-distance toll records or subscriber information; and

(2) Are material to an active criminal investigation being conducted by the State Bureau of Investigation. (1995, c. 407, s. 1; 1997-435, s. 4.)

ARTICLE 16A.

Discontinuation of Telecommunications Services.

§ 15A-299. Discontinuation of telecommunications services used for unlawful purposes.

(a) The legislature finds that some persons use telecommunications services to violate State or federal criminal law. The legislature further finds that some persons use telecommunications services or technology, such as call forwarding and cellular radio transmission, to avoid detection or arrest.

(b) A customer of a telecommunications company operating within the State may use telecommunications services only for lawful purposes.

(c) If a local, State, or federal law enforcement officer acting within the scope of the officer's duties obtains evidence that telecommunications services are being used or have been used by a customer or by the employee or agent of the customer to violate State or federal criminal law, the officer may request either the district attorney or the Attorney General as appropriate to apply to the district court of the county in which the suspected violation of State or federal criminal law occurred for an order requiring the telecommunications company to discontinue service to the customer. The court shall hold a hearing on the application as soon as possible, but no sooner than 48 hours after notice of the application for discontinuation of service is delivered to the address at which the telecommunications services are furnished or to the address to which bills for telecommunications services are mailed, according to the telecommunications company records. Notice must also be given to the registered agent for the service of process upon the telecommunications company at least 48 hours prior to the hearing. Notices required under this section shall be given pursuant to the provisions of Rule 4 of the North Carolina Rules of Civil Procedure. If the court finds clear and convincing evidence that the telecommunications services are being used or have been used to violate State or federal criminal law, the court may order the telecommunications company to discontinue such service immediately.

(d) Telecommunications services discontinued under this section may be reinstated only by court order, and call forwarding or message referrals, whether recorded or live, may not be provided until reinstatement of service is ordered by the court. The court may order reinstatement of telecommunications services if it finds that the customer is not likely to use the services to violate State or federal criminal law. The standard of proof shall be the same as that used for the disconnect order.

(e) A telecommunications company shall be held harmless from liability to any person when complying with any court order issued under this section. (1997-372, s. 1.)

§ 15A-300: Reserved for future codification purposes.

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

OFFICIAL COMMENTARY

Criminal process includes the citation, criminal summons, warrant for arrest, and order for arrest. They all serve the function of requiring a person to come to court. Each is issued by an official for some specific cause.

An attempt has been made here to standardize the component parts of the different instruments, varying a particular component only as it serves a different function. For example, a warrant for arrest contains a statement of the crime based upon a showing of probable cause and an order directing a law-enforcement officer to arrest the defendant. The criminal summons contains the same components except the order directed to the officer to arrest, which is replaced by an order to the defendant to appear. This should serve to emphasize the similarities and differences in the various types of process with resultant accuracy in usage. In addition, this should facilitate the further development of multiple purpose forms, with components which can be selected as desired, resulting in both convenience and economy.

The warrant is the key instrument, both because of frequency of usage and the impact of decisions of the courts. The commentary there explains the development of some differences from present process.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-301. Criminal process generally.

(a) Formal Requirements. —

(1) A record of each criminal process issued in the trial division of the General Court of Justice must be maintained in the office of the clerk in either paper form or in electronic form in the Electronic Repository as provided in G.S. 15A-301.1.

(2) Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it.

(b) To Whom Directed. — Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear and must be delivered to and may be served by any law-enforcement officer having authority and territorial jurisdiction to make an arrest for the offense charged, except that in those instances where the defendant is called into a law-enforcement agency to receive a summons, any employee so designated by the agency's chief executive officer may serve a criminal summons at the agency's office. The citation must be directed to the person cited to appear.

(c) Service. —

(1) A law-enforcement officer or other employee designated as provided in subsection (b) receiving for service or execution a criminal process that was first created and exists only in paper form must note thereon the date and time of its receipt. A law enforcement officer receiving a copy of a criminal process that was printed in paper form as provided in G.S. 15A-301.1 shall cause the date of receipt to be recorded as provided in that section. Upon execution or service, a copy of the process must be delivered to the person arrested or served.

(2) A corporation may be served with criminal summons as provided in G.S. 15A-773.

(d) Return. —

(1) The officer or other employee designated as provided in subsection (b) who serves or executes a criminal process that was first created and exists only in paper form must enter the date and time of the service or execution on the process and return it to the clerk of court in the county in which issued. The officer or other employee designated as provided in subsection (b) of this section who serves or executes a copy of a criminal process that was printed in paper form as provided in G.S. 15A-301.1 shall promptly cause the date of the service or execution to be recorded as provided in that section.

(2) If criminal process that was created and exists only in paper form is not served or executed within a number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with a reason for the failure of service or execution noted thereon.

a. Warrant for arrest — 180 days.

b. Order for arrest — 180 days.

c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk as required by subdivision (2) of this subsection does not invalidate the process, nor does it invali-

date service or execution made after the period specified in subdivision (2).
- (4) The clerk to which return of a criminal process that was created and exists only in paper form is made may redeliver the process to a law-enforcement officer or other employee designated as provided in subsection (b) for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(e) Copies to Be Made by Clerk. —
- (1) The clerk may make a certified copy of any criminal process that was created and exists only in paper form filed in his office pursuant to subsection (a) when the original process has been lost or when the process has been returned pursuant to subdivision (d)(2). The copy may be executed as effectively as the original process whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4).
- (2) When criminal process is returned to the clerk pursuant to subdivision (d)(1) and it appears that the appropriate venue is in another county, the clerk must make and retain a certified copy of the process and transmit the original process to the clerk in the appropriate county.
- (3) Upon request of a defendant, the clerk must make and furnish to him without charge one copy of every criminal process filed against him.
- (4) Nothing in this section prevents the making and retention of uncertified copies of process for information purposes under G.S. 15A-401(a)(2) or for any other lawful purpose.

(f) Protection of Process Server. — An officer or other employee designated as provided in subsection (b), and serving process as provided in subsection (b), receiving under this section or under G.S. 15A-301.1 criminal process which is complete and regular on its face may serve the process in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service.

(g) Recall of Process — Authority. — A criminal process that has not been served on the defendant, other than a citation, shall be recalled by a judicial official or by a person authorized to act on behalf of a judicial official as follows:
- (1) A warrant or criminal summons shall be recalled by the issuing judicial official when that official determines that probable cause did not exist for its issuance.
- (2) Any criminal process other than a warrant or criminal summons may be recalled for good cause by any judicial official of the trial division in which it was issued. Good cause includes, without limitation, the fact that:
  - a. A copy of the process has been served on the defendant.
  - b. All charges on which the process is based have been disposed.
  - c. The person named as the defendant in the process is not the person who committed the charged offense.
  - d. It has been determined that grounds for the issuance of an order for arrest did not exist, no longer exist or have been satisfied.
- (3) The disposition of all charges on which a process is based shall effect the recall, without further action by the court, of that process and of all other outstanding process issued in connection with the charges, including all orders for arrest issued for the defendant's failure to appear to answer the charges.

When the process was first created and exists only in paper form, the recall shall promptly be communicated by any reasonable means to each law enforcement agency known to be in possession of the original or a copy of the process, and each agency shall promptly return the process to the court, unserved. When the process is in the Electronic Repository, the recall shall promptly be entered in the Electronic Repository, and no further copies of the process shall be printed in paper form. The recall shall also be communicated by any reasonable means to each agency that is known to be in possession of a copy of the process in paper form and that does not have remote electronic access to the Electronic Repository. (1868-9, c. 178, subch. 3, s. 4; Code, s. 1135; Rev., s. 3159; C.S., s. 4525; 1957, c. 346; 1969, c. 44, s. 28; 1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 136, 137; 1979, c. 725, ss. 1-3; 1989, c. 262, s. 3; 2002-64, s. 3.)

OFFICIAL COMMENTARY

Several self-explanatory directory provisions are gathered here, familiar to all who have dealt with service and return of process. The new provisions for mandatory return contained in subsection (d), "Return," are designed to reduce the number of unaccounted-for "floating" warrants and other process. It should be noted that the requirements for 90-day return do not invalidate the process or its service after that time, or in any respect create a limitation on prosecution of the crime. These provisions are administrative and the process may be returned to the officer for further attempts at service.

Subsection (a) provides for the filing of a copy of criminal process in the office of the clerk of superior court. At times an arrest warrant may be issued in one county when the crime has been committed in another and must be tried there. Subsection (e)(2) provides that in that circumstance the clerk keeps a certified copy and forwards the original to the county of appropriate venue.

Subsection (f), "Protection of Officer," is new, added to insure that an officer may execute criminal process promptly without fear or danger of encountering difficulty because of some deficiency not apparent to him.

Local Modification. — Carteret: 2001-60.

Cross References. — As to criminal liability for failure to return process, see G.S. 14-242. As to electronic technology in criminal process and procedure, see G.S. 15A-101.1. As to liability of sheriff for failure to execute process, see G.S. 162-14.

CASE NOTES

Clerk Properly Denied Request from Bond Company's Attorney for an Order of Arrest. — Where a bond company's attorney made the request for an order for arrest of defendant who failed to appear at a scheduled court appearance, the county clerk complied with the statutory mandate in denying the request, because the attorney was not a law enforcement officer. State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

Applied in State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

Cited in In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986).

§ 15A-301.1. Electronic Repository.

(a) The Administrative Office of the Courts shall create and maintain, in cooperation with State and local law enforcement agencies, an automated electronic repository for criminal process (hereinafter referred to as the Electronic Repository), which shall comprise a secure system of electronic data entry, storage, and retrieval that provides for creating, signing, issuing, entering, filing, and retaining criminal process in electronic form, and that provides for the following with regard to criminal process in electronic form:

(1) Tracking criminal process.

(2) Accessing criminal process through remote electronic means by all authorized judicial officials and employees and all authorized law enforcement officers and agencies that have compatible electronic access capacity.

(3) Printing any criminal process in paper form by any authorized judicial official or employee or any authorized law enforcement officer or agency.

The Administrative Office of the Courts shall assure that all electronic signatures effected through use of the system meet the requirements of G.S. 15A-101.1(5).

(b) Any criminal process may be created, signed, and issued in electronic form, filed electronically in the office of a clerk of superior court, and retained in electronic form in the Electronic Repository.

(c) Any process that was first created, signed, and issued in paper form may subsequently be filed in electronic form and entered in the Electronic Repository by the judicial official who issued the process or by any person authorized to enter it on behalf of the judicial official. All copies of the process in paper form are then subject to the provisions of subsections (i) and (k) of this section.

(d) Any criminal process in the Electronic Repository shall be part of the official records of the clerk of superior court of the county for which it was issued and shall be maintained in the office of that clerk as required by G.S. 15A-301(a).

(e) Any criminal process in the Electronic Repository may, at any time and at any place in this State, be printed in paper form and delivered to a law enforcement agency or officer by any judicial official, law enforcement officer, or other authorized person.

(f) When printed in paper form pursuant to subsection (e) of this section, any copy of a criminal process in the Electronic Repository confers the same authority and has the same force and effect for all other purposes as the original of a criminal process that was created and exists only in paper form.

(g) Service of any criminal process in the Electronic Repository may be effected by delivering to the person to be served a copy of the process that was printed in paper form pursuant to subsection (e) of this section.

(h) The tracking information specified in subsection (i) of this section shall promptly be entered in the Electronic Repository when one or both of the following occurs:

(1) A process is first created, signed, and issued in paper form and subsequently entered in electronic form in the Electronic Repository as provided in subsection (c) of this section.

(2) A copy of a process in the Electronic Repository is printed in paper form pursuant to subsection (e) of this section.

(i) The following tracking information shall be entered in the Electronic Repository in accordance with subsections (c) and (h) of this section:

(1) The date and time when the process was printed in paper form.

(2) The name of the law enforcement agency by or for which the process was printed in paper form.

(3) If available, the name and identification number of the law enforcement officer to whom any copy of the process was delivered.

(j) The service requirements set forth in subsection (k) of this section shall apply to:

(1) Each copy of a criminal process that is first created in paper form and subsequently entered into the Electronic Repository as provided in subsection (c) of this section.

(2) Each copy of a criminal process in the Electronic Repository that is printed in paper form pursuant to subsection (e) of this section.

(k) Service Requirements for Process Entered in the Electronic Repository. — The copy of the process shall be served not later than 24 hours after it has been printed. The date, time, and place of service shall promptly be recorded in the Electronic Repository and shall be part of the official records of the court. If the process is not served within 24 hours, that fact shall promptly be recorded in the Electronic Repository and all copies of the process in paper form shall be destroyed. The process may again be printed in paper form at later times and at the same or other places. Subsection (f) of this section applies to each successively printed copy of the process. When service of the warrant is no longer being actively pursued, that fact shall be promptly recorded in the Electronic Repository.

(*l*) A law enforcement officer or agency that does not have compatible remote access to the Electronic Repository shall promptly communicate, by any reasonable means, the information required by subsection (k) of this section to the clerk of superior court of the county in which the process was issued or to any other person authorized to enter information into the Electronic Repository, and the information shall promptly be entered in the Electronic Repository.

(m) Failure to enter any information as required by subsection (i) or (k) of this section does not invalidate the process, nor does it invalidate service or execution made after the period specified in subsection (k) of this section.

(n) A warrant created and existing only in paper form is returned within the meaning of G.S. 132-1.4(k) when it is returned as provided in G.S. 15A-301(d). A warrant that exists only in electronic form in the Electronic Repository is returned within the meaning of G.S. 132-1.4(k), when it has been served or when service of the warrant is no longer being actively pursued, as either fact is entered in the Electronic Repository pursuant to subsection (k) of this section. (2002-64, s. 2.)

Cross References. — As to electronic technology in criminal process and procedure, see G.S. 15A-101.1.

§ 15A-302. Citation.

(a) Definition. — A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges.

(b) When Issued. — An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.

(c) Contents. — The citation must:

(1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,

(2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,

(3) Identify the officer issuing the citation, and

(4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

(d) Service. — A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. If the cited person refuses to sign, the officer shall certify delivery of the citation by signing the original, which shall thereafter be filed with the clerk. Failure of the person cited to sign the citation shall not constitute grounds for his arrest or the requirement that he post a bond. When a citation is issued for a parking offense, a copy shall be delivered to the operator of a vehicle who is present at the time of service, or shall be delivered to the registered owner of the vehicle if the operator is not present by affixing a copy of the citation to the vehicle in a conspicuous place.

(e) Dismissal by Prosecutor. — If the prosecutor finds that no crime or infraction is charged in the citation, or that there is insufficient evidence to warrant prosecution, he may dismiss the charge and so notify the person cited.

An appropriate entry must be made in the records of the clerk. It is not necessary to enter the dismissal in open court or to obtain consent of the judge.

(f) Citation No Bar to Criminal Summons or Warrant. — If the offense is a misdemeanor, a criminal summons or a warrant may issue notwithstanding the prior issuance of a citation for the same offense. If a defendant fails to appear in court as directed by a citation that charges the defendant with a misdemeanor, an order for arrest for failure to appear may be issued by a judicial official.

(g) Preparation of Form. — The form and content of the citation is as prescribed by the Administrative Officer of the Courts. The form of citation used for violation of the motor vehicle laws must contain a notice that the driving privilege of the person cited may be revoked for failure to appear as cited, and must be prepared as provided in G.S. 7A-148(b). (1973, c. 1286, s. 1; 1975, c. 166, ss. 3, 27; 1983, c. 327, s. 4; 1985, c. 385; c. 764, s. 4; 1989, c. 243, s. 1; 2003-15, s. 1.)

OFFICIAL COMMENTARY

Although the use of a citation is quite familiar in North Carolina for traffic cases, it previously has not had statutory sanction as criminal process. Actually, there has not been a citation, but rather a warrant form not acted upon by a judicial officer. (There has been an authorization in G.S. 7A-148 for the chief district judges to prescribe a multicopy uniform traffic ticket, and that is reflected in subsection (g) of this section.)

This statute provides for a separate criminal process, applicable to any misdemeanor. It is issued by a law-enforcement officer to direct the appearance in court of the person charged when the officer lacks authority or deems it inappropriate to make an arrest and take the defendant into custody.

Since the citation is issued by a law-enforcement officer, contempt of court may not be used to enforce obedience to its direction to appear. Thus, other criminal process may be issued if the defendant does not appear.

Subsection (f)(2) refers to a proposed section of the Criminal Code Commission's proposal which would have inserted provisions in Chapter 20 of the General Statutes. The amendment to Chapter 20 was deleted in the General Assembly, but subsection (f)(2) was not deleted.

It should be noted that in certain circumstances the citation can serve as the pleading upon which the trial is based. See G.S. 15A-922 and Article 49, Pleadings and Joinder.

CASE NOTES

Citation Requirements. — A citation complies with all necessary requirements where it identifies the crimes charged and the date of the offenses, contains the name and address of the person cited, identifies the officer issuing the citation, designates the court in which the defendant is required to appear, and designates the date and time. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Officer had probable cause to stop vehicle in which defendant was a passenger where officer observed that neither the driver nor the defendant passenger were wearing seat belts. Likewise, the officer was allowed to ask defendant passenger to exit the vehicle. State v. Hamilton, 125 N.C. App. 396, 481 S.E.2d 98 (1997), appeal dismissed and cert. denied, 345 N.C. 757, 485 S.E.2d 302 (1997).

Applied in State v. Wallace, 49 N.C. App. 475, 271 S.E.2d 760 (1980).

Cited in State v. McClendon, 130 N.C. App. 368, 502 S.E.2d 902 (1998); State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002); State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002).

§ 15A-303. Criminal summons.

(a) Definition. — A criminal summons consists of a statement of the crime or infraction of which the person to be summoned is accused, and an order directing that the person so accused appear and answer to the charges made against him. It is based upon a showing of probable cause supported by oath or affirmation.

(b) Statement of the Crime or Infraction. — The criminal summons must contain a statement of the crime or infraction of which the person summoned is accused. No criminal summons is invalid because of any technicality of pleading if the statement is sufficient to identify the crime or infraction.

(c) Showing of Probable Cause; Record. — The showing of probable cause for the issuance of a criminal summons, and the record thereof, is the same as provided in G.S. 15A-304(d) for the issuance of a warrant for arrest.

(d) Order to Appear. — The summons must order the person named to appear in a designated court at a designated time and date and answer to the charges made against him and advise him that he may be held in contempt of court for failure to appear. Except for cause noted in the criminal summons by the issuing official, an appearance date may not be set more than one month following the issuance or reissuance of the criminal summons.

(e) Enforcement. —

(1) If the offense charged is a criminal offense, a warrant for arrest, based upon the same or another showing of probable cause, may be issued by the same or another issuing official, notwithstanding the prior issuance of a criminal summons.

(2) If the offense charged is a criminal offense, an order for arrest, as provided in G.S. 15A-305, may issue for the arrest of any person who fails to appear as directed in a duly executed criminal summons.

(3) A person served with criminal summons who willfully fails to appear as directed may be punished for contempt as provided in G.S. 5A-11.

(4) Repealed by Session Laws 1975, c. 166, s. 4.

(f) Who May Issue. — A criminal summons, valid throughout the State, may be issued by any person authorized to issue warrants for arrest. (1973, c. 1286, s. 1; 1975, c. 166, ss. 4, 5; 1975, 2nd Sess., c. 983, s. 138; 1983, c. 294, s. 3; 1985, c. 764, s. 5.)

OFFICIAL COMMENTARY

Former G.S. 15-20 authorized the criminal summons, but it was little used. There appears to be no good reason, for in many cases in which a criminal summons could have been used, the law-enforcement officer simply "served" the warrant and did not take the defendant into custody.

The criminal summons can appropriately be used in any case in which it appears that it is not necessary to arrest the defendant and take him into custody to ensure his appearance in court. This should be true in many misdemeanors and in a number of felonies. If the defendant simply is directed to appear in court on the appropriate date, the entire machinery of arrest, processing, and bail can be avoided with resultant savings to the system of criminal justice. This section is separated from the warrant provisions (unlike the former statute), and placed first, in order to call it to the attention of readers of the statutes and encourage its use.

Note that due to the interchangeability of parts of process a warrant for arrest may be based on the criminal summons (it needs only the order to the officer), and the same is true of an order for arrest. Since the summons is issued by a judicial officer, the contempt power also is available.

Subsection (e)(4) refers to a proposed section of the Criminal Code Act which would have inserted provisions in Chapter 20 of the General Statutes. The amendment to Chapter 20 was deleted in the General Assembly, but subsection (e)(4) was not deleted.

CASE NOTES

Cited in State v. Charlotte Liberty Mut. Ins. Co., 298 N.C. 270, 258 S.E.2d 343 (1979); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

§ 15A-304. Warrant for arrest.

(a) Definition. — A warrant for arrest consists of a statement of the crime of which the person to be arrested is accused, and an order directing that the person so accused be arrested and held to answer to the charges made against him. It is based upon a showing of probable cause supported by oath or affirmation.

(b) When Issued. — A warrant for arrest may be issued, instead of or subsequent to a criminal summons, when it appears to the judicial official that the person named should be taken into custody. Circumstances to be considered in determining whether the person should be taken into custody may include, but are not limited to, failure to appear when previously summoned, facts making it apparent that a person summoned will fail to appear, danger that the person accused will escape, danger that there may be injury to person or property, or the seriousness of the offense.

(c) Statement of the Crime. — The warrant must contain a statement of the crime of which the person to be arrested is accused. No warrant for arrest, nor any arrest made pursuant thereto, is invalid because of any technicality of pleading if the statement is sufficient to identify the crime.

(d) Showing of Probable Cause. — A judicial official may issue a warrant for arrest only when he is supplied with sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it. The information must be shown by one or more of the following:

(1) Affidavit;
(2) Oral testimony under oath or affirmation before the issuing official; or
(3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.

If the information is insufficient to show probable cause, the warrant may not be issued. A judicial official shall not refuse to issue a warrant for the arrest of a person solely because a prior warrant has been issued for the arrest of another person involved in the same matter.

(e) Order for Arrest. — The order for arrest must direct that a law-enforcement officer take the defendant into custody and bring him without unnecessary delay before a judicial official to answer to the charges made against him.

(f) Who May Issue. — A warrant for arrest, valid throughout the State, may be issued by:

(1) A Justice of the Supreme Court.
(2) A judge of the Court of Appeals.
(3) A judge of the superior court.
(4) A judge of the district court, as provided in G.S. 7A-291.
(5) A clerk, as provided in G.S. 7A-180 and 7A-181.
(6) A magistrate, as provided in G.S. 7A-273. (1868-9, c. 178, subch. 3, ss. 1-3; Code, ss. 1132-1134; 1901, c. 668; Rev., ss. 3156-3158; C.S., ss. 4522-4524; 1955, c. 332; 1969, c. 44, s. 27; c. 1062, s. 1; 1973, c. 1286, s. 1; 1997-268, s. 2; 2004-186, s. 15.1.)

OFFICIAL COMMENTARY

The standard format for a warrant for arrest in North Carolina has been an affidavit charging the crime, sworn before a judicial officer, followed by an order to a law-enforcement officer directing the arrest of the defendant. The warrant, consisting of the affidavit and the order, is then used as a pleading for trial.

In Whiteley v. Warden of Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), the Supreme Court of the United States said: "The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Thus it is clear that the judicial officer must be furnished information and our old conclusory affidavit in the form of a charge of the crime is not sufficient for the purpose. We still need a statement of the crime — for notification to the defendant and for a pleading, and that is provided for in this section.

This section provides for the showing of probable cause by an affidavit (which necessarily will be longer and more detailed if no other evidence in taken) or by the taking of evidence by the judicial officer. It should be emphasized that the judicial officer must have presented to him information from which he can decide that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it — and if the warrant is not based upon such a factual showing, it is invalid under the decisions of the Supreme Court.

In order to emphasize the desirability of utilizing the criminal summons when arrest and custody are not needed, subsection (b) states the circumstances for the use of a warrant for arrest. That subsection is directory and does not require a finding by the judicial officer, and of course would not invalidate the warrant if the circumstances in fact were absent.

Legal Periodicals. — For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former law.*

U.S. Const., Amend. IV Applies to Both Arrest Warrants and Search Warrants. — The requirement under U.S. Const., Amend. IV that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Freeman, 31 N.C. App. 335, 229 S.E.2d 238 (1976).

Issuance of a warrant of arrest is a judicial act. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Section vests discretionary power in officials authorized to issue warrants. State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959).

Probable Cause Explained. — Sufficient evidence was presented to the magistrate in support of defendant's arrest warrant to support the reasonable probability that defendant was involved in drug trafficking; probable cause determinations were the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, acted. State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

When Warrant May Be Issued. — After the required examination on oath of the complainant and any witnesses who may be produced by him, the justice of the peace is authorized to issue the warrant upon his determination that there is sufficient ground for the arrest and prosecution of the accused person for the described criminal offense. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Requirements for Valid Warrant. — A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A warrant of arrest is sufficient if it clearly gives the defendant notice of the charge against him, so that he may prepare his defense, and if it enables him to plead former acquittal or former conviction should he again be brought to trial for the same offense. It must also enable the court to pronounce judgment in case of conviction. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970).

A warrant must allege lucidly and accurately all the essential elements of the offense endeavored to be charged in order that the defendant may be duly informed of the charges against him, protected from double jeopardy, and able to prepare for trial, and that the trial court may be able to pronounce an appropriate sentence upon a conviction or plea. State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 216 (1982).

Probable Cause Defined. — Probable cause under this section refers to the existence of a reasonable suspicion in the mind of a prudent person, considering the facts and circumstances presently known. State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981).

Duty of Magistrate. — It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases super visum, to require evidence on oath amounting to a direct charge or creating a strong suspicion of guilt. Welch v. Scott, 27 N.C. 72 (1844).

Must Appear to Magistrate That Offense Was Committed. — A warrant will issue only if it appears to the magistrate from his examination that a criminal offense has been committed. Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971).

It must appear by the examination that an offense has been committed before any warrant is issued. State v. Moore, 136 N.C. 581, 48 S.E. 573 (1904).

Sufficient Charge Is Essential to Jurisdiction. — It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or indictment. State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Jones, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

But Issuance of Warrant Prior to Arrest Is Not. — But it is not an essential of jurisdiction that a warrant be issued prior to arrest and that the defendant be initially arrested thereunder. State v. Green, 251 N.C. 40, 110 S.E.2d 609 (1959); State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967); State v. Jones, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

Warrant should not be quashed or judgment arrested for mere informalities or absence of refinements. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970).

Rules Less Strict Than for Indictments. — A warrant and the affidavit upon which it is based are tested by rules less strict than those applicable to indictments. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970).

No Special Form of Affidavit or Complaint Required. — It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment. State v. Gupton, 166 N.C. 257, 80 S.E. 989 (1914); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Signature of Affiant Not Essential. — Where the warrant discloses that the affiant was duly sworn before a competent official and is signed by such official, and the name of the affiant is set forth, the fact that the affiant does not subscribe the affidavit is not a fatal defect. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Uniform Traffic Ticket as Warrant. — The Court of Appeals disapproves the use of the Uniform Traffic Ticket as a warrant of arrest. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970).

Information received from a reliable informant is sufficient to support a conclusion that probable cause for arrest exists. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Police Officer May Rely on Information Reported by Other Officers. — A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

State Bureau of Investigation agent's affidavit and testimony before a magistrate that another State Bureau of Investigation agent had purchased heroin from defendant furnished sufficient evidence to support the magistrate's determination that probable cause existed for defendant's arrest. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

In order to properly charge an assault, there must be a victim named, since by failing to name the particular person assaulted, the defendant would not be protected from a subsequent prosecution for assault upon a named person. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Motion to Quash Warrant Made After Pleading and Participating in Trial. — By pleading and participating in a trial, defendant waives any defect incident to the authority of the person issuing a warrant, and a motion to quash made after the State has rested is addressed to the discretion of the trial judge. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970).

Arrest of Judgment Where Warrant Altered. — Where defendant was arrested, tried and convicted in district court for permitting a person under the influence of intoxicating liquor to operate his automobile, but the warrant was altered after trial in district court and before any evidence was heard in superior court so that defendant was tried and convicted in superior court on a warrant charging him with driving while under the influence, judgment of the superior court must be arrested since a defendant may be tried upon a warrant in superior court only after there has been a trial and appeal from a conviction by an inferior court having jurisdiction. State v. Chappell, 18 N.C. App. 288, 196 S.E.2d 558 (1973).

Appellate Court Cannot Look Behind Warrant. — The appellate court can only look at the warrant, which is the complaint, and cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890). See State v. Bryson, 84 N.C. 780 (1881).

Applied in State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993).

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87 (1980); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); Howell v. Barker, 684 F. Supp. 132 (E.D.N.C. 1988); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001); State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

OPINIONS OF ATTORNEY GENERAL

Issuance of Warrant Is Discretionary Act. — See opinion of Attorney General to Mr. Gerard J. Anderson, Director, Alamance County Department of Social Services, 40 N.C.A.G. 191 (1970), rendered under former G.S. 15-19 and 15-20.

Complainant Need Not Have Personal Knowledge of Facts. — See opinion of Attorney General to Honorable H.M. Shelton, Sheriff of Polk County, 40 N.C.A.G. 176 (1969), rendered under former G.S. 15-19 and 15-20.

§ 15A-305. Order for arrest.

(a) Definition. — As used in this section, an order for arrest is an order issued by a justice, judge, clerk, or magistrate that a law-enforcement officer take a named person into custody.

(b) When Issued. — An order for arrest may be issued when:

(1) A grand jury has returned a true bill of indictment against a defendant who is not in custody and who has not been released from custody pursuant to Article 26 of this Chapter, Bail, to answer to the charges in the bill of indictment.

(2) A defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required.

(3) The defendant has failed to appear as required by a duly executed criminal summons issued pursuant to G.S. 15A-303 or a citation issued by a law enforcement officer or other person authorized by statute pursuant to G.S. 15A-302 that charged the defendant with a misdemeanor.

(4) A defendant has violated the conditions of probation.

(5) In any criminal proceeding in which the defendant has become subject to the jurisdiction of the court, it becomes necessary to take the defendant into custody.

(6) It is authorized by G.S. 15A-803 in connection with material witness proceedings.

(7) The common-law writ of capias has heretofore been issuable.

(8) When a defendant fails to appear as required in a show cause order issued in a criminal proceeding.

(9) It is authorized by G.S. 5A-16 in connection with contempt proceedings.

(c) Statement of Cause and Order; Copy of Indictment. —

(1) The process must state the cause for its issuance and order an officer described in G.S. 15A-301(b) to take the person named therein into

custody and bring him before the court. If the defendant is to be held without bail, the order must so provide.

(2) When the order is issued pursuant to subdivision (b)(1), a copy of the bill of indictment must be attached to each copy of the order for arrest.

(d) Who May Issue. — An order for arrest, valid throughout the State, may be issued by any person authorized to issue warrants for arrest. (1973, c. 1286, s. 1; 1975, c. 166, s. 6; 1977, c. 711, s. 21; 2003-15, s. 2.)

OFFICIAL COMMENTARY

This section provides a new term and more formality for our former "capias." Other than the change in the name, which substitutes English for Latin and should lend clarity, the most striking provision is the statutory requirement that the cause for the issuance of the process be stated. Some "capias" forms already follow this practice. It was felt that in addition to limiting issuance to proper circumstances, this device leads to more ready compliance by the person to be taken into custody. The format would follow that of the summons and the warrant for arrest, both of which contain a statement of the crime (for which we here substitute "cause for arrest") followed by an order. The following is a suggested format for the body of the process:

"CAUSE FOR ARREST OF John Doe
The person named above having been charged with the crime of embezzlement and having been released on his own recognizance to appear at the July 14, 1975, Session of the Superior Court of Wake County, failed to appear.
ORDER: You are commanded to arrest the person named above and bring him before this session of this court. Should you be unable to execute this process before the end of this session, you are directed to:
X secure his/her appearance at the next session by taking bail in the sum of $5,000.00, or in default thereof, by committing him/her to the county jail of this county.
commit him/her to the county jail of this county to be held without bail."

Legal Periodicals. — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

CASE NOTES

Order of Arrest Referring to Attached Affidavit or Complaint. — When the order of arrest referred to attached affidavit or complaint, the affidavit or complaint became a part of the warrant of arrest. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970), decided under prior law.

New Bond. — Additional $30,000 bond and second arrest order that were issued after defendant had been released on $1,000 bond were not improper as the additional bond was not a modification to the prior bond, but was a new bond for a new felony indictment. State v. Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (1996).

Applied in State v. Koberlein, 60 N.C. App. 356, 299 S.E.2d 444 (1983); State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

Cited in Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

ARTICLE 18.

§§ 15A-306 through 15A-353: Reserved for future codification purposes.

ARTICLE 19.

§§ 15A-354 through 15A-400: Reserved for future codification purposes.

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

(a) Arrest by Officer Pursuant to a Warrant. —

(1) Warrant in Possession of Officer. — An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial jurisdiction.

(2) Warrant Not in Possession of Officer. — An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession, may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible. This subdivision applies even though the arrest process has been returned to the clerk under G.S. 15A-301.

(b) Arrest by Officer Without a Warrant. —

(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or
2. May cause physical injury to himself or others, or damage to property unless immediately arrested; or

c. Has committed a misdemeanor under G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2; or

d. Has committed a misdemeanor under G.S. 14-33(a), 14-33(c)(1), 14-33(c)(2), or 14-34 when the offense was committed by a person with whom the alleged victim has a personal relationship as defined in G.S. 50B-1; or

e. Has committed a misdemeanor under G.S. 50B-4.1(a); or

f. Has violated a pretrial release order entered under G.S. 15A-534.1(a)(2).

(3) Repealed by Session Laws 1991, c. 150.

(4) A law enforcement officer may detain an individual arrested for violation of an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 or G.S. 130A-145 in the area designated by the State Health Director or local health director pursuant to such order. The person may be detained in such area until the initial appearance before a judicial official pursuant to G.S. 15A-511 and G.S. 15A-534.5.

(c) How Arrest Made. —

(1) An arrest is complete when:

a. The person submits to the control of the arresting officer who has indicated his intention to arrest, or

b. The arresting officer, with intent to make an arrest, takes a person into custody by the use of physical force.

(2) Upon making an arrest, a law-enforcement officer must:

a. Identify himself as a law-enforcement officer unless his identity is otherwise apparent,

b. Inform the arrested person that he is under arrest, and

c. As promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest, unless the cause appears to be evident.

(d) Use of Force in Arrest. —

(1) Subject to the provisions of subdivision (2), a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:

a. To prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or

b. To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

(2) A law-enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:

a. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;

b. To effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay; or

c. To prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.

Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(e) Entry on Private Premises or Vehicle; Use of Force. —

(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

a. The officer has in his possession a warrant or order or a copy of the warrant or order for the arrest of a person, provided that an officer may utilize a copy of a warrant or order only if the original warrant or order is in the possession of a member of a law enforcement agency located in the county where the officer is employed and the officer verifies with the agency that the warrant is current and valid; or the officer is authorized to arrest a person without a warrant or order having been issued,

b. The officer has reasonable cause to believe the person to be arrested is present, and

c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

(2) The law-enforcement officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or if he is authorized under subsection (e)(1)c to enter without giving notice of his authority and purpose.

(f) Use of Deadly Weapon or Deadly Force to Resist Arrest. —

(1) A person is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force, when the person knows or has reason to know that the officer is a law-enforcement officer and that the officer is effecting or attempting to effect an arrest.

(2) The fact that the arrest was not authorized under this section is no defense to an otherwise valid criminal charge arising out of the use of such deadly weapon or deadly force.

(3) Nothing contained in this subsection (f) shall be construed to excuse or justify the unreasonable or excessive force by an officer in effecting an arrest. Nothing contained in this subsection (f) shall be construed to bar or limit any civil action arising out of an arrest not authorized by this Article.

(g) Care of minor children. — When a law enforcement officer arrests an adult who is supervising minor children who are present at the time of the arrest, the minor children must be placed with a responsible adult approved by a parent or guardian of the minor children. If it is not possible to place the minor children with a responsible adult approved by a parent or guardian within a reasonable period of time, the law enforcement officer shall contact the county department of social services. (1868-9, c. 178, subch. 1, ss. 3, 5; Code, ss. 1126, 1128; Rev., ss. 3178, 3180; C.S., ss. 4544, 4546; 1955, c. 58; 1973, c. 1286, s. 1; 1979, c. 561, s. 3; c. 725, s. 4; 1983, c. 762, s. 1; 1985, c. 548; 1991, c. 150, s. 1; 1995, c. 506, s. 10; 1997-456, s. 3; 1999-23, s. 7; 1999-399, s. 1; 2002-179, s. 14; 2004-186, s. 13.1; 2009-544, s. 2.)

OFFICIAL COMMENTARY

(a) Arrest by law-enforcement officer. As has been true, a law-enforcement officer may arrest at any place with an arrest warrant in his possession. The former rule is modified by providing that when an officer knows that there is a warrant but does not have it in his possession, the officer is permitted to arrest pursuant to the warrant and serve the warrant as soon as possible.

(b) Arrest by officer without warrant. In addition to the usual authorization to arrest without a warrant for crimes committed in his presence, the officer is given broadened authority to arrest for crimes committed out of his presence when he has probable cause to make the arrest. North Carolina law has limited arrest without a warrant for crimes not committed in the presence of the officer to felonies, when there is reasonable ground to believe that the person will evade arrest if not immediately taken into custody. Here the authority is broadened, as is the case in a number of other states, to include felonies generally and misdemeanors when there exists one of the "emergency" situations of danger of escape or danger of injury or property damage.

In connection with this expanded arrest authority, it should be noted that "peace warrant" provisions have been repealed and a new crime of "communicating threats" has been created in G.S. 14-277.1. This combination should be more effective in dealing with situations in which peace warrants have been used.

(c) How arrest made. For convenience the existing law of North Carolina as to when an arrest is complete is codified and states more fully the requirements for notification to the person arrested (compare the former G.S. 15-47).

(d) Use of force in arrest. This section codifies an area not heretofore mentioned in our statutes. While the officer is authorized to use force to the extent that he reasonably believes it necessary to effect an arrest, prevent an escape, or defend himself or another from imminent physical force, the authorization to utilize deadly force is substantially more limited. That force is permitted only in the defense situation or when necessary to prevent the risk of death or serious physical injury to others, made manifest by the use of a deadly weapon or other conduct or means, or to prevent the escape of a convicted felon.

It should be noted that the last paragraph makes it clear that the law-enforcement officer cannot act with indifference to the safety of others in the use of force. Shooting into a crowded street would be an obvious example of criminally negligent conduct, and this section would not justify such action.

(e) Entry on private premises or vehicle; use of force. In State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), the court said: "In North Carolina, under G.S. 15-44, even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right, in the absence of special and emergency circumstances, to break into the house and arrest the person unless and until admittance has been demanded and denied." This statute codifies that idea and states that the emergency which will justify the omission of the demand is that which presents clear danger to human life. Subdivision (2) provides that the officer may use force concomitant with his right to enter.

Cross References. — As to arrest in civil cases, see G.S. 1-409 et seq. As to arrest of persons violating the laws regulating intoxicating liquors, see G.S. 18B-500 et seq. As to power of bank examiner to arrest, see G.S. 53-121. As to arrest for violation of the weights and measures laws, see G.S. 81A-16. As to arrest by State forest rangers, see G.S. 113-55.1. As to arrest by appointees of directors of the State facilities for the mentally ill, etc., see G.S. 122C-183. As to arrest by the commanding officer of militia, see G.S. 127A-148. As to arrest of parolee from the State prison whose parole has been revoked, see G.S. 148-63.

Effect of Amendments. — Session Laws 2009-544, s. 2, effective January 1, 2010, added subsection (g).

Legal Periodicals. — For article on the law of arrest in North Carolina, see 15 N.C.L. Rev. 101 (1937).

For article on arrest without warrant in misdemeanor cases, see 33 N.C.L. Rev. 17 (1954).

For note on arrest without warrant in misdemeanor cases, see 35 N.C.L. Rev. 290 (1957).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For note on home arrest in the shelter of search and seizure law, see 59 N.C.L. Rev. 973 (1981).

For note on the Fourth Circuit requirement of search warrants for entry to arrest suspects in third-party dwellings, see 17 Wake Forest L. Rev. 120 (1981).

For note analyzing the scope of civil liability of law-enforcement officers, in the use of deadly force in North Carolina, see 4 Campbell L. Rev. 391 (1982).

For note discussing the exclusionary rule in probation revocation hearings in light of State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982), see 19 Wake Forest L. Rev. 845 (1983).

For note discussing the use of deadly force to arrest as an unreasonable search and seizure, see 65 N.C.L. Rev. 155 (1986).

For article, "Litigating Police Misconduct Claims in North Carolina," see 19 N.C. Cent. L.J. 113 (1991).

For article, "Law Enforcement Use of Force: The Objective Reasonableness Standards Under North Carolina and Federal Law," see 24 Campbell L. Rev. 201 (2002).

CASE NOTES

I. General Consideration.
II. Warrant Not in Possession of Officer.
III. Arrest Without Warrant.
  A. In General.
  B. Illustrative Cases.
    1. Offense in Presence of Officer.
    2. Offense Out of Presence of Officer.
IV. Use of Force in Arrest.
V. Entry on Premises.
VI. Unlawful Arrest.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided under former law.*

Whether an arrest warrant must be obtained is determined by State law. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

Formal declaration of arrest by the officer is not a prerequisite to the making of an arrest. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Burden on State to Show Legality of Arrest. — It was incumbent upon the State to satisfy the jury from the evidence beyond a reasonable doubt that defendant committed a crime in the presence of the officer, or that the officer had reasonable grounds to believe the defendant had done so, in order to establish the authority and duty of the officer to make the arrest without a warrant. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

Officer's Statement as to Whether Defendant Under Arrest. — Just as a formal declaration of arrest is not essential to the making of an arrest, an officer's statement that a defendant was or was not under arrest is not conclusive. When a law-enforcement officer, by word or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Custody Tantamount to Arrest for Search Purposes. — A finding and conclusion that defendant was taken into custody is tantamount to finding and concluding that defendant was under arrest at the time of a search. State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

It was not necessary to read defendant the Miranda rights in order to make lawful arrest, where defendant was advised by the arresting officers that he was being arrested on a charge of rape in compliance with subdivision (c)(2)c. State v. Kinch, 314 N.C. 99, 331 S.E.2d 665 (1985).

For purposes of a false arrest tort action under State law, the existence of legal justification for a deprivation of liberty is determined in accordance with this section; thus, it is possible, in some instances, for an arrest to be constitutionally valid and yet illegal under State law. Myrick v. Cooley, 91 N.C. App. 209, 371 S.E.2d 492, petition denied as to additional issues, 323 N.C. 477, 373 S.E.2d 865 (1988).

Civil Liability of Arresting Officer for Mistaken Identity. — As to the civil liability for false imprisonment of an arresting officer, acting under a valid arrest warrant, who arrests the wrong person because of a mistake in the identity of the person arrested, see Robinson v. City of Winston-Salem, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

Conviction Establishes Existence of Probable Cause. — In the absence of a showing that the district court's conviction of the defendant for disorderly conduct and resisting arrest was obtained improperly, the conviction establishes, as a matter of law, the existence of probable cause for his arrest and defeated both his federal and State claims for false arrest or imprisonment, even though on appeal to the superior court the disorderly conduct and resisting arrest charges were dismissed at the close of the State's evidence. Myrick v. Cooley, 91 N.C. App. 209, 371 S.E.2d 492, petition denied as to additional issues, 323 N.C. 477, 373 S.E.2d 865 (1988).

Search and Seizure Upheld. — Where officers were lawfully on the premises pursuant to a valid search warrant, and were authorized under G.S. 15A-256 to initially detain defendant in house, their discovery of a packet of cocaine which fell out of defendant's clothing was the result of their lawful detention and the seizure of that packet was authorized under the "plain view" doctrine. Moreover, once this packet had been discovered, the officers had probable cause to arrest defendant without benefit of a warrant under subsection (b) of this section, and thus, second packet of cocaine found as a result of a search incident to defendant's arrest was properly seized and admissible at trial. State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988).

Applied in State v. Williams, 31 N.C. App. 237, 229 S.E.2d 63 (1976); Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976); In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977); State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977); In re Jacobs, 33 N.C. App. 195, 234 S.E.2d 639 (1977); State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); State v. Thompson, 37 N.C. App. 628, 246 S.E.2d 827 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Whitehead, 42 N.C. App. 506, 257 S.E.2d 131 (1979); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979); State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980); State v. Whitt, 299 N.C. 393, 261 S.E.2d 914 (1980); Hinton v. City of Raleigh, 46 N.C. App. 305, 264 S.E.2d 777 (1980); State v. Spencer, 46 N.C. App. 507, 265 S.E.2d 451 (1980); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980); State v. Duers, 49 N.C. App. 282, 271 S.E.2d 81 (1980); State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983); State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984); Annie Penn Mem. Hosp. v. Caswell County, 72 N.C. App. 197, 323 S.E.2d 487 (1984); State v. Grady, 73 N.C. App. 452, 326 S.E.2d 126 (1985); State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990); State v. Mills, 104 N.C. App. 724, 411 S.E.2d 193 (1991); State v. Trapp, 110 N.C. App. 584, 430 S.E.2d 484 (1993); Marlowe v. Piner, 119 N.C. App. 125, 458 S.E.2d 220 (1995); State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207, 2002 N.C. App. LEXIS 1472 (2002).

Cited in State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976); State v. Weddington, 28 N.C. App. 269, 220 S.E.2d 853 (1976); State v. Hagler, 32 N.C. App. 444, 232 S.E.2d 712 (1977); State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Atkins, 304 N.C. 582, 284 S.E.2d 296 (1981); State v. McNeill, 54 N.C. App. 454, 283 S.E.2d 565 (1981); State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981); State v. Cromartie, 55 N.C. App. 221, 284 S.E.2d 728 (1981); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982); State v. Adams, 55 N.C. App. 599, 286 S.E.2d 371

(1982); State v. Primes, 314 N.C. 202, 333 S.E.2d 278 (1985); State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986); State v. Alston, 82 N.C. App. 372, 346 S.E.2d 184 (1986); State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988); State v. Swift, 105 N.C. App. 550, 414 S.E.2d 65 (1992); State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992); State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992); State v. Medlin, 333 N.C. 280, 426 S.E.2d 402 (1993); State v. Mathis, 126 N.C. App. 688, 486 S.E.2d 475 (1997); State v. Dammons, 128 N.C. App. 16, 493 S.E.2d 480 (1997); Prior v. Pruett, 143 N.C. App. 612, 550 S.E.2d 166, 2001 N.C. App. LEXIS 335 (2001); State v. Martinez, 150 N.C. App. 364, 562 S.E.2d 914 (2002); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

II. WARRANT NOT IN POSSESSION OF OFFICER.

Probable Cause Exists When Officer Has Personal Knowledge of Warrant. — Probable cause to believe that the person has committed a felony exists without question where the officer has personal knowledge that a warrant has been issued for the arrest of such person, which warrant charges a felony. State v. Denton, 17 N.C. App. 684, 195 S.E.2d 334, cert. denied, 283 N.C. 586, 196 S.E.2d 810 (1973).

Service of Warrants After Request for Attorney. — When a defendant is arrested pursuant to an arrest warrant, subdivision (a)(2) of this section requires the arrest warrant to be served upon the defendant as soon as possible. The fact that delivery and reading of warrants was made after defendant's request for an attorney did not alter the routineness of such delivery, nor did it constitute the initiation of questioning. State v. Underwood, 84 N.C. App. 408, 352 S.E.2d 898 (1987), overruled on other grounds, State v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991).

Defendant was not guilty of resisting arrest by closing his door to officers who were arresting him on a civil warrant which was not in their possession, and they entered his home illegally to arrest him. State v. Hewson, 88 N.C. App. 128, 362 S.E.2d 574 (1987).

III. ARREST WITHOUT WARRANT.

A. In General.

Constitution does not dictate circumstances under which arrest warrants are required. Whether an arrest warrant must be obtained is determined by State law alone. Likewise, State law alone determines the sanction to be applied for failure to obtain an arrest warrant where one is required. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Power of arrest without warrant is defined and limited entirely by legislative enactments in this State. And the rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

Subsection (b) broadened the authority of a law-enforcement officer to make a warrantless arrest for crimes not committed in his presence. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Former Law Compared. — Prior to this section North Carolina law limited arrest without a warrant for crimes not committed in the presence of the officer to felonies, when there was reasonable ground to believe that the person will evade arrest if not immediately taken into custody. This section broadens the authority to arrest for crimes committed out of an officer's presence to include felonies generally and misdemeanors when the officer has probable cause to believe the person (1) has committed a misdemeanor and (2) will not be apprehended unless immediately arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested. In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978).

Statute Applies Only to State Officers. — The statute governing arrests without warrant applies only to peace officers of the State and in the enforcement of the State law, and does not affect the conduct or powers of federal officers unless the principles therein are extended to such officers by a federal statute, when in the enforcement of a valid federal law. State v. Burnett, 183 N.C. 703, 110 S.E. 588 (1922).

Superintendent of a convict gang was not such an officer as was contemplated by the statute, relating to arrest without warrant. State v. Stancill, 128 N.C. 606, 38 S.E. 926 (1901).

Arrest without warrant except as authorized by statute is illegal. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969); State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970); State v. Harris, 9 N.C. App. 649, 177 S.E.2d 445 (1970), aff'd, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Denton, 17 N.C. App. 684, 195 S.E.2d 334, cert. denied, 283 N.C. 586, 196 S.E.2d 810 (1973); State v. Little, 27 N.C. App. 54, 218 S.E.2d 184, cert. denied, 288 N.C. 512, 219 S.E.2d 347 (1975); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

Where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Statute Not Intended to Legalize Warrantless Entry. — The statute was never intended to legalize a warrantless entry upon premises which could not otherwise be lawfully entered except under authority of a valid warrant. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Information Must Be Sufficient to Have Required Issuance of Warrant. — One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

"Probable Cause" Defined. — Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. State v. Harris, 9 N.C. App. 649, 177 S.E.2d 445 (1970), aff'd, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); State v. Thompson, 313 N.C. 157, 326 S.E.2d 19 (1985); State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988); State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

An arrest without a warrant is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Campbell, 30 N.C. App. 652, 228 S.E.2d 52, appeal dismissed, 291 N.C. 324, 230 S.E.2d 677 (1976); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied and appeal dismissed, 297 N.C. 179, 254 S.E.2d 40 (1979); State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988).

A warrantless arrest is based on probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. The standard is the same as that required by the United States Constitution. State v. Mathis, 295 N.C. 623, 247 S.E.2d 919 (1978).

Whether probable cause exists depends upon whether at that moment the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Existence of probable cause depends upon whether at the time of the arrest there were facts and circumstances within the knowledge of the arresting officer which would justify a prudent man's belief that a suspect had committed an offense. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. State v. Thompson, 313 N.C. 157, 326 S.E.2d 19 (1985).

"Probable cause" and "reasonable ground to believe" are substantially equivalent terms. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976), appeal dismissed, 291 N.C. 713, 232 S.E.2d 202 (1977); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

"Reasonable ground" and "probable cause" are basically equivalent terms with similar meanings. State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976).

Existence of probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); State v. Thompson, 313 N.C. 157, 326 S.E.2d 19 (1985); State v. Patrick, 88 N.C. App. 582, 364 S.E.2d 450 (1988); State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

And Is Determined by Factual and Practical Considerations. — The existence of probable cause justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. Thompson, 313 N.C. 157, 326 S.E.2d 19 (1985).

To establish probable cause, the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975), cert. denied, 289 N.C. 455, 223 S.E.2d 164 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983); State v. Thompson, 313 N.C. 157, 326 S.E.2d 19 (1985).

Proof of Actual Commission of Crime Not Necessary. — A peace officer may justify an arrest without a warrant when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of actual commission of the crime is not necessary. Neal v. Joyner, 89 N.C. 287 (1883).

Same — Verdict of Not Guilty Not-Tantamount to Finding of No Reasonable Grounds. — Verdict of not guilty of the misdemeanor for which defendant was arrested was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in his presence and that defendant therefore could lawfully resist the arrest. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

The failure of the State to satisfy the jury beyond a reasonable doubt of defendant's guilt of the offense charged is a far cry from a failure to satisfy the jury beyond a reasonable doubt that the arresting officer had reasonable ground to believe defendant had committed the offense in the officer's presence. In order to justify an officer in making an arrest without a warrant, it is not essential that the offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

Same — Question for Jury. — The reasonableness of the officer's grounds to believe the defendant had committed a misdemeanor in the officer's presence, when properly raised, is a factual question to be decided by the jury. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

Only Reasonable Ground for Belief Need Be Shown. — In order to justify an arrest without warrant, it is not required that a felony be shown actually to have been committed; it is only necessary that the officer have reasonable ground to believe that such an offense has been committed. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977).

An officer need not show that a felony has actually been committed. It is only necessary for the officer to have reasonable ground to believe that such an offense has been committed. State v. Campbell, 30 N.C. App. 652, 228 S.E.2d 52, appeal dismissed, 291 N.C. 324, 230 S.E.2d 677 (1976).

Totality of Circumstances Considered. — The basis of reasonable ground for belief that felony has been committed is drawn from the totality of facts and circumstances surrounding the arrest, known to the officers. State v. Little, 27 N.C. App. 54, 218 S.E.2d 184, cert. denied, 288 N.C. 512, 219 S.E.2d 347 (1975).

Description as Furnishing Reasonable Ground for Belief. — A description of either a person or an automobile furnishes reasonable ground for arresting and detaining a criminal suspect. State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970).

A description of an assailant's physical characteristics and his clothing may supply reasonable grounds for believing that he had committed a felony. State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Evidence That Person May Injure Self or Others. — The same evidence that provides probable cause for a belief that a misdemeanor had been committed is sufficient to provide probable cause to believe that defendant might injure himself or others if allowed to leave the police station at that time. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

When Flight May Be Considered in Assessing Probable Cause. — Flight is a strong indicia of mens rea, and when coupled with other relevant facts or the specific knowledge on the part of the arresting officer relating the subject to the evidence of the crime, it may properly be considered in assessing probable cause. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282, appeal dismissed, 292 N.C. 470, 233 S.E.2d 924 (1977).

Flight from unlawful arrest cannot be added to other relevant facts to give the officer probable cause for making a warrantless arrest. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282, appeal dismissed, 292 N.C. 470, 233 S.E.2d 924 (1977).

Likelihood of Escape. — The likelihood of evasion of arrest, frequently referred to as the likelihood of escape, by the person to be arrested is not a factor to be considered in determining the right of a police officer to arrest without a warrant when the offense, felony or misdemeanor, has been committed in the presence of the officer, or when the officer has reasonable ground to believe that the offense has been committed in his presence by the person to be arrested. State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970).

Same — Factors Considered. — In determining whether officers had reasonable grounds to believe that the defendant would evade arrest if not taken into immediate custody, the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects, and of the officers available for assistance, and the likely consequences of the officers' failure to act promptly must necessarily be taken into consideration. State v. Roberts, 6 N.C. App. 312, 170 S.E.2d 193 (1969), aff'd, 276 N.C. 98, 171 S.E.2d 440 (1970); State v. Kennon, 20 N.C. App. 195, 201 S.E.2d 80 (1973).

Factual Findings on Issue of Probable Cause. — In determining whether probable cause exists in any particular case, it is the function of the trial court, if there be conflicting evidence, to find the relevant facts. Such factual findings, if supported by competent evidence, are binding on appeal. However, whether the facts so found by the trial court or shown by uncontradicted evidence are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Arresting Officer May Act on Information Supplied by Others. — It is elemental that an arresting officer may act on information supplied by others relating that a felony has been committed and describing the suspected felon. Although the arresting officers may not have had personal knowledge of all the facts justifying arrest, probable cause can be imputed from one officer to others acting at his request. State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

Information from Reliable Informant. — Where an informant is reliable, probable cause may be based upon information given to police by such informant. State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981), rev'd on other grounds, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

Officers and deputies had probable cause to believe that defendant was engaged in criminal activity sufficient to justify a warrantless arrest where a known and reliable informant gave a deputy detailed information that defendant would be delivering a large amount of cocaine to a specific location to which he would be driven by a woman in a black car in about 50 minutes, the deputy and other officers set up surveillance near the specified location, and defendant arrived at the specified location in the car with the woman. State v. Chadwick, 149 N.C. App. 200, 560 S.E.2d 207, 2002 N.C. App. LEXIS 124 (2002), cert. denied, 355 N.C. 752, 565 S.E.2d 672 (2002).

Information Given Officer by Another. — Reasonable ground for belief, which is an element of the officer's right to arrest without a warrant, may be based upon information given to the officer by another, the source of such information being reasonably reliable. Upon this question it is immaterial that such information, being hearsay, is not, itself, competent in evidence at the trial of the person arrested. State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970); State v. McMillan, 19 N.C. App. 721, 200 S.E.2d 339 (1973); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976), appeal dismissed, 291 N.C. 713, 232 S.E.2d 202 (1977).

Information given by one officer to another officer is reasonably reliable information to provide probable cause. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Reasonable grounds for belief can be based upon information given to an officer by another, the source of such information being reasonably reliable. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Probable cause may be based upon information given to the officer by another, the source of such information being reasonably reliable. State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Knowledge of police officers that an informant had told one of them that he had heard defendant discuss a robbery gave them probable cause to believe defendant had committed a felony, and they could therefore arrest him without a warrant. State v. White, 68 N.C. App. 671, 316 S.E.2d 112 (1984).

Probable cause for arrest can be imputed from one officer to others acting at his request. The officers receiving the request are entitled to assume that the officer requesting aid had probable cause to believe that a crime had been committed. If the transmitting officer did not have probable cause, the arrest would be illegal. State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

Authority to Briefly Detain Citizens. — It is permissible for police officers to make, in the course of a routine investigation, a brief detention of citizens upon a reasonable suspicion that criminal activity has taken place. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied and appeal dismissed, 297 N.C. 179, 254 S.E.2d 40 (1979).

A law officer may lawfully detain a person where there is a need for immediate action, if, upon personal observation or reliable information, he has an honest and reasonable suspicion that the suspect either has committed or is preparing to commit a crime. In re Horne, 50 N.C. App. 97, 272 S.E.2d 905 (1980).

Temporary Detention to Determine If Criminal Activity Is Afoot. — If, from the totality of circumstances, a law-enforcement officer has reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain an individual, and if upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

When incriminating evidence comes to the officer's attention during detention, such evidence may establish a reasonable basis for finding the probable cause necessary for effecting a warrantless arrest. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied and appeal dismissed, 297 N.C. 179, 254 S.E.2d 40 (1979).

Mistaken Arrest Excused If Officer Had Reasonable Belief. — In making an arrest upon personal observation and without a warrant an officer will be excused, though no offense was perpetrated, if the circumstances are such as to reasonably warrant the belief that it had been. State v. McNinch, 90 N.C. 695 (1884); State v. Campbell, 182 N.C. 911, 110 S.E. 86 (1921), aff'd, 262 U.S. 728, 43 S. Ct. 519, 67 L. Ed. 1203 (1923).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Misdemeanor. — In contrast to the rule for searches, police generally need not obtain a warrant before arresting a person in a public place; an officer may make a warrantless arrest for a misdemeanor committed in his or her presence. State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994).

Violation of Motor Vehicle Act. — An officer has a right to make an arrest without a warrant if a violation of the Motor Vehicle Act is actually committed in his presence. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

If the officer saw the commission of a violation of the Motor Vehicle Act, a misdemeanor, he would have the right to enter the premises where the defendant lived in order to make an arrest without a warrant. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

Police officer had probable cause to arrest defendant for speeding and failing to produce a driver's license after the officer clocked defendant on radar going 57 miles per hour in a zone where the posted speed limit was 35 miles per hour and where defendant failed to produce his driver's license to the officer upon request after the officer stopped defendant. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Driving Motor Vehicle While Under Influence of Intoxicants. — A highway patrolman apprehending a person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized to arrest such person without a warrant, and such arrest is legal. State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967).

The petitioner's driving privilege was properly revoked because of his unwillingness to take the breathalyzer test, whether or not his warrantless arrest was legal under this section, where the arrest was constitutionally valid by virtue of the fact that the arresting officer had ample information to provide him with probable cause to arrest the petitioner for operating a motor vehicle upon a public highway while under the influence of intoxicants. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Before making the stop of a vehicle the arresting officer noticed defendant weaving back and forth and once running off the highway. After he made the stop, the officer noticed that defendant's eyes were extremely red and glassy and that he appeared to be in a daze. He stated that defendant moved sort of slowly and appeared to be nervous and in the officer's opinion he was not normal. Finally, the officer testified that he detected a moderate odor of alcohol about his breath. As a result probable cause existed for placing defendant under arrest for driving while impaired. State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

Threats and Profane Language in Presence of Officer. — The evidence was sufficient to sustain the legality of defendant's arrest without a warrant for disorderly conduct, where, although the arresting officer did not quote the defendant's precise language to the jury, he did testify that the defendant was cursing and threatening a cab driver and that the threats and profane language were continued in the presence of the officer. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Trespass. — Sheriff may arrest anyone committing crime of trespass in his presence. State v. Brown, 264 N.C. 191, 141 S.E.2d 311 (1965).

As to window breaking, see State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

Carrying Concealed Weapon. — Where police officers stopped defendant's car to make a routine driver's license check and defendant removed revolver from a bag in the back seat, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe defendant was committing a misdemeanor, namely, carrying a concealed weapon in violation of G.S. 14-269, in their presence. State v. White, 18 N.C. App. 31, 195 S.E.2d 576, appeal dismissed, 283 N.C. 587, 196 S.E.2d 811 (1973).

Where a fully justified frisk by a police officer revealed that defendant was carrying a revolver, and the officer had probable cause to arrest him for carrying a concealed weapon in violation of G.S. 14-269, at that point, the officer had absolute knowledge that defendant was violating the statute and that he was committing a misdemeanor in his presence. Thus, defendant's arrest for carrying a concealed weapon was not in violation of his constitutional rights, and the police officer did not exceed his authority under State law to arrest without a warrant. State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Possession of Heroin. — Once the arresting agent corroborated the description of the defendant provided by an informant by observing the defendant at the named location, the agent had reasonable grounds to believe the defendant was in possession of heroin, a felony, thereby committing an offense in the agent's presence, and creating probable cause to arrest. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

Manufacture of Whiskey. — An alcoholic beverage control officer who saw defendant at a still unlawfully engaged in the manufacture of whiskey had a lawful right to arrest defendant there without a warrant. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

As to arrest of participants in indecent show, see Brewer v. Wynne, 163 N.C. 319, 79 S.E. 629 (1913).

Violation of Curfew. — The presence of the defendant and his driver upon the streets while curfew was in effect was a violation of an ordinance, and declared thereby to be a misdemeanor, unless they were traveling for an excepted purpose. The arresting officer having, at least, reasonable ground to believe that the defendant had committed a misdemeanor in his presence, the arrest without a warrant was lawful. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Use of Body-Bug Transmitter. — Knowledge of an offense acquired through officer's sense of hearing as he monitored conversations and a drug transaction through body-bug transmitter worn by informant held to have occurred in presence of the officer. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Where detective had given informant money to make drug purchase from defendant, he listened to the drug purchase transaction take place through the use of a body-bug transmitter worn by informant, and immediately following the transaction, informant delivered the drugs to the officer and gave him a detailed account of the transaction, the officer had probable cause to believe that defendant had committed a felony. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

2. Offense Out of Presence of Officer.

Investigatory Stop Justified. — Circumstances known to police officers when they stopped defendant's car created a reasonable suspicion of criminal activity, thus justifying a brief investigatory stop. State v. Williams, 87 N.C. App. 261, 360 S.E.2d 500 (1987).

Drunken Driving. — Where, based upon his own observation, officer had probable cause to believe that defendant was intoxicated, and based upon statement of security guard, officer also had probable cause to believe that defendant had driven in that intoxicated state, and further, as defendant's car was nearby, knowing that defendant had come and gone once already, the officer had probable cause to believe that defendant would get back in his car and drive in an intoxicated condition, defendant's arrest was entirely proper and legal. State v. White, 84 N.C. App. 111, 351 S.E.2d 828, cert. denied, 319 N.C. 227, 353 S.E.2d 404, appeal dismissed, 319 N.C. 409, 354 S.E.2d 887 (1987).

Deputy had authority to arrest defendant without a warrant where the deputy was alone at the scene, and there was no evidence that the intoxicated driver's car was inoperable, giving the deputy probable cause to believe the driver may cause injury to himself or others. State v. Crawford, 125 N.C. App. 279, 480 S.E.2d 422 (1997).

Manslaughter. — Probable cause to believe defendant had committed the felony of manslaughter was present where, through his investigation, the officer had reasonable cause to believe the defendant had driven his vehicle while under the influence of intoxicating liquor and that he had driven his vehicle across the median of the highway, struck one vehicle and crashed into a second vehicle, killing the two occupants. State v. Stewardson, 32 N.C. App.

344, 232 S.E.2d 308, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

Robbery. — Where arresting officer knew that a robbery had been committed by one who had fled and had a general description of the felon, and his clothing and injury, and defendant was found at the location described in the officer's information and had property on his person similar to that taken in the robbery, such information in possession of the officers was amply sufficient to authorize the arrest without a warrant. State v. Grier, 268 N.C. 296, 150 S.E.2d 443 (1966); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Where the police officer first saw defendant on a bank near a wooded area, defendant matched the general description the officer had received of a robbery suspect, defendant's appearance gave rise to a reasonable inference that he had been through a wooded area, and the officer was aware that suspects in the robbery had escaped into woods less than one mile from the spot the officer was patrolling, the officer had probable cause to believe that a felony had been committed and that defendant had committed it. Defendant's arrest was therefore legal under subsection (b)(2) of this section. State v. Mathis, 295 N.C. 623, 247 S.E.2d 919 (1978).

When police officers stopped an automobile fitting the description of one used in conjunction with a robbery and observed a pistol on the seat of the automobile, they had reasonable ground to believe that defendant had committed a felony and would evade arrest if not taken into custody. State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971).

Where the police had a description of defendants, including their height, weight, estimated age, clothing, color and complexion, one defendant had been identified from photographs by two eyewitnesses and one informer, a second informer whose information had led to the conviction of seven persons within the past two years, had told police that defendants were the individuals involved in this robbery, had told police how he came into possession of this information and how it was revealed to him, the totality of these facts and circumstances would warrant a prudent man in believing that the felony of armed robbery had been committed and that these defendants participated in commission of the crime, the Supreme Court held that the officers acted on reasonable grounds and with probable cause. State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971).

Where although the officer had not personally participated in investigation of the robbery for which defendant was arrested, but the record showed that at the time he made the arrest he knew that defendant had been identified from a photograph by one of the eyewitnesses as the man who was involved in the robbery, the arresting officer had probable cause to believe defendant had committed a felony. State v. McDonald, 32 N.C. App. 457, 232 S.E.2d 467, cert. denied, 292 N.C. 469, 233 S.E.2d 925 (1977).

When the victim in an assault and robbery charge pointed out the defendant to an officer as being one of his assailants, the officer not only had the right but the duty to arrest the defendant. State v. Grant, 248 N.C. 341, 103 S.E.2d 339 (1958).

Where the victim of a robbery gave officers a description of the men who robbed him and the vehicle in which they were riding, and where on the same night men fitting the description given the officers and riding in a vehicle similar to the one described to the officers were apprehended and arrested by the officers, the Supreme Court held that the officers had ample evidence of probable cause to authorize the making of the arrest. State v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970).

Discovery by police of a bag of money, together with previous observations of the defendants and a defendant's resulting flight gave officers sufficient probable cause to believe that a felony had been committed and subsequently to place all three defendants under arrest without a warrant. State v. Allen, 15 N.C. App. 670, 190 S.E.2d 714 (1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

Where defendant was in an automobile traveling away from the scene of the crime, the arresting officers were warranted in the belief that the defendant would not be apprehended unless immediately arrested. Thus, in arresting the defendant without a warrant for a misdemeanor offense not committed in their presence, the arresting officers complied with subsection (b) of this section, and the arrest was both constitutionally valid and legal. State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

Breaking and Entering. — Where a felonious breaking and entering and a felonious larceny had occurred, and footprints led from the scene of the felonies to a wooded area, and the stolen items were found in that wooded area, and later the police saw a person enter that area and look around, then the police had reasonable ground upon which to believe that person had committed the two felonies; that he would evade arrest if not immediately taken into custody; and thus the search of his person (which produced positive evidence of his guilt) was legal. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971).

An arrest without warrant was upheld when the evidence disclosed that the officer had information that the felony of breaking and entering had been committed, and the defendants fitted the description of the perpetrators of the crimes. State v. Roberts, 6 N.C. App. 312, 170 S.E.2d 193 (1969), aff'd, 276 N.C. 98, 171 S.E.2d 440 (1970).

Possession of Illegal Drugs. — The warrantless arrest of a defendant for the felonious possession of LSD and the subsequent warrantless searches of his person were held lawful, where (1) the arresting officer received information from a reliable informant that two unknown persons, accompanied by the defendant, were on a certain street and that the two unknown persons had narcotic drugs in their possession; (2) the officer briefly observed the three suspects walking on the sidewalk; (3) the officer arrested the defendant on the street for the possession of narcotic drugs, but the search of defendant's person at that time uncovered no drugs; and (4) a subsequent "strip search" at the police station resulted in the finding of LSD tablets in defendant's clothing. State v. Parker, 11 N.C. App. 648, 182 S.E.2d 264, cert. denied, 279 N.C. 396, 183 S.E.2d 247 (1971).

Sale of Illegal Drugs. — Where the officer received information from an informant of known reliability that a described person was at that time at a particular location engaged in selling LSD, went to the scene accompanied by another officer and found the defendant, dressed in the manner described by the second informant, observed the defendant for several minutes, during which time his actions were consistent with the activity of selling LSD, and where, when the officers approached, defendant started walking rapidly away, the officer's own observations and defendant's activities in the officer's presence served to verify the information furnished by the reliable informant, and thus, it was lawful for the officer to effect a warrantless arrest. State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976), appeal dismissed, 291 N.C. 713, 232 S.E.2d 202 (1977).

Defendant's arrest and subsequent search conducted by a police officer were permissible under U.S. Const. amend. IV because the officer had sufficient probable cause, pursuant to G.S. 15A-401(b)(1) and (b)(2)(a), to believe that defendant was committing, or had committed, a felony in light of information provided by a confidential informant, to the effect that a black male matching defendant's description was selling drugs outside a local store in violation of G.S 90-95(a)(1) and (b)(1); the informant's 14 years of personal dealings with the officer resulting in over 100 arrests and numerous convictions allowed the conclusion that the informant was reliable. State v. Stanley, 175 N.C. App. 171, 622 S.E.2d 680, 2005 N.C. App. LEXIS 2707 (2005).

Possession of Heroin for Purpose of Sale. — A police officer had reasonable grounds to arrest defendant without a warrant for the felony of possessing heroin for purpose of sale, where a person suffering from a narcotics overdose told the officer that the defendant had administered hypodermically narcotic drugs to him and that the defendant had narcotic drugs on his person. State v. Jackson, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

Rearrest of Escaped Convict. — An escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court. State v. Finch, 177 N.C. 599, 99 S.E. 409 (1919).

An escapee from the State's prison system may be lawfully seized and held in custody by the police, with or without probable cause. State v. White, 21 N.C. App. 173, 203 S.E.2d 644, appeal dismissed, 285 N.C. 595, 205 S.E.2d 726 (1974).

Misdemeanor Offense. — Minor's arrest, three months after the minor's alleged commission of a misdemeanor offense, violated state law because the arresting officer was not an eyewitness to minor's misdemeanor offenses, G.S. 15A-401(b)(2), and there were insufficient grounds to believe that the minor was a danger to himself or others so as to excuse his arrest at that time. Bailey v. Kennedy, 349 F.3d 731, 2003 U.S. App. LEXIS 23317 (4th Cir. 2003).

As to escapees who lacked standing to challenge probable cause for arrest, see State v. White, 21 N.C. App. 173, 203 S.E.2d 644, appeal dismissed, 285 N.C. 595, 205 S.E.2d 726 (1974).

Driver's willful refusal to submit to a chemical analysis could be used to revoke his drivers license even though the arrest was not in compliance with subdivision (b)(2). Quick v. North Carolina DMV, 125 N.C. App. 123, 479 S.E.2d 226 (1997).

IV. USE OF FORCE IN ARREST.

Purpose of Deadly Force Provision. — Subdivision (d)(2) was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Discretion of Officer in Use of Force. — Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Defendant was not entitled to a jury instruction on perfect or imperfect self-defense because the trial court could reasonably have found that when the officer fired at defendant, the officer acted within the officer's discretion given defendant's threat to shoot and the officer's belief that defendant had weapons on defendant's person or within the bag defendant carried. State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Assault on Law Officer. — In all cases where the charge is assault on a law officer in violation of former G.S. 14-33(b)(4), or assault of a law officer with a firearm (G.S. 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

In a prosecution for assault on a police officer it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

Murder of Law-Enforcement Officer Making Illegal Arrest. — Murder committed against a law-enforcement officer was an aggravating factor in a capital trial, even though the defendant argued that the officer was killed after making an illegal entry into the defendant's home to arrest the defendant, because the defendant had no right to use deadly force. State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1013 (1999).

Officer Cannot Shoot at Fleeing Misdemeanant. — Where a person charged with a misdemeanor is fleeing from arrest, and is out of the control of the officer, such officer is guilty of an assault if he shoots at said person. And indeed the use of a pistol in attempting to arrest for a misdemeanor is excessive force. Sossamon v. Cruse, 133 N.C. 470, 45 S.E. 757 (1903).

One resisting an illegal arrest is not resisting an officer within the discharge of his official duties. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Right to Defend Against Excessive Force and to Resist Unlawful Arrest. — The right to defend oneself from the excessive use of force by a police officer must be carefully distinguished from the well-guarded right to resist an arrest which is unlawful. The right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the use of excessive force does not render the arrest illegal. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Bystander Defending Arrestee from Excessive Force. — The bystander coming to the aid of an arrestee is entitled to use only such force as is reasonably necessary to defend the arrestee from the excessive use of force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The privilege to intervene in the context of a supposed felonious assault upon an arrestee by a person known or reasonably believed to be a police officer must be more limited than the traditionally recognized right to come to the defense of a third party. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Reasonableness of Grounds for Using Force a Jury Question. — In an action for wrongful death growing out of the mortal wounding of intestate in a scuffle while a police officer was attempting to arrest him, the court should have instructed the jury that the jury and not the officer must be the judge of the reasonableness of the grounds on which the officer acted. Perry v. Gibson, 247 N.C. 212, 100 S.E.2d 341 (1957), aff'd, 249 N.C. 134, 105 S.E.2d 277 (1958).

Instruction on Use of Force to Resist Excessive Force. — When there is evidence tending to show the excessive use of force by a law-enforcement officer in making an arrest, the trial court is required to instruct the jury that the force used against the law-enforcement officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Defendant Not Justified in Resisting. — The court did not err by refusing to give defendant's requested special jury instruction that if the officer was beyond his jurisdiction, the defendant had a right to resist; even if the entry was illegal or the arrest unauthorized, defendant was not justified in using a deadly weapon against a law-enforcement officer attempting to effect an arrest. State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

When a person has been placed under arrest by an officer, the person does not have the right to kill the officer. State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996).

Interlocutory appeal of denial of police officer's motion for summary judgment on the issue of whether he was entitled to public officer immunity under subsection (d) in wrongful death action against him was permissible.

Thompson v. Farmer, 945 F. Supp. 109 (W.D.N.C. 1996).

City could not be held liable for police officers use of deadly force in shooting the parents' rampaging son. The use of force was justified under G.S. 15A-401. Turner v. City of Greenville, — N.C. App. —, 677 S.E.2d 480, 2009 N.C. App. LEXIS 732 (2009).

V. ENTRY ON PREMISES.

Purpose of Demand and Denial Requirement. — The requirement that a police officer, armed with an arrest warrant or search warrant, must demand and be denied admittance before making forcible entry, serves to identify his official status and to protect both the officer and the occupant. State v. Shue, 16 N.C. App. 696, 193 S.E.2d 481 (1972); State v. Gagne, 22 N.C. App. 615, 207 S.E.2d 384, cert. denied, 285 N.C. 761, 209 S.E.2d 285 (1974).

Demand and Denial Where Officers Have Warrant. — The requirement that admittance be demanded and denied would seem to apply even though the officers have a search warrant or warrant of arrest. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Rudisill, 20 N.C. App. 313, 201 S.E.2d 368 (1973).

Forcible Entry Where Admittance Demanded and Denied. — Compliance with the requirement of the statute that admittance be "demanded and denied" serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Where an officer comes armed with process founded on a breach of the peace, he may, after demand of admittance for the purpose of making the arrest, and refusal of the occupant to open the doors of a house, lawfully break them in order to effect an entrance and if he acts in good faith in doing so, both he and his posse comitatus will be protected. See State v. Mooring, 115 N.C. 709, 20 S.E. 182 (1894), commented on in 15 N.C.L. Rev. 125.

Length of Time Prior to Forcible Entry Must Be Reasonable. — The length of time an officer must wait before breaking in to serve a valid warrant must be reasonable under the circumstances as they appear to him. State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185, cert. denied and appeal dismissed, 284 N.C. 124, 199 S.E.2d 662 (1973).

Failure to Receive Reply Before Entering Residence. — There was sufficient compliance with the requirement that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where defendant had observed the officer's uniform and was aware of his official status, the officer had seen defendant looking out a door and knew that defendant had observed him, and the officer twice called out defendant's name and received no reply before he opened the door to defendant's residence. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

The fact that silence greeted the officers' demands for entrance and that defendant was not found in the house did not make their entry illegal. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Open door obviates the demand for admittance by first knocking. State v. Rudisill, 20 N.C. App. 313, 201 S.E.2d 368 (1973).

Entry Without Notice May Be Proper Under Special and Emergency Conditions. — While under ordinary circumstances the officers must announce their purpose and demand admittance before making a forcible entry to conduct a search pursuant to a valid search warrant, such an entry may be proper under special and emergency conditions when it reasonably appears that such an announcement and demand by the officer and the delay consequent thereto would provoke the escape of the suspect, place the officer in peril, or cause the destruction or disposition of critical evidence. State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185, cert. denied and appeal dismissed, 284 N.C. 124, 199 S.E.2d 662 (1973).

Question of whether there was an actual breaking of the door is not determinative of the issue of whether or not the statute is applicable. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Officers Admitted by Owner of House. — The arrest without warrant of the defendant for armed robbery, the defendant having been discovered hiding in the attic of a house, is lawful where the discovery and arrest of the defendant occurred after the owner of the house had admitted the officers by the front door. State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

Entry of Other Officers to Assist Officers Voluntarily Admitted. — Where a law officer makes a lawful entry of a home with consent of the owner to apprehend and arrest a suspect, then other officers may enter the home to assist those officers who have been voluntarily admitted. State v. Rhodes, 54 N.C. App. 193, 282 S.E.2d 809 (1981), aff'd, 305 N.C. 294, 287 S.E.2d 898 (1982).

Demand and Denial Where Person Reasonably Believed to Be on Premises. — Even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right, in the absence of special and emergency circumstance, to break into the house and arrest the person unless and until admittance has been demanded and denied. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Entry Held Lawful. — The entry of police officers into the house in which the defendant and his companions were hiding, and the arrest without warrant of the occupants therein for the offense of armed robbery, was proper and lawful where (1) the felony of armed robbery had been committed at an ABC store, (2) within a few minutes after the robbery the officers discovered in the driveway of the house the automobile which they reasonably believed had been used in the robbery, (3) all curtains on the windows of the house were drawn, and (4) the occupants of the house failed to respond to the officers' knock at the front door. State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

The fact that officers were standing under a light on a porch of a house from which a short time previously two shots had been fired, killing one person and seriously wounding another, was such an exigent circumstance that the officers were justified in entering the home and searching it to make sure no one else, including the officers, would be shot; and since the officers saw a shotgun in the house in plain view, evidence in regard to the gun was admissible. State v. Mackins, 47 N.C. App. 168, 266 S.E.2d 694, cert. denied, 301 N.C. 102 (1980).

Where there was evidence that after a police officer made a lawful entry into defendant's home and read an order for his arrest, but defendant did not submit peacefully, and that the officer called for assistance and another officer came to defendant's home to assist the first officer, the evidence failed to indicate an illegal entry into defendant's home. State v. Rhodes, 54 N.C. App. 193, 282 S.E.2d 809 (1981), aff'd, 305 N.C. 294, 287 S.E.2d 898 (1982).

Subdivision (e)(1) of this section outlines the situations when a law-enforcement officer may enter on private premises to arrest someone. Three requirements must be met. The officer must possess a warrant for the arrest of a person, he must have reasonable cause to believe that the person to be arrested is present, and he has given, or made a reasonable effort to give, notice of his authority and purpose to an occupant of the premises. Kuykendall v. Turner, 61 N.C. App. 638, 301 S.E.2d 715 (1983).

There was sufficient compliance with the requirements that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where the officer knocked, identified himself twice, heard a lot of scrambling and running noises coming from within the dwelling, and received no reply before he forcibly opened the door. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Evidence in Plain View Admissible. — In a prosecution for first degree rape and first degree kidnapping, evidence was properly admitted, where officers possessing valid arrest warrants were permitted to enter trailer by defendant's brother, the officers had reason to suspect that defendant was present in the trailer, the officers informed defendant's brother of their purpose, and the items seized and admitted into evidence were seen in plain view. State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573, cert. denied, 338 N.C. 670, 453 S.E.2d 183 (1994).

Entry into trailer was lawful and bloody T-shirt and cowboy boots were properly admitted where they were in plain view and were later seized pursuant to a search warrant. State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996).

Knock and Announce Requirement. — The requirements of subsection (e) were satisfied where plaintiff was well aware of police officer's identities and their reason for being at her house; defendants were uniformed Highway Patrolmen who had arrived on the scene in patrol cars and who had been involved in an altercation with plaintiff minutes before the alleged unlawful entry; and, moreover, defendants were about to apprehend plaintiff as she entered the kitchen and attempted to close the door; in such a case, compliance with the knock and announce requirement was not required. Lee v. Greene, 114 N.C. App. 580, 442 S.E.2d 547 (1994).

Notice Held Proper. — Where the searching officer made the announcement to the person at the door and repeated it to the other occupants as soon as he came upon them, the requirement that such notice be given as will identify the officer and protect the occupants and the officer is satisfied. State v. Rudisill, 20 N.C. App. 313, 201 S.E.2d 368 (1973).

VI. UNLAWFUL ARREST.

Person has the right to resist an unlawful arrest. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282, appeal dismissed, 292 N.C. 470, 233 S.E.2d 924 (1977); State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

And may flee from an unlawful arrest. State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282, appeal dismissed, 292 N.C. 470, 233 S.E.2d 924 (1977).

Arrest Not Complete Where Defendant Fled from Unlawful Attempt to Arrest. — Where the defendant fled from the unlawful attempt to arrest him, the arrest was not complete under subdivision (c)(1) because the defendant did not "submit to the control" of the officer, nor had the officer taken him "into custody by the use of physical force." State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282, appeal dismissed, 292 N.C. 470, 233 S.E.2d 924 (1977).

Illegal arrest, unaccompanied by violent or oppressive circumstances, would not be more coercive than a legal arrest. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

Unlawful Arrest Does Not Discharge Defendant from Liability. — The law does not discharge a defendant from criminal liability merely because his arrest is not lawful, unless the offense charged stems from such arrest. State v. Jones, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

Arrest May Be Constitutionally Valid But Illegal Under State Law. — The words "illegal" and "unconstitutionally" are not synonymous. An arrest is constitutionally valid when the officers have probable cause to make it. Thus an arrest may be constitutionally valid and yet "illegal" under State law. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

And Evidence Not Excluded When Arrest Only Constitutionally Valid. — When an arrest is constitutionally valid but illegal under the law of North Carolina, the facts discovered or the evidence obtained as a result of the arrest need not be excluded as evidence in the trial of the action. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Mere failure to comply with the letter of this section in making an arrest does not require that evidence discovered as a result of the arrest be excluded. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977), cert. denied and appeal dismissed, 294 N.C. 186, 241 S.E.2d 521 (1978).

Identification Evidence Subsequently Obtained Not Excluded. — Nothing in the law of this State requires that identification evidence, obtained subsequent to an illegal arrest, be excluded. State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977).

Evidence in Action for Unlawful Arrest. — In an action against an officer for malicious and unlawful arrest, evidence that a robbery had been committed is held competent upon the issue, and defendant's evidence tending to show good faith and that he was acting within the provisions of the statute in arresting plaintiffs, was properly submitted to the jury. Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936).

Summary judgment was improper on the grounds that the defendant police officer "did not commit the common law torts of false imprisonment, assault and/or battery" where the trier of fact had yet to decide whether this section was applicable. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

False Imprisonment Claim Properly Dismissed. — Summary judgment was properly granted for the defendants, a sheriff and his officers, as to the plaintiff's false imprisonment claim where the evidence indicated that the sheriff had probable cause to believe plaintiff obstructed, resisted and delayed him in carrying out his duties when he caused the plaintiff to be arrested after repeatedly warning him to turn over some equipment which the plaintiff held pursuant to a mechanic's lien. Thomas v. Sellers, 142 N.C. App. 130, 542 S.E.2d 283, 2001 N.C. App. LEXIS 88 (2001).

OPINIONS OF ATTORNEY GENERAL

Arrests of Inmates Either Inside or Outside Confines of Private Prison Facility. — In order to make arrests of inmates either inside or outside the confines of a private prison facility, and use force in doing so, the employees of a private prison operator must obtain certification as municipal law-enforcement officers, be deputized by the sheriff, or become commissioned as company police officers; absent certification as a law-enforcement officer or deputization, the employees of a private prison operator may only detain inmates and use force against them consistent with the common law principles of self defense and defense of property. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

(a) Territorial Jurisdiction of State Officers. — Law-enforcement officers of the State of North Carolina may arrest persons at any place within the State.

(b) Territorial Jurisdiction of County and City Officers. — Law-enforcement officers of cities and counties may arrest persons within their particular cities or counties and on any property and rights-of-way owned by the city or county outside its limits.

(c) City Officers, Outside Territory. — Law-enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city. Law enforcement officers of cities may transport a person in custody to or from any place within the State for the purpose of that person attending criminal court proceedings. While engaged in the transportation of persons for the purpose of attending criminal court proceedings, law enforcement officers of cities may arrest persons at any place within the State for offenses occurring in connection with and incident to the transportation of persons in custody.

(d) County and City Officers, Immediate and Continuous Flight. — Law-enforcement officers of cities and counties may arrest persons outside the territory described in subsections (b) and (c) when the person arrested has committed a criminal offense within that territory, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory.

(e) County Officers, Outside Territory, for Felonies. — Law-enforcement officers of counties may arrest persons at any place in the State of North Carolina when the arrest is based upon a felony committed within the territory described in subsection (b). For purposes of this subsection, law enforcement officers of counties shall include all officers of consolidated county-city law enforcement agencies.

(f) Campus Police Officers, Immediate and Continuous Flight. — A campus police officer: (i) appointed by a campus law-enforcement agency established pursuant to G.S. 116-40.5(a); (ii) appointed by a campus law enforcement agency established under G.S. 115D-21.1(a); or (iii) commissioned by the Attorney General pursuant to Chapter 74E or Chapter 74G of the General Statutes and employed by a college or university which is licensed, or exempted from licensure, by G.S. 116-15 may arrest a person outside his territorial jurisdiction when the person arrested has committed a criminal offense within the territorial jurisdiction, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory. (1935, c. 204; 1973, c. 1286, s. 1; 1987, c. 671, s. 3; 1989, c. 518, s. 4; 1991 (Reg. Sess., 1992), c. 1043, s. 3; 1995, c. 206, s. 1; 1999-68, s. 2; 2005-231, s. 7; 2007-45, s. 1.)

OFFICIAL COMMENTARY

The Commission here provides a straightforward statement of the territorial jurisdiction of officers to make arrests, bringing together the provisions previously split between Chapter 15 and Chapter 160A. Although it is generally conceded that there is a power of "hot pursuit" for going beyond normal territorial jurisdiction, there has been little authority on the subject in North Carolina, and no statutory coverage other than that referred to in G.S. 15-42 and in Chapter 160A. The Commission here proposed a statement of that authority and uses the term "immediate and continuous flight," a term more commonly used in statutes and which conveys the requisite idea without the undesirable connotations of dangerous chases inherent in the phrase "hot pursuit."

Local Modification. — Gaston County: 1985 (Reg. Sess., 1986), c. 836, s. 1; Town of Norwood: 1983, c. 91.

CASE NOTES

This section and § 160A-286 must be analyzed to determine the territorial jurisdiction of a municipal law-enforcement officer. State v. Treants, 60 N.C. App. 203, 298 S.E.2d

438 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 395 (1983).

Section 160A-286 extends the extraterritorial power of city police officers beyond the mere power to arrest found in subsection (c) of this section. State v. Treants, 60 N.C. App. 203, 298 S.E.2d 438 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 395 (1983).

Where police officer is acting within his territorial jurisdiction as extended by G.S. 160A-286, the defendant has no right to resist, delay, or obstruct a search being conducted pursuant to a warrant. State v. Treants, 60 N.C. App. 203, 298 S.E.2d 438 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 395 (1983).

State Has Burden to Show Officer Was a Government Officer. — The State did not meet its burden of showing that officer was a government officer at the time of the incident because the officer was outside the jurisdiction of his city police department pursuant to this section, and the State failed to show that the requirements of G.S. 160A-288 and the emergency assistance provisions of the Mutual Aid Agreement were followed. State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

Technical violation of this section does not necessarily require exclusion of evidence obtained in the search incident to the arrest. State v. Mangum, 30 N.C. App. 311, 226 S.E.2d 852 (1976).

Violation of Section Held Not to Require Exclusion of Evidence. — Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion from the evidence of a pistol seized during the stop. Furthermore, even if the stop were an arrest in terms of subsection (b) of this section, this is not a substantial violation of this Chapter which would require exclusion of the evidence under G.S. 15A-974. State v. Harris, 43 N.C. App. 346, 258 S.E.2d 802 (1979), appeal dismissed, 298 N.C. 808, 261 S.E.2d 920 (1979).

Evidence obtained in the search and seizure of an automobile in which defendant was a passenger was properly admitted even though the arresting police officers were outside their territorial jurisdiction as prescribed by this section and defendant's arrest may have been unlawful. State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981), cert. denied, 305 N.C. 762, 292 S.E.2d 578 (1982).

Applied in State v. Carr, 61 N.C. App. 402, 301 S.E.2d 430 (1983).

Cited in State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

§ 15A-403. Arrest by officers from other states.

(a) Any law-enforcement officer of a state contiguous to the State of North Carolina who enters this State in fresh pursuit and continues within this State in such fresh pursuit of a person who is in immediate and continuous flight from the commission of a criminal offense, has the same authority to arrest and hold in custody such person on the ground that he has committed a criminal offense in another state which is a criminal offense under the laws of the State of North Carolina as law-enforcement officers of this State have to arrest and hold in custody a person on the ground that he has committed a criminal offense in this State.

(b) If an arrest is made in this State by a law-enforcement officer of another state in accordance with the provisions of subsection (a), he must, without unnecessary delay, take the person arrested before a judicial official of this State, who must conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judicial official determines that the arrest was lawful, he must commit the person arrested to await a reasonable time for the issuance of an extradition warrant by the Governor of this State or release him pursuant to Article 26 of this Chapter, Bail. If the judicial official determines that the arrest was unlawful, he must discharge the person arrested.

(c) This section applies only to law-enforcement officers of a state which by its laws has made similar provision for the arrest and custody of persons closely pursued within its territory. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is based upon the "Uniform Fresh Pursuit Act," and permits officers from other states in fresh pursuit of a person who has committed an offense to make the arrest in North Carolina. The Commission has restricted the act by limiting it to officers from contiguous states, requiring reciprocal provisions, requiring that the offender be taken before a judicial officer in this State for determination of lawfulness of the arrest, and requiring extradition proceedings for his removal.

§ 15A-404. Detention of offenders by private persons.

(a) No Arrest; Detention Permitted. — No private person may arrest another person except as provided in G.S. 15A-405. A private person may detain another person as provided in this section.

(b) When Detention Permitted. — A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:

(1) A felony,

(2) A breach of the peace,

(3) A crime involving physical injury to another person, or

(4) A crime involving theft or destruction of property.

(c) Manner of Detention. — The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.

(d) Period of Detention. — The detention may be no longer than the time required for the earliest of the following:

(1) The determination that no offense has been committed.

(2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e).

(e) Surrender to Officer. — A private person who detains another must immediately notify a law-enforcement officer and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section would replace the old concept of "citizen's arrest" with a concept of "citizen's detention." North Carolina has authorized the private citizen to make arrests in certain limited circumstances — essentially felonies and breaches of the peace in his presence. To those two situations are added crimes involving physical injury to another person and a general authorization with regard to crimes involving theft or destruction of property.

The important conceptual change is from "arrest" to "detention." The notion of a private citizen "arresting" another in certain circumstances had led persons at times to act without authority and at times to place themselves or others in unjustified danger. Perhaps a safer idea is that the private citizen may detain the offender sufficiently long to turn him over to a law-enforcement officer. Though there may be little or no difference in the physical actions taken, it is hoped that this will be a clearer and safer concept for the private citizen.

This section has no effect on the 1971 addition to G.S. 14-72.1 which provides that a merchant is not civilly liable for reasonably detaining persons believed to have violated the "shoplifting" statute.

CASE NOTES

"Detain." — The ordinary meaning of the word "detain," and the meaning the legislature intended when it enacted this section, is "to hold or keep in or as if in custody." State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

Use of Deadly Force. — A private citizen is not allowed to employ deadly force to detain a fleeing misdemeanant in circumstances under which an officer of the law could not have employed similar force to effect such an arrest. State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

Blocking Exit. — Where plaintiff was restrained for a very brief time and the restraint consisted of having her exit from office temporarily blocked, and no defendant used actual force to keep her in office, the simple act of standing in front of a door for a few seconds was not an unreasonable detention. Caldwell v. Linker, 901 F. Supp. 1010 (M.D.N.C. 1995).

Instruction on Reasonableness. — Defendant was entitled to requested instruction concerning the reasonableness of his armed detention of homicide victim only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated in subsection (b) of this section had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances. State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Illustrative Cases. — Individual who was shot attempting to stop defendants from leaving scene had cause to believe the felony of burglary was being committed in his presence, where evidence showed that at the time of his arrival he knew only that his daughter had telephoned at approximately 2:15 a.m. to report that someone was breaking into her home and that the call was then cut off, that he observed a strange vehicle in the driveway and two individuals in the process of removing certain components of an entertainment center from the home, and that the two individuals ran from the dwelling. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

Where community college president requested that instructor return the keys belonging to college and she refused, this refusal was sufficient to justify president in temporarily restraining plaintiff and attempting to have the college's property returned. Caldwell v. Linker, 901 F. Supp. 1010 (M.D.N.C. 1995).

Because defendant was a lawful resident of the dwelling where the altercation occurred, he had no duty to retreat from an assault on the premises so long as he was not responsible for bringing on the difficulty; thus, the court should have instructed the jury to that effect. State v. Beal, 181 N.C. App. 100, 638 S.E.2d 541, 2007 N.C. App. LEXIS 20 (2007).

Applied in Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976); State v. Gilliam, 71 N.C. App. 83, 321 S.E.2d 553 (1984).

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.

(a) Assistance upon Request; Authority. — Private persons may assist law-enforcement officers in effecting arrests and preventing escapes from custody when requested to do so by the officer. When so requested, a private person has the same authority to effect an arrest or prevent escape from custody as the officer making the request. He does not incur civil or criminal liability for an invalid arrest unless he knows the arrest to be invalid. Nothing in this subsection constitutes justification for willful, malicious or criminally negligent conduct by such person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(b) Benefits to Private Persons. — A private person assisting a law-enforcement officer pursuant to subsection (a) is:

(1) Repealed by Session Laws 1989, c. 290, s. 1.

(2) Entitled to the same benefits as a "law-enforcement officer" as that term is defined in G.S. 143-166.2(d) (Law-Enforcement Officers', Firemen's and Rescue Squad Workers' Death Benefit Act); and

(3) To be treated as an employee of the employer of the law-enforcement officer within the meaning of G.S. 97-2(2) (Workers' Compensation Act).

The Governor and the Council of State are authorized to allocate funds from the Contingency and Emergency Fund for the payment of benefits under subdivision (3) when no other source is available for the payment of such benefits and when they determine that such allocation is necessary and appropriate. (1868-9, c. 178, subch. 1, s. 2; Code, s. 1125; Rev., s. 3181; C.S., s. 4547; 1973, c. 1286, s. 1; 1979, c. 714, s. 2; 1989, c. 290, s. 1.)

OFFICIAL COMMENTARY

Source: G.S. 15-45, G.S. 14-224. Subsection (a) of this section changes the former law making it the duty of the private citizen to assist a law-enforcement officer in making arrests and preventing escapes under certain circumstances when requested to do so. Here there is substituted a broader, but permissive, statute. Thus the criminal sanction provided by G.S. 14-224 is repealed. When so requested, the private citizen has the same authority, both as to extent and as to limitation, as the officer making the request, but he is protected from civil or criminal liability, if the arrest is invalid, unless he knows it is invalid.

Subsection (b) of this section brings together several benefits available to law-enforcement officers and makes them available to private citizens assisting law-enforcement officers pursuant to subsection (a). Except for the Death Benefit Act, these benefits have already been available to private citizens in some circumstances.

(1) Section 143-166(m) makes the Law-Enforcement Officers' Benefit and Retirement Fund available to "any citizen duly deputized as a deputy by a sheriff or other law-enforcement officer in an emergency." The effect here is to dispense with any formalities.

(2) The Law-Enforcement Officers' Death Benefit Act is applicable only to full-time officers, G.S. 143-166.2(4). No funding problem is created by making the act applicable to the private citizen under these circumstances, for the benefits are payable from the Contingency and Emergency Fund.

(3) The Workmen's Compensation Act, G.S. 97-2(2), defines "employee" to include "deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency." We here again dispense with the formalities and make the act applicable to private persons acting pursuant to subsection (a). Of course, that subsection is limited to requested help in effecting arrests and preventing escapes, thus generally presenting an emergency situation.

(By way of comparison, note that G.S. 160A-282 makes the benefits of the North Carolina Workmen's Compensation Act applicable to auxiliary police.)

The last sentence of subsection (b) makes the Contingency and Emergency Fund available, if necessary, to assist in payments under subdivisions (1) and (3) — unnecessary as to subdivision (2) for those benefits are paid from the Contingency and Emergency Fund. While it should not ordinarily be necessary, it was thought advisable to grant this authority in order to prevent loss to the citizen in the event of the failure of other funding. Compare the provisions for the State Volunteer Fire Department in G.S. 69-24 and G.S. 69-25.

CASE NOTES

Cited in State v. Mathis, 126 N.C. App. 688, 486 S.E.2d 475 (1997).

OPINIONS OF ATTORNEY GENERAL

Arrests of Inmates Either Inside or Outside Confines of Private Prison Facility. — In order to make arrests of inmates either inside or outside the confines of a private prison facility, and use force in doing so, the employees of a private prison operator must obtain certification as municipal law-enforcement officers, be deputized by the sheriff, or become commissioned as company police officers; absent certification as a law-enforcement officer or deputization, the employees of a private prison operator may only detain inmates and use force against them consistent with the common law principles of self defense and defense of property. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

§ 15A-406. Assistance by federal officers.

(a) For purposes of this section, "federal law enforcement officer" means any of the following persons who are employed as full-time law enforcement officers by the federal government and who are authorized to carry firearms in the performance of their duties:

(1) United States Secret Service special agents;
(2) Federal Bureau of Investigation special agents;
(3) Bureau of Alcohol, Tobacco and Firearms special agents;
(4) United States Naval Investigative Service special agents;
(5) Drug Enforcement Administration special agents;
(6) United States Customs Service officers;
(7) United States Postal Service inspectors;

(8) Internal Revenue Service special agents;
(9) United States Marshals Service marshals and deputies;
(10) United States Forest Service officers;
(11) National Park Service officers;
(12) United States Fish and Wildlife Service officers;
(13) Immigration and Naturalization Service officers;
(14) Tennessee Valley Authority officers; and
(15) Veterans Administration police officers.

(b) A federal law enforcement officer is authorized under the following circumstances to enforce criminal laws anywhere within the State:

(1) If the federal law enforcement officer is asked by the head of a state or local law enforcement agency, or his designee, to provide temporary assistance and the request is within the scope of the state or local law enforcement agency's subject matter and territorial jurisdiction; or
(2) If the federal law enforcement officer is asked by a state or local law enforcement officer to provide temporary assistance when at the time of the request the state or local law enforcement officer is acting within the scope of his subject matter and territorial jurisdiction.

(c) A federal law enforcement officer shall have the same powers as those invested by statute or common law in a North Carolina law enforcement officer, and shall have the same legal immunity from personal civil liability as a North Carolina law enforcement officer, while acting pursuant to this section.

(d) A federal law enforcement officer who acts pursuant to this section shall not be considered an officer, employee, or agent of any state or local law enforcement agency.

(e) For purposes of the Federal Tort Claims Act, a federal law enforcement officer acts within the scope of his office or employment while acting pursuant to this section.

(f) Nothing in this section shall be construed to expand the authority of federal officers to initiate or conduct an independent investigation into violation of North Carolina law. (1991, c. 262, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 8; 1993 (Reg. Sess., 1994), c. 571, s. 1; 2001-257, s. 1; 2003-36, s. 1.)

§§ 15A-407 through 15A-409: Reserved for future codification purposes.

ARTICLE 21.

§§ 15A-410 through 15A-453: Reserved for future codification purposes.

ARTICLE 22.

§§ 15A-454 through 15A-500: Reserved for future codification purposes.

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:

(1) Must inform the person arrested of the charge against him or the cause for his arrest.

(2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.

(3) May, prior to taking the person before a judicial official, take the person arrested to some other place if the person so requests.

(4) May, prior to taking the person before a judicial official, take the person arrested to some other place if such action is reasonably necessary for the purpose of having that person identified.

(5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

(6) Must make available to the State on a timely basis all materials and information acquired in the course of all felony investigations. This responsibility is a continuing affirmative duty. (1868-9, c. 178, subch. 1, s. 7; Code, s. 1130; Rev., s. 3182; C.S., s. 4548; 1937, c. 257, ss. 1, 2; 1955, c. 889; 1969, c. 296; 1973, c. 1286, s. 1; 1975, c. 166, ss. 7, 8; 2004-154, s. 11.)

OFFICIAL COMMENTARY

This section is similar to former G.S. 15-47. Some of the provisions of that statute are separately covered, and it has been possible to simplify the format of this section.

Subdivisions (3) and (4) are based upon the American Law Institute's Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, Section 3.09 (1) (Alternate Provision) and Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). North Carolina statutes formerly did not provide such a section. See G.S. 15-24 (Arrest with a warrant) and G.S. 15-46 (Arrest without a warrant).

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Legal Periodicals. — For note on right to counsel in pretrial situations, see 38 N.C.L. Rev. 630 (1960).

For article, "The Applicability of Miranda to the Police Booking Process," see 1976 Duke L.J. 574.

For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

I. General Consideration.
II. Taking Person Before Judiciary Official.
III. Identification of Person.
IV. Right of Communication.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided under former law.*

Statute Implements Constitutional Rights. — The General Assembly enacted the statute to implement the constitutional rights under N.C. Const., Art. I, § 23. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Statute does not prescribe mandatory procedures affecting validity of trial. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971), cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972).

The failure of law-enforcement personnel in complying with the provisions of this section and G.S. 15A-511 can result in the violation of a person's constitutional rights. However, these statutes do not prescribe mandatory procedures affecting the validity of a trial. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2164, 64 L. Ed. 2d 795 (1980).

Object of a preliminary hearing is to effect a release for one who is held in violation of his rights. State v. Chamberlain, 263 N.C. 406, 139 S.E.2d 620 (1965).

Rights of Intoxicated Persons. — One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23, as any other accused. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Effect of Violation of Section on Voluntary Confession. — The violation of the statute, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent. State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938).

Where any delay in arrest was at the request of defendant's counsel and was unquestionably not caused by anything the deputies did, and after the arrest warrant was served, there was no delay in presenting defendant before the magistrate, there was no "unnecessary delay" and therefore no breach of duty by the arresting officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Delay Not Error Since Confession Not Result of Violation. — Where there was nothing in the record that showed that the defendant's confession resulted from any delay in taking him before a magistrate, any unnecessary delay, if any occurred, in violation of this section would not result in error, since a confession must be suppressed only if the confession was obtained as a result of a violation. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Confession Held Involuntary. — Defendant's youth, his low mentality, and limited education, his incommunicado detention and interrogation for 19 hours by a number of different police officers who allowed him only scant time to rest, the inadequate explanation of his constitutional rights and the suggestions that it would be better for him to confess, the failure of the police to notify his parents or to afford him the opportunity to consult with a lawyer, and the delay in producing him before a magistrate — all of these elements combined to establish that defendant's confession could not be deemed a voluntary act and that its admission into evidence denied him due process of law. Thomas v. North Carolina, 447 F.2d 1320 (4th Cir. 1971).

Transfer After High-Speed Chase Upheld. — Where defendant was arrested in Chatham County solely because he was trying to evade police in a chase that began in Randolph County and, consequently, was brought before a Randolph County magistrate without "unnecessary delay," the "seizure and transfer" of defendant and his car did not violate his statutory and constitutional rights. State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002); State v. Zamora-Ramos, 190 N.C. App. 420, 660 S.E.2d 151, 2008 N.C. App. LEXIS 896 (2008).

Cited in State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Sanders, 303 N.C. 608, 281 S.E.2d 7 (1981); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Hunter, 305 N.C. 106, 286 S.E.2d 535 (1982); State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983); State v. Gilbert, 85 N.C. App. 594, 355 S.E.2d 261 (1987); State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987); State v. Jones, 112 N.C. App. 337, 435 S.E.2d 574 (1993); State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994); State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002); State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

II. TAKING PERSON BEFORE JUDICIARY OFFICIAL.

"Unnecessary Delay" Under Subdivision (2). — Subdivision (2) of this section and G.S. 15A-511(a)(1) only require that an arrested person be taken before a magistrate "without unnecessary delay," and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied and appeal dismissed, 294 N.C. 187, 241 S.E.2d 522 (1978).

Homicide defendant's clothes were not taken as a result of an unnecessarily long delay in his appearance before a magistrate where he was taken before a magistrate within 90 minutes of his arrest and his clothing was taken within a few hours thereafter. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Duty of Officer Making Arrest Without Warrant. — A police officer within the limits of his city may summarily and without warrant arrest a person for a misdemeanor committed in his presence. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have warrant issued, giving him opportunity to provide bail and communicate with counsel and friends. Perry v. Hurdle, 229 N.C. 216, 49 S.E.2d 400 (1948).

Liability for Delay in Procuring Warrant. — A warrant must be procured as soon after the arrest as possible and, where it appears that this was not done, the officer responsible for the arrest is personally answerable in damages. Hobbs v. City of Washington, 168 N.C. 293, 84 S.E. 391 (1915).

When required bail bond is given and approved, accused is to be released. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with a defendant who had escaped. State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Defendant failed to show that police investigators violated this section by waiting nineteen hours to take defendant before a magistrate after his arrest, taking him to the Law Enforcement Center (LEC) for questioning prior to his appearance before a magistrate, and waiting three and a half hours after questioning began before advising him of his Miranda rights where his confession was not a result of the delay; his confession necessarily took a lot of time because it involved nine murders; the police accommodated his request to sleep, and he was advised of his rights at the outset. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Delay Was Not Unnecessary Where Defendant Advised of His Rights. — Thirteen-hour delay between the time defendant was taken into custody and the time he was taken before a magistrate was not an unnecessary delay where police officers interrogated the defendant for ten hours before he confessed; the officers fully advised him of his constitutional rights before the interrogation began and if he had been taken before a magistrate, he would have been advised of those same rights. The court could not hold that the defendant would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer. State v. Littlejohn, 340 N.C. 750, 459 S.E.2d 629 (1995).

Delay Not Unnecessary. — Where the defendant was arrested at 9:30 a.m., and was not taken before the magistrate until 8 p.m., his right to be taken before a magistrate without unnecessary delay was not violated as a large part of that time was spent in interrogating the defendant about several crimes. State v. Chapman, 343 N.C. 495, 471 S.E.2d 354 (1996).

III. IDENTIFICATION OF PERSON.

Meaning of "Reasonably Necessary" in Subdivision (4). — Based on the official commentary provided by the legislature, the words "reasonably necessary" in subdivision (4) have a stricter meaning than would ordinarily apply. Only exigent circumstances, such as were present in Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), where the only eyewitness was critically injured, will suffice as "reasonably necessary." State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

Subdivision (4) Held Violated. — Police officers violated subdivision (4) of this section by taking defendant to the town in which the crime was committed for a show-up after they had first prepared to take him before a magistrate in the town in which he was arrested. State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

IV. RIGHT OF COMMUNICATION.

Rights of communication go with a man into jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. The denial of the opportunity to exercise that right is a denial of the right. State v. Wheeler, 249 N.C. 187, 105 S.E.2d 615 (1958); State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right to Communication Includes Right of Access. — A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Communication Not Limited to Professional Advice. — Under N.C. Const., Art. I, § 23 and the statute, a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Fact that a person is defendant's lawyer as well as his friend does not impair his right to see the defendant at a critical time of the proceedings. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Defendant is entitled to counsel at every critical stage of the proceedings against him. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

When Critical Stage Reached in Prosecution for Driving While Intoxicated. — A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated, and the denial of counsel at this point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor, the only means by which defendant might prove his innocence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right to Communication When Intoxication is Essential Element of Offense. — When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. He is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The denial of request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication is a denial of a constitutional right resulting in irreparable prejudice to his defense. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under G.S. 20-138 (see now G.S. 20-138.1) depends upon whether he is intoxicated (now under the influence) at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Defendant charged with driving while impaired was informed of his right to communicate with counsel, family, and friends by a State trooper, pursuant to G.S. 15A-501, after his arrest and was given a telephone; defendant's failure to complete a long distance call because defendant failed to dial the area code did not mean that there was a failure to afford defendant his rights under G.S. 15A-501. State v. Lewis, 147 N.C. App. 274, 555 S.E.2d 348, 2001 N.C. App. LEXIS 1136 (2001).

When defendant was arrested for driving while impaired, his right to consult with family and friends, as specified in G.S. 15A-501(5) was not denied, as his friend was in contact with him from the time she arrived at the scene of the accident in which he was involved until he was released from custody and saw him before the accident, providing her with enough contact with defendant to allow her to form an opinion as to his impairment or lack thereof, and defendant was not prejudiced by the fact that his friend was not allowed to witness his field sobriety tests, as the results of those tests were suppressed, and the appreciable impairment theory of driving while impaired was dismissed. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

Subdivision (5) Not Applicable to Breathalyzer Tests. — The legislature did not intend for the "reasonable time" contemplated by subdivision (5) of this section to apply to the specialized situation contemplated by G.S. 20-16.2, a civil matter involving the administrative removal of driving privileges as a result of refusing to submit to a breathalyzer test. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

When a defendant was arrested for driving while impaired, his right to consult, with counsel, as specified in G.S. 20-16.2(a)(6), controlled over the right stated in G.S. 15A-105(5) because anyone who accepted the privilege of driving on North Carolina's highways consented to the use of a breathalyzer test and had no constitutional right to consult a lawyer to void that consent, so defendant had no right to consult counsel other than that provided for in G.S. 20-16.2(a)(6). State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

Denial of Communication Rights Held Not Prejudicial. — Where the defendant was informed of his Miranda rights, waived those rights, and voluntarily submitted his statement admitting guilt to police, the defendant could not have suffered prejudice had he been denied his statutory right to communicate with friends. State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978).

Defendant was not prejudiced by the failure of the police to advise him of his right to communicate with his friends where he waived his Miranda rights and voluntarily submitted his statement to the police. State v. Chapman, 343 N.C. 495, 471 S.E.2d 354 (1996).

OPINIONS OF ATTORNEY GENERAL

Duty of Jailer to Receive Prisoner Before Warrant Issued. — See opinion of Attorney General to Mr. Lee J. Greer, Prosecutor, Thirteenth Judicial District, 40 N.C.A.G. 351 (1969), rendered under former law.

§ 15A-502. Photographs and fingerprints.

(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:

(1) Arrested or committed to a detention facility, or
(2) Committed to imprisonment upon conviction of a crime, or
(3) Convicted of a felony.

(a1) It shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of a felony to be fingerprinted and to forward those fingerprints to the State Bureau of Investigation.

(a2) If the person cannot be identified by a valid form of identification, it shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of:

(1) Any offense involving impaired driving, as defined in G.S. 20-4.01(24a), or
(2) Driving while license revoked if the revocation is for an Impaired Driving License Revocation as defined in G.S. 20-28.2

to be fingerprinted and photographed.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a Class 2 or 3 misdemeanor under Chapter 20 of the General Statutes, "Motor Vehicles." Notwithstanding the prohibition in this subsection, a photograph may be taken of a person who operates a motor vehicle on a street or highway if:

(1) The person is cited by a law enforcement officer for a motor vehicle moving violation, and
(2) The person does not produce a valid drivers license upon the request of a law enforcement officer, and
(3) The law enforcement officer has a reasonable suspicion concerning the true identity of the person.

As used in this subsection, the phrase "motor vehicle moving violation" does not include the offenses listed in the third paragraph of G.S. 20-16(c) for which no points are assessed, nor does it include equipment violations specified in Part 9 of Article 3 of Chapter 20 of the General Statutes.

(b1) Any photograph authorized by subsection (b) of this section and taken by a law enforcement officer or agency:

(1) Shall only be taken of the operator of the motor vehicle, and only from the neck up.

(2) Shall be taken at either the location where the citation is issued, or at the jail if an arrest is made.

(3) Shall be retained by the law enforcement officer or agency until the final disposition of the case.

(4) Shall not be used for any purpose other than to confirm the identity of the alleged offender.

(5) Shall be destroyed by the law enforcement officer or agency upon a final disposition of the charge.

(c) This section does not authorize the taking of photographs or fingerprints of a juvenile alleged to be delinquent except under Article 21 of Chapter 7B of the General Statutes.

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a), (a1), or (a2) of this section may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies. (1973, c. 1286, s. 1; 1977, c. 711, s. 22; 1979, c. 850; 1981, c. 862, s. 3; 1993, c. 539, s. 298; 1994, Ex. Sess., c. 24, s. 14(c); 1996, 2nd Ex. Sess., c. 18, s. 23.2(b); 1998-202, s. 13(f); 2007-370, s. 1; 2007-534, s. 1.)

OFFICIAL COMMENTARY

This section carries forward the concept of the present provisions of the former first two paragraphs of G.S. 114-19 in a more logical location than in the Chapter dealing with the Department of Justice. Those provisions have been simplified and broadened in some respects, but restricted as to motor vehicle and juvenile offenses.

Cross References. — As to taking of fingerprints of convicted felons for submission to State Bureau of Investigation with report of disposition of charges, see G.S. 15A-1382.

Legal Periodicals. — For article, "The Applicability of Miranda to the Police Booking Process," see 1976 Duke L.J. 574 (1976).

CASE NOTES

Legislative Intent. — It was the intent of the legislature that photographs taken under the authority of this section could be used for any law-enforcement purpose. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

Official Commentary correctly states the legislature's intent that this section carries forward the concept of the present provisions of the former first two paragraphs of G.S. 114-19. Those provisions have been simplified and broadened in some respects, but restricted as to motor vehicle and juvenile offenses. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Use of Photograph in Subsequent Identification Procedure. — Where a defendant was legally arrested for a misdemeanor and photographed under the authority of this section, the photograph could be used in a photographic identification procedure in connection with defendant's first-degree rape case. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

Photograph taken prior to the defendant's arrest for rape was not illegally taken in contravention of the provisions of this section. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Section does not create an exclusionary rule of evidence. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Effect of 1979 Amendment of Subsection (c). — The amendment of subsection (c) of this section to allow fingerprinting of juveniles pursuant to G.S. 7A-596 [see now G.S. 7B-2103] constitutes a narrowing of an exclusionary rule of evidence. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Fingerprinting of Juvenile Committing Crime Prior to Effective Date of Procedural Change. — Application of the provisions of G.S. 7A-596 and 7A-598 [see now G.S. 7B-2103 and 7B-2105] to take the fingerprints of a juvenile accused of a crime committed prior to their effective date did not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Subsection (c) of this section and G.S. 7A-596 [see now G.S. 7B-2103] are procedural statutes, and a change in the evidentiary or procedural law between the time of the offense and the time of trial did not preclude the State from utilizing the new procedure even though at the time of the offense it was unavailable. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Applied in State v. Hamilton, 298 N.C. 238, 258 S.E.2d 350 (1979).

Cited in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 15A-503. Police assistance to persons arrested while unconscious or semiconscious.

(a) Whenever a law-enforcement officer arrests a person who is unconscious, semiconscious, or otherwise apparently suffering from some disabling condition, and who is unable to provide information on the causes of the condition, the officer should make a reasonable effort to determine if the person arrested is wearing a bracelet or necklace containing the Medic Alert Foundation's emergency alert symbol to indicate that the person suffers from diabetes, epilepsy, a cardiac condition, or any other form of illness which would cause a loss of consciousness. If such a symbol is found indicating that the person being arrested suffers from one of those conditions, the officer must make a reasonable effort to have appropriate medical care provided.

(b) Failure of a law-enforcement officer to make a reasonable effort to discover an emergency alert symbol, as required by this section, does not by itself establish negligence of the officer, but may be considered along with other evidence to determine if the officer took reasonable precautions to ascertain the emergency medical needs of the person in his custody.

(c) A person who is provided medical care under the provisions of this section is liable for the reasonable costs of that care unless he is indigent.

(d) Repealed by Session Laws 1975, c. 818, s. 1. (1975, c. 306, s. 1; c. 818, s. 1.)

CASE NOTES

Cited in Doerner ex rel. Price v. City of Asheville, 90 N.C. App. 128, 367 S.E.2d 356 (1988).

§ 15A-504. Return of released person.

(a) Upon a magistrate's finding under G.S. 15A-511(c)(2) of no probable cause for a warrantless arrest, a law-enforcement officer may return the person previously arrested and any other person accompanying him to the scene of the arrest.

(b) No officer acting pursuant to this section may be held to answer in any civil or criminal action for injury to any person or damage to any property when damage results, whether directly or indirectly, from the actions of the person so released or transported.

(c) Nothing in this section shall be construed to supersede the provisions of G.S. 122C-301. (1981, c. 928; 1987, c. 282, s. 3.)

§ 15A-505. Notification of parent and school.

(a) A law enforcement officer who charges a minor with a criminal offense shall notify the minor's parent or guardian of the charge, as soon as practicable, in person or by telephone. If the minor is taken into custody, the law enforcement officer or the officer's immediate superior shall notify a parent or guardian in writing that the minor is in custody within 24 hours of the minor's arrest. If the parent or guardian of the minor cannot be found, then the officer or the officer's immediate superior shall notify the minor's next-of-kin of the minor's arrest as soon as practicable.

(b) The notification provided for by subsection (a) of this section shall not be required if:

(1) The minor is emancipated;

(2) The minor is not taken into custody and has been charged with a motor vehicle moving violation for which three or fewer points are assessed under G.S. 20-16(c), except an offense involving impaired driving, as defined in G.S. 20-4.01(24a); or

(3) The minor has been charged with a motor vehicle offense that is not a moving violation.

(c) A law enforcement officer who charges a person with a criminal offense that is a felony, except for a criminal offense under Chapter 20 of the General Statutes, shall notify the principal of any school the person attends of the charge as soon as practicable but at least within five days. The notification may be made in person or by telephone. If the person is taken into custody, the law enforcement officer or the officer's immediate supervisor shall notify the principal of any school the person attends. This notification shall be in writing and shall be made within five days of the person's arrest. If a principal receives notification under this subsection, a representative from the district attorney's office shall notify that principal of the final disposition at the trial court level. This notification shall be in writing and shall be made within five days of the disposition. As used in this subsection, the term "school" means any public or private school in the State that is authorized under Chapter 115C of the General Statutes. (1983, c. 681, s. 1; 1994, Ex. Sess., c. 26, s. 1; 1997-443, s. 8.29(g).)

§§ 15A-506 through 15A-510: Reserved for future codification purposes.

Article 24.

Initial Appearance.

§ 15A-511. Initial appearance.

(a) Appearance before Magistrate. —

(1) A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501.

(2) The magistrate must proceed in accordance with this section, except in those cases in which he has the power to determine the matter pursuant to G.S. 7A-273. In those cases, if the arrest has been without a warrant, the magistrate must prepare a magistrate's order containing a statement of the crime with which the defendant is charged.

(3) If the defendant brought before a magistrate is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxi-

cated, or is otherwise unable to understand the procedural rights afforded him by the initial appearance, upon order of the magistrate he may be confined or otherwise secured. If this is done, the magistrate's order must provide for an initial appearance within a reasonable time so as to make certain that the defendant has an opportunity to exercise his rights under this Chapter.

(a1) A proceeding for initial appearance in a noncapital case under this section may be conducted by an audio and video transmission between the magistrate or other authorized judicial official and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding. Prior to the use of audio and video transmission pursuant to this subsection, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.

(b) Statement by the Magistrate. — The magistrate must inform the defendant of:

(1) The charges against him;
(2) His right to communicate with counsel and friends; and
(3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

(c) Procedure When Arrest Is without Warrant; Magistrate's Order. — If the person has been arrested, for a crime, without a warrant:

(1) The magistrate must determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed it, and in the manner provided by G.S. 15A-304(d).
(2) If the magistrate determines that there is no probable cause the person must be released.
(3) If the magistrate determines that there is probable cause, he must issue a magistrate's order:
    a. Containing a statement of the crime of which the person is accused in the same manner as is provided in G.S. 15A-304(c) for a warrant for arrest, and
    b. Containing a finding that the defendant has been arrested without a warrant and that there is probable cause for his detention.
(4) Following the issuance of the magistrate's order, the magistrate must proceed in accordance with subsection (e) and must file the order with any supporting affidavits and records in the office of the clerk.

(d) Procedure When Arrest Is Pursuant to Warrant. — If the arrest is made pursuant to a warrant, the magistrate must proceed in accordance with subsection (e).

(e) Commitment or Bail. — If the person arrested is not released pursuant to subsection (c), the magistrate must release him in accordance with Article 26 of this Chapter, Bail, or commit him to an appropriate detention facility pursuant to G.S. 15A-521 pending further proceedings in the case.

(f) Powers Not Limited to Magistrate. — Any judge, justice, or clerk of the General Court of Justice may also conduct an initial appearance as provided in this section. (1868-9, c. 178, subch. 1, s. 7; Code, s. 1130; Rev., s. 3182; C.S., s. 4548; 1973, c. 1286, s. 1; 1975, c. 166, ss. 9-11; 1975, 2nd Sess., c. 983, s. 141; 1997-268, s. 1.)

OFFICIAL COMMENTARY

When an arrested person is brought before a magistrate, the magistrate may try the matter if it is within his jurisdiction. Otherwise, there are two possibilities. If the person has been arrested without a warrant, and there has been no judicial determination of probable cause, the magistrate should make that determination, and release the defendant if it is lacking. The determination is made in the same manner as when a warrant is sought. Section 15-46 provided for the issuance of a warrant in such a case — even though the defendant had already been arrested. The new procedure utilizes all of the statements in the warrant format, but eliminates the actual order for arrest. At this point an order of commitment or bail is appropriate if the defendant is not released.

Of course, if the defendant has been arrested under a warrant there already has been an initial determination of probable cause, and it is not necessary to repeat the step. If the defendant is continued in custody, the magistrate must proceed to set bail.

While the steps in this section ordinarily will be performed by a magistrate, it was thought prudent also to authorize other judicial officers to perform these steps (subsection (f)).

Cross References. — As to return of person released after finding of no probable cause for warrantless arrest, see G.S. 15A-504.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative

Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

For casenote: "State v. Fisher: Canine Sniffs — Who Let the Dogs Out?," see 26 N.C. Cent. L.J. 47 (2003).

CASE NOTES

Editor's Note. *— Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

Statute does not prescribe mandatory procedures affecting validity of trial. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. Broome, 269 N.C. 661, 153 S.E.2d 384 (1967); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971), cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972).

The failure of law-enforcement personnel in complying with the provisions of G.S. 15A-501 and this section can result in the violation of a person's constitutional rights. However, these statutes do not prescribe mandatory procedures affecting the validity of a trial. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2164, 64 L. Ed. 2d 795 (1980).

This section does not prescribe mandatory procedures affecting the validity of a trial. For a violation of this section to be substantial, defendant must show that the delay in some way prejudiced him, for example, by causing a violation of his constitutional rights, or by resulting in a confession that would not have been obtained but for the delay. State v. Martin, 315 N.C. 667, 340 S.E.2d 326 (1986), involving a delay of less than two hours.

The officers' failure to procure a magistrate's signature on the citation for driving without a valid license indicated that the defendant was never arrested for that violation; a perimeter canine sniff which turned up narcotics was, therefore, not justified; defendant's detention during the canine sniff was an illegal seizure; and the trial court properly suppressed evidence subsequently pursuant to the sniff. State v. Fisher, 141 N.C. App. 448, 539 S.E.2d 677, 2000 N.C. App. LEXIS 1409 (2000).

Absent Showing of Prejudice. — This section does not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. State v. Burgess, 33 N.C. App. 76, 234 S.E.2d 40 (1977).

Deputy sheriffs may not conduct bail hearings nor may they decide on the granting or denying of bail under North Carolina law; that authority is vested in a judicial officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Requirement That Person Be Taken Before Magistrate "Without Unnecessary Delay". — Subdivision (a)(1) of this section and G.S. 15A-501(2) only require that an arrested person be taken before a magistrate "without unnecessary delay" and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied and appeal dismissed, 294 N.C. 187, 241 S.E.2d 522 (1978).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Where any delay in arrest was at the request of defendant's counsel and was unquestionably not caused by anything the deputies did, and after the arrest warrant was served, there was no delay in presenting defendant before the magistrate, there was no "unnecessary delay" and therefore no breach of duty by the arresting officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Where defendant contended that the four and one-half hour delay in taking him before a judicial official after service of warrants was a coercive factor which rendered his confession involuntary, but he did not show any causal connection between the confession and the delay, no constitutional provision required exclusion of his statement on this ground. State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988).

Failure to Take Person Before Magistrate Where Arrested Without Warrant. — Court did not err in not allowing defendant's motion to quash the warrant charging him with resisting arrest for the reason that he was arrested without a warrant and was not taken before a magistrate as provided by the statute, because it did not prescribe mandatory procedures affecting the validity of a trial. State v. Foust, 18 N.C. App. 138, 196 S.E.2d 375 (1973).

Effect of Failure to Issue Magistrate's Order. — Compliance with subdivision (c)(3) of this section is not mandatory, and a failure to comply will not affect the validity of a trial. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Defendant's Right to Communicate With Counsel and Friends. — A defendant arrested for impaired driving was properly informed of his right to communicate with friends and counsel, as required by subsection (b), where the magistrate and the jailer informed defendant that a telephone was available for him to call family, friends, counsel, and others to help with his pretrial release. State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (1998).

Failure to Advise Defendants of Their Rights. — Defendants made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief where the evidence showed that magistrates failed to advise defendants of their rights under subsection (b) of this section, G.S. 15A-533(b) and 15A-534(c) and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Statutory violations by magistrate, who failed to inform defendant of his rights to pretrial release under either the general provisions of this section or the more specific provisions of G.S. 15A-534.2, did not justify dismissal of driving while impaired charges. State v. Gilbert, 85 N.C. App. 594, 355 S.E.2d 261 (1987). But see, State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Effect of Violation of Subsection (e) on Confession. — Assuming, arguendo, that magistrate denied bail in violation of subsection (e) of this section, the trial court was not required to suppress a voluntary confession given thereafter by defendant. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

Delay Not Unreasonable. — Defendant's argument that four hour interval between arrest and appearance before a magistrate violated the requirement that an officer take an arrested person before a magistrate without unnecessary delay was without merit. State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997).

Applied in State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983); State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

Cited in State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976); State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (1998); State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006); State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

§§ 15A-512 through 15A-520: Reserved for future codification purposes.

ARTICLE 25.

Commitment.

§ 15A-521. Commitment to detention facility pending trial.

(a) Commitment. — Every person charged with a crime and held in custody who has not been released pursuant to Article 26 of this Chapter, Bail, must be committed by a written order of the judicial official who conducted the initial appearance as provided in Article 24 to an appropriate detention facility as provided in this section.

(b) Order of Commitment; Modification. — The order of commitment must:

(1) State the name of the person charged or identify him if his name cannot be ascertained.

(2) Specify the offense charged.

(3) Designate the place of confinement.

(4) If release is authorized pursuant to Article 26 of this Chapter, Bail, state the conditions of release. If a separate order stating the

conditions has been entered, the commitment may make reference to that order, a copy of which must be attached to the commitment.

(5) Subject to the provisions of subdivision (4), direct, as appropriate, that the defendant be:

a. Produced before a district court judge pursuant to Article 29 of this Chapter, First Appearance before District Court Judge,

b. Produced before a district court judge for a probable cause hearing as provided in Article 30 of this Chapter, Probable-Cause Hearing,

c. Produced for trial in the district or superior court, or

d. Held for other specified purposes.

(6) State the name and office of the judicial official making the order and be signed by him.

The order of commitment may be modified or continued by the same or another judicial official by supplemental order.

(c) Copies and Use of Order, Receipt of Prisoner. —

(1) The order of commitment must be delivered to a law-enforcement officer, who must deliver the order and the prisoner to the detention facility named therein.

(2) The jailer must receive the prisoner and the order of commitment, and note on the order of commitment the time and date of receipt. As used in this subdivision, "jailer" includes any person having control of a detention facility.

(3) Upon releasing the prisoner pursuant to the terms of the order, or upon delivering the prisoner to the court, the jailer must note the time and date on the order and return it to the clerk.

(4) Repealed by Session Laws 1975, 2nd Sess., c. 983, s. 142.

(d) Commitment of Witnesses. — If a court directs detention of a material witness pursuant to G.S. 15A-803, the court must enter an order in the manner provided in this section, except that the order must:

(1) State the reason for the detention in lieu of the description of the offense charged, and

(2) Direct that the witness be brought before the appropriate court when his testimony is required. (1868-9, c. 178, subch. 3, ss. 24, 32; Code, ss. 1155, 1163; Rev., ss. 3230, 3232; C.S., ss. 4597, 4599; 1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 142.)

OFFICIAL COMMENTARY

This section essentially carries forward the provisions of Article 12 of Chapter 15, Commitment to Prison (G.S. 15-125, 126, and 127).

Changes from the old law involve first tying the new statute in with the modifications in the bail provisions and in the provisions relating to probable cause hearings. In addition specific designation of the county jail as the place of confinement is omitted, and provision is made for modification or continuation of the order.

The subsection relating to copies of the order is new. The former statute did not in terms require an order, but rather contained a directive as to the contents of an order for pretrial commitment. In some counties the practice had arisen of omitting the order of commitment, and simply writing the amount of the bond on the face of the warrant. Subsection (a) will require the order, and subsection (c) will ensure that the officer having the prisoner in custody will have the original order, that a copy of every order of commitment issued by a judicial officer will be on file in the clerk's office in which it was issued, and that if the prisoner is transferred to another county, the copy of the order of commitment will go to the clerk's office in that county. This will provide a source of information in the clerk's office about the population of the local detention facilities.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

CASE NOTES

Verbal Order Invalid. — A verbal order of a magistrate sending a prisoner to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. State v. James, 78 N.C. 455 (1878), decided under former law.

Cited in Knight v. Vernon, 23 F. Supp. 2d 634 (M.D.N.C. 1998).

OPINIONS OF ATTORNEY GENERAL

Section Inapplicable to Detention of Federal Prisoner in Local Jail. — See opinion of Attorney General to Mr. Louis A. Giovanetti, Special Agent, United States Department of Justice, Federal Bureau of Investigation, 45 N.C.A.G. 258 (1976).

§§ 15A-522 through 15A-530: Reserved for future codification purposes.

ARTICLE 26.

Bail.

OFFICIAL COMMENTARY

In formulating its bail provisions, the Commission referred to several sources, among them D.C. Code, Sections 23-1321 to 23-1332, as enacted by the District of Columbia Court Reform and Criminal Procedure Act of 1970, and A.B.A. Project on Standards for Criminal Justice, Standards Relating to Pretrial Release (1968). The Commission worked upon several successive drafts quite extensively, however, and the final product is not recognizably similar to the provisions of any other jurisdiction.

The major changes proposed in our bail laws are:

(1) Making bail on appeal from superior court discretionary in all cases.

(2) Inserting a carefully worked out procedure which is designed to result in more efficient handling of bond forfeitures. No person as to whom a judgment on a forfeiture remains outstanding for more than 10 days may become surety on any bail bond in the judicial district so long as the judgment remains unsatisfied.

A proposal of the Commission to give the bail-setting official the option of authorizing release on a bail bond to be secured with a deposit of 10% of the amount of the bond with the clerk was removed in the course of passage by the General Assembly.

The Commission discussed the professional bail bondsman. It finally decided that he still provides a service in a number of counties, and except for G.S. 15A-541 the Article does not mention the professional bondsman. He is treated in law as any other person acting as a surety upon a bail bond, although certain restrictive provisions are obviously written with the bondsman in mind. The Commission also discussed the advisability of revising the provisions relating to licensing of professional bondsmen in Chapter 85A of the General Statutes, and making that Chapter applicable to all counties. In the press of its work, however, the Commission never found time to develop this as part of its 1973 proposal.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

Part 1. General Provisions.

§ 15A-531. Definitions.

As used in this Article the following definitions apply unless the context clearly requires otherwise:

(1) "Accommodation bondsman" means a natural person who has reached the age of 18 years and is a bona fide resident of this State and who, aside from love and affection and release of the person concerned, receives no consideration for action as surety and who endorses the bail bond after providing satisfactory evidences of ownership, value, and marketability of real or personal property to the extent necessary to reasonably satisfy the official taking bond that such real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized in the event of breach of the conditions thereof. "Consideration" as used in this subdivision does not include the legal rights of a surety against a defendant by reason of breach of the conditions of a bail bond nor does it include collateral furnished to and securing the surety so long as the value of the surety's rights in the collateral do not exceed the defendant's liability to the surety by reason of a breach in the conditions of said bail bond.

(2) "Address of record" means:

a. For a defendant or an accommodation bondsman, the address entered on the bail bond under G.S. 15A-544.2, or any later address filed by that person with the clerk of superior court.

b. For an insurance company, the address of the insurance company as it appears on the power of appointment of the company's bail agent registered with the clerk of superior court under G.S. 58-71-140.

c. For a bail agent, the address shown on the bail agent's license from the Department of Insurance registered with the clerk of superior court under G.S. 58-71-140.

d. For a professional bondsman, the address shown on that bondsman's license from the Department of Insurance, as registered with the clerk of superior court under G.S. 58-71-140.

(3) "Bail agent" means any person who is licensed by the Commissioner as a surety bondsman under Article 71 of Chapter 58 of the General Statutes, is appointed by an insurance company by power of attorney to execute or countersign bail bonds for the insurance company in connection with judicial proceedings, and receives or is promised consideration for doing so.

(4) "Bail bond" means an undertaking by the defendant to appear in court as required upon penalty of forfeiting bail to the State in a stated amount. Bail bonds include an unsecured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage under G.S. 58-74-5, and an appearance bond secured by at least one solvent surety. A bail bond for which the surety is a bail agent acting on behalf of an insurance company is considered the same as a cash deposit for all purposes in this Article. A bail bond signed by a professional bondsman who is not a bail agent is not considered the same as a cash deposit under this Article. Cash bonds set in child support contempt proceedings shall not be satisfied in any manner other than the deposit of cash.

(5) "Defendant" means a person obligated to appear in court as required upon penalty of forfeiting bail under a bail bond.

(5a) House arrest with electronic monitoring. — Pretrial release in which the offender is required to remain at his or her residence unless the court authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training. The offender shall be required to wear a device which permits the supervising agency to electronically monitor the offender's compliance with the condition.

(6) "Insurance company" means any domestic, foreign, or alien surety company which has qualified under Chapter 58 of the General Statutes generally to transact surety business and specifically to transact bail bond business in this State.

(7) "Professional bondsman" means any person who is approved and licensed by the Commissioner of Insurance under Article 71 of Chapter 58 of the General Statutes and who pledges cash or approved securities with the Commissioner as security for bail bonds written in connection with a judicial proceeding and receives or is promised money or other things of value therefor.

(8) "Surety" means:

a. The insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company.

b. The professional bondsman, when a bail bond is executed by a professional bondsman or by a runner on behalf of a professional bondsman.

c. The accommodation bondsman, when a bail bond is executed by an accommodation bondsman. (1973, c. 1286, s. 1; 1975, c. 166, s. 12; 1995, c. 290, s. 1; c. 503, s. 1; 2000-133, s. 1; 2009-547, s. 2.)

OFFICIAL COMMENTARY

The reference in G.S. 15A-531(1) to "premium-secured appearance bond" is to the bond issued by the clerk upon a deposit of 10% of the face amount. In amending Article 26 to delete provisions pertaining to this type of bond, the General Assembly overlooked the phrase in subdivision (1).

Cross References. — As to mortgage in lieu of security for appearance, see G.S. 58-74-5.

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

Editor's Note. — Subdivisions (1) to (8) had been designated as subdivisions (1), (1a) to (1f) and (4) by Session Laws 2000-133, s. 1, and were renumbered at the direction of the Revisor of Statutes.

Session Laws 2000-133, s. 5, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, added the Part 1 heading.

Effect of Amendments. — Session Laws 2009-547, s. 2, effective December 1, 2009, and applicable to offenses committed on or after that date, added subdivision (5a).

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

Editor's Note. *— Some of the cases below were decided under former similar provisions of Chapter 15 and earlier statutes.*

Recognizance Binds to Three Things. — A recognizance (or bail bond) in general binds to three things: (1) To appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide by the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars is distinct and independent. State v. Schenck, 138 N.C. 560, 49 S.E. 917 (1905); State v. Eure, 172 N.C. 874, 89 S.E. 788 (1916); State v. Mallory, 266 N.C. 31, 145 S.E.2d 335 (1965), cert. denied, 384 U.S. 928, 86 S. Ct. 1443, 16 L. Ed. 2d 531 (1966).

Defendant Must Appear Until Discharged. — An appearance bond by its terms, and under the uniform ruling of the court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court. State v. Eure, 172 N.C. 874, 89 S.E. 788 (1916).

Recognizance for the appearance of the defendant at the next term of the court to be held for a given county is valid and binds the defendant to appear at the next term and at the courthouse, although neither time nor place is specifically named; because everyone knows, or is presumed to know, the time and place of holding the court. State v. Houston, 74 N.C. 174 (1876).

Failure to Appear at Time and Place Other Than That Specified. — If the recognizance specifies time and place, the defendant cannot be held to be in default for not appearing at some other time or place. State v. Houston, 74 N.C. 174 (1876).

Continuance Does Not Release Recognizance. — The continuance of a criminal case does not release the recognizance given for the appearance of the defendant. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

Agreement by Prosecutor to Discharge Will Not Relieve Defendant. — An agreement by a solicitor (now prosecutor) for the State to discharge a defendant if he would become a State's witness against codefendant will not relieve such defendant from a forfeited recognizance. State v. Moody, 69 N.C. 529 (1873).

Liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. He is not released by the principal's having been drunk and under arrest when his case was called in court and continued, and by the principal's having since become a fugitive from justice under charge of a different offense. State v. Holt, 145 N.C. 450, 59 S.E. 64 (1907).

Propriety of Sentence Reflecting That

Defendant Was on Pretrial Release When Crime Was Committed. — Whether or not one on pretrial release on another felony charge is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The legislature may constitutionally require that it be considered. One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance. State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

Cited in State v. Vikre, 86 N.C. App. 196, 356 S.E.2d 802 (1987); State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

§ 15A-532. Persons authorized to determine conditions for release; use of two-way audio and video transmission.

(a) Judicial officials may determine conditions for release of persons brought before them or as provided in subsection (b) of this section, in accordance with this Article.

(b) Any proceeding under this Article to determine, modify, or revoke conditions of pretrial release in a noncapital case may be conducted by an audio and video transmission between the judicial official and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding. Upon motion of the defendant, the court may not use an audio and video transmission.

(c) Prior to the use of audio and video transmission pursuant to subsection (b) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts. (1973, c. 1286, s. 1; 1993, c. 30, s. 1.)

OFFICIAL COMMENTARY

This section builds upon the definition of "judicial official" in G.S. 15A-101(5).

§ 15A-533. Right to pretrial release in capital and noncapital cases.

(a) A defendant charged with any crime, whether capital or noncapital, who is alleged to have committed this crime while still residing in or subsequent to his escape or during an unauthorized absence from involuntary commitment in a mental health facility designated or licensed by the Department of Health and Human Services, and whose commitment is determined to be still valid by the judge or judicial officer authorized to determine pretrial release to be valid, has no right to pretrial release. In lieu of pretrial release, however, the individual shall be returned to the treatment facility in which he was residing at the time of the alleged crime or from which he escaped or absented himself for continuation of his treatment pending the additional proceedings on the criminal offense.

(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

(c) A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial. If he determines release is warranted, the judge must authorize release of the defendant in accordance with G.S. 15A-534.

(d) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense involving trafficking in a controlled substance;
(2) The drug trafficking offense was committed while the person was on pretrial release for another offense; and
(3) The person has been previously convicted of a Class A through E felony or an offense involving trafficking in a controlled substance and not more than five years has elapsed since the date of conviction or the person's release from prison for the offense, whichever is later.

(e) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community, if a judicial official finds the following:

(1) There is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal street gang, as defined in G.S. 14-50.16;
(2) The offense described in subdivision (1) of this subsection was committed while the person was on pretrial release for another offense; and
(3) The person has been previously convicted of an offense described in G.S. 14-50.16 through G.S. 14-50.20, and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

Persons who are considered for bond under the provisions of subsections (d) and (e) of this section may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community. (1973, c. 1286, s. 1; 1981, c. 936, s. 2; 1997-443, s. 11A.118(a); 1998-208, s. 1; 2008-214, s. 4.)

OFFICIAL COMMENTARY

The shift to the word "judge" in subsection (b) is intentional. The section restates in simplified fashion the provisions of former G.S. 15-102 and G.S. 15-103.

Cross References. — As to prohibition against holding deaf arrestee, otherwise eligible for release, pending arrival of interpreter, see G.S. 8B-1. As to housing responsibilities for certain residents in or escapees from involuntary commitment in a mental health facility designated or licensed by the Department of Human Resources, see G.S. 122C-254.

Effect of Amendments. — Session Laws 2008-214, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "There shall be a rebuttable presumption" for "Subject to rebuttal by the person, it shall be presumed" at the beginning of subsection (d); added subsection (e); redesignated the former concluding paragraph of subsection (d) as the concluding paragraph of subsection (e); and substituted "Persons who are considered for bond under the provisions of subsections (d) and (e) of this section" for "Such person" at the beginning of the concluding paragraph of subsection (e).

Legal Periodicals. — For note on right to pretrial release when charged with capital offense, see 6 Wake Forest Intra. L. Rev. 327 (1970).

CASE NOTES

Bail Discretionary for Capital Offense. — Whether a defendant charged with a capital offense is entitled to a bail bond is a matter in the discretion of the trial judge. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

First-Degree Murder Is "Capital Offense" Regardless of Date Committed. — Whether or not a particular defendant, depending upon the date his crime was committed, faces the death penalty, the crime of first-degree murder is a "capital offense" within the meaning of subsection (b) of this section, so that the release of such defendant on bail is a matter to be determined within the discretion of the trial judge. This is so notwithstanding that the trial itself may not be a "capital case" within the meaning of the jury selection statute, G.S. 15A-1217. State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

Failure to Advise Defendants of Their Rights. — Defendants made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief where the evidence showed that magistrates failed to advise defendants of their rights under G.S. 15A-511(b), subsection (b) of this section and G.S. 15A-534(c) and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Defendant Not Prejudiced. — Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Denial of Right to Bail Permissible. — Defendant's right was not violated when the trial court set bond as "no bond" and "zero" because defendant was charged with first-degree murder, a crime for which, under G.S. 15A-533(c), the trial court had the discretion not to set bail. State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

Applied in State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992).

Cited in State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982); State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993).

§ 15A-534. Procedure for determining conditions of pretrial release.

(a) In determining conditions of pretrial release a judicial official must impose at least one of the following conditions:

(1) Release the defendant on his written promise to appear.
(2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
(3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
(4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.
(5) House arrest with electronic monitoring.

If condition (5) is imposed, the defendant must execute a secured appearance bond under subdivision (4) of this subsection. If condition (3) is imposed, however, the defendant may elect to execute an appearance bond under subdivision (4). The judicial official may also place restrictions on the travel, associations, conduct, or place of abode of the defendant as conditions of pretrial release.

(b) The judicial official in granting pretrial release must impose condition (1), (2), or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) or (5) in subsection (a) above instead of condition (1), (2), or (3), and must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a).

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

(d) The judicial official authorizing pretrial release under this section must issue an appropriate order containing a statement of the conditions imposed, if any; inform the defendant in writing of the penalties applicable to violations of the conditions of his release; and advise him that his arrest will be ordered immediately upon any violation. The order of release must be filed with the clerk and a copy given the defendant.

(d1) When conditions of pretrial release are being imposed on a defendant who has failed on one or more prior occasions to appear to answer one or more of the charges to which the conditions apply, the judicial official shall at a minimum impose the conditions of pretrial release that are recommended in any order for the arrest of the defendant that was issued for the defendant's most recent failure to appear. If no conditions are recommended in that order for arrest, the judicial official shall require the execution of a secured appearance bond in an amount at least double the amount of the most recent previous secured or unsecured bond for the charges or, if no bond has yet been required for the charges, in the amount of at least five hundred dollars ($500.00). The judicial official shall also impose such restrictions on the travel, associations, conduct, or place of abode of the defendant as will assure that the defendant will not again fail to appear. The judicial official shall indicate on the release order that the defendant was arrested or surrendered after failing to appear as required under a prior release order. If the information available to the judicial official indicates that the defendant has failed on two or more prior occasions to appear to answer the charges, the judicial official shall indicate that fact on the release order.

(d2) When conditions of pretrial release are being determined for a defendant who is charged with a felony offense and the defendant is currently on probation for a prior offense, a judicial official shall determine whether the defendant poses a danger to the public prior to imposing conditions of pretrial release and must record that determination in writing. This subsection shall apply to any judicial official authorized to determine or review the defendant's eligibility for release under any proceeding authorized by this Chapter.

(1) If the judicial official determines that the defendant poses a danger to the public, the judicial official must impose condition (4) or (5) in subsection (a) of this section instead of condition (1), (2), or (3).

(2) If the judicial official finds that the defendant does not pose a danger to the public, then conditions of pretrial release shall be imposed as otherwise provided in this Article.

(3) If there is insufficient information to determine whether the defendant poses a danger to the public, then the defendant shall be retained in custody until a determination of pretrial release conditions is made pursuant to this subdivision. The judicial official that orders that the defendant be retained in custody shall set forth, in writing, the following at the time that the order is entered:

   a. The defendant is being held pursuant to this subdivision.

b. The basis for the judicial official's decision that additional information is needed to determine whether the defendant poses a danger to the public and the nature of the necessary information.

c. A date, within 96 hours of the time of arrest, when the defendant shall be brought before a judge for a first appearance pursuant to Article 29 of this Chapter. If the necessary information is provided to the court at any time prior to the first appearance, the first available judicial official shall set the conditions of pretrial release. The judge who reviews the defendant's eligibility for release at the first appearance shall determine the conditions of pretrial release as provided in this Article.

(e) A magistrate or a clerk may modify his pretrial release order at any time prior to the first appearance before the district court judge. At or after such first appearance, except when the conditions of pretrial release have been reviewed by the superior court pursuant to G.S. 15A-539, a district court judge may modify a pretrial release order of the magistrate or clerk or any pretrial release order entered by him at any time prior to:

(1) In a misdemeanor case tried in the district court, the noting of an appeal; and
(2) In a case in the original trial jurisdiction of the superior court, the binding of the defendant over to superior court after the holding, or waiver, of a probable-cause hearing.

After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any such order entered by him, at any time prior to the time set out in G.S. 15A-536(a).

(f) For good cause shown any judge may at any time revoke an order of pretrial release. Upon application of any defendant whose order of pretrial release has been revoked, the judge must set new conditions of pretrial release in accordance with this Article.

(g) In imposing conditions of pretrial release and in modifying and revoking orders of release under this section, the judicial official must take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials.

(h) A bail bond posted pursuant to this section is effective and binding upon the obligor throughout all stages of the proceeding in the trial division of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken or the entry of judgment in the superior court. The obligation of an obligor, however, is terminated at an earlier time if:

(1) A judge authorized to do so releases the obligor from his bond; or
(2) The principal is surrendered by a surety in accordance with G.S. 15A-540; or
(3) The proceeding is terminated by voluntary dismissal by the State before forfeiture is ordered under G.S. 15A-544(b); or
(4) Prayer for judgment has been continued indefinitely in the district court. (1973, c. 1286, s. 1; 1975, c. 166, s. 13; 1977, 2nd Sess., c. 1134, s. 5; 1987, c. 481, s. 1; 1989, c. 259; 2001-487, s. 46.5(b); 2009-412, s. 1; 2009-547, ss. 3, 4, 4.1.)

OFFICIAL COMMENTARY

This section differs from the prior law in expressly favoring the policy that pretrial release of the defendant should be effected under the three conditions that do not depend upon the defendant's financial condition. Subsection (b). Only if the official determines that none of those conditions will assure the appearance of the defendant or protect against other possible harm may he impose the requirement that the defendant post a secured bond. Although the other possible harm may affect which conditions are imposed, the Commission steered clear of the preventive-detention controversy. The proposal allows the defendant to elect to post a secured bail bond rather than to be subjected to release in someone's custody, and his dangerousness and potential for harm, other than the risk of nonappearance, are not factors to be considered in setting the conditions of release on the secured bail bond. See subsection (a).

Subsection (d) requires the defendant to be given a copy of the pretrial release order. Thus the defendant will have in written form a statement of the conditions imposed on him and notice of the penalties for failure to appear as required.

There are special provisions relating to modification or revocation of pretrial release orders tailored to the various pretrial stages in subsection (e). The general modification or revocation provisions as to all release orders are in G.S. 15A-538 to G.S. 15A-540. Because of the need on occasion to act swiftly to revoke conditions of release which may not be adequate to keep a defendant from fleeing prior to trial, subsection (f) allows revocation by any judge at any time. Presumably a district court judge would not revoke an order of release of a superior court judge without excellent cause.

Subsection (h) carries forward in modified form the provisions of G.S. 15-104.1(a).

Editor's Note. — G.S. 15A-544, referred to in subdivision (h)(3) of this section, was repealed by Session Laws 2000-133, s. 4, effective January 1, 2001. See now G.S. 15A-544.1 et seq.

Session Laws 2009-547, s. 4.1, which amended this section, was contingent on Senate Bill 1078, 2009 Regular Session becoming law. Senate Bill 1078, 2009 Regular Session was enacted as Session Laws 2009-412.

Effect of Amendments. — Session Laws 2009-412, s. 1, effective December 1, 2009 and applicable to offenses committed on or after that date, added subsection (d2).

Session Laws 2009-547, ss. 3, 4, 4.1, effective December 1, 2009, and applicable to offenses committed on or after that date, in subsection (a), inserted "at least" in the introductory language, added subdivision (a)(5), and in the concluding language, added the present first sentence; and substituted "condition (4) or (5)" for "condition (4)" in subsection (b) and subdivision (d2)(1).

CASE NOTES

Primary purpose of an appearance bond is to insure the defendant's presence at trial. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Setting of conditions of pretrial release is a judicial function, and is not a function of the office of a county sheriff. Estate of McKendall v. Webster, — N.C. App. —, 672 S.E.2d 768, 2009 N.C. App. LEXIS 203 (2009).

Appearance bond is a contract of the defendant and the surety with the State. General rules for construction of contracts thus determine liability thereon. A contract must be construed as a whole, considering each clause and word with reference to other provisions and giving effect to each if possible by any reasonable construction. The heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter, and the situation of the parties at the time of execution. State v. Corl, 58 N.C. App. 107, 293 S.E.2d 264 (1982).

Deputy sheriffs may not conduct bail hearings, nor may they decide on the granting or denying of bail under North Carolina law; that authority is vested in a judicial officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Amount of bail pending trial is a matter within the trial judge's discretion. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Accused May Deposit Cash. — The law contemplates that a defendant in a criminal prosecution may give security for his appearance to answer to the charge and the fact that defendant of his own volition, chooses to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its spirit and meaning. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948), decided under prior law.

Cash deposited by accused as security for his appearance remains his property, subject to the conditions of a recognizance, the magistrate becoming the custodian of the cash for the benefit of the State only insofar as the debt of accused to the State is concerned. If defendant fails to perform the conditions, the deposit will be subject to forfeiture. But if he performs the conditions, the cash deposit would be returnable to him. This is a right which he may enforce against the custodian of the deposit. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948), decided under prior law.

And Is Liable to Attachment. — A defendant in a criminal prosecution who is a nonresident of the State, and who voluntarily deposits cash in lieu of bond for his appearance for a preliminary hearing, has such property right and interest in the deposit as is liable to attachment and garnishment at the instance of his creditor pending such preliminary hearing. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948), decided under prior law.

Failure to Advise Defendants of Their Rights. — Defendants made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief where the evidence showed that magistrates failed to advise defendants of their rights under G.S. 15A-511(b), 15A-533(b) and subsection (c) of this section and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Consideration of Defendant's Mental and Physical Condition. — In determining the conditions of release or the propriety of revoking a defendant's bond, the trial court may consider not only the question of whether the defendant will appear for trial but may also consider whether he will appear for trial in such mental and physical condition as to be able to proceed. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Where the defendant had specifically indicated to the court in his motion for a continuance that his illness and the medication it necessitated directly impaired his mental capacity, and the defendant's evidence additionally indicated that, absent hospitalization and definitive treatment, the condition might well continue to impair his mental ability beyond the next criminal term of court, the trial court's order granting the defendant's motion for a continuance and revoking his appearance bond in order to insure that he would be both present and able to proceed with trial was without error. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Modification of Pretrial Release Orders. — After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk or district court judge or any such order entered by him at any time before defendant's guilt has been established in superior court. Section 15A-536 imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Bond provision that defendant appear "whenever required" and render himself amenable to court orders "at all times" must be considered only "until the entry of judgment in the superior court." Where the bond is derived in haec verba from subsection (h) of this section, the bond and that subsection dictate that the sureties' liability terminates upon entry of judgment. State v. Corl, 58 N.C. App. 107, 293 S.E.2d 264 (1982).

Increase in Bond During Trial. — Where, during trial, the trial judge noted defendant's misconduct in the presence of jurors and the court, and he was aware that defendant faced serious punishment if convicted and that defendant had just lost the aid of one of his prime witnesses, and in light of these circumstances, the court expressed doubt as to the sufficiency of the bond to bring defendant to court until a final determination of his guilt or innocence, the trial judge did not err by increasing defendant's bond during the course of the trial. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Commitment of Defendant During Trial. — In addition to modification of a bail bond, a trial judge has discretionary power to order a defendant taken into custody during the progress of a trial. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Factors Guiding Court's Discretion to Order Defendant into Custody. — Before exercising its discretionary power to order a criminal defendant into custody, a trial court should consider whether there is some indication the defendant will fail to reappear whether there is a danger of injury to, or intimidation of, witnesses if the defendant remains free, whether there are less restrictive alternatives to incarceration, and whether incarceration of the defendant would unduly interfere with the ability of the defendant to consult with counsel or to prepare his defense. State v. Suggs, 130 N.C. App. 140, 502 S.E.2d 383 (1998).

Failure to Consider Statutory Factors. — Defendant was not prejudiced by the magistrate's failure to inquire into every individual statutory factor in determining the conditions of his pretrial release, where the defendant resided outside the county and none of the other factors would have required the magistrate to depart from the $500 bond he had set. State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (1998).

Pretrial Assignment to Division of Adult Probation. — The legislature has provided for pretrial assignment of a defendant to the Division of Adult Probation and Parole only upon deferred prosecution, and upon the agreement to assume supervision of the person. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Court Had No Authority to Order Supervision of Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant, who had been determined incompetent to stand trial but not subject to involuntary commitment, while defendant was in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Stay of commitment is appropriate and customary under certain circumstances. Provision should be made, however, to assure the defendant's appearance when ordered. This section and bonds entered pursuant thereto do not make such provision. State v. Corl, 58 N.C.

App. 107, 293 S.E.2d 264 (1982).

Claim of Prejudice Due to Excessive Bail. — A claim that excessive bail prejudiced the efforts of the accused to prepare for trial will not be sustained on mere unsupported and conclusory allegations. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Defendant Not Prejudiced. — Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Burden on Defendant to Demonstrate Judge's Failure to Consider Appropriate Factors. — Absent some evidence from the defendant indicating that the trial judge did not consider the appropriate factors in either the initial establishment of the bond, in the later modification, or in subsequent refusals to modify, the court concluded that the law relating to pretrial release was properly applied to him although there was no indication that the judge did, in fact, consider the factors in this section. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

Compliance with Statute Shown. — Where neither the transcript from a pretrial hearing, nor anything else in the record, indicated that the judge did not consider the appropriate factors in either the initial establishment of defendant's bond, in the later modification, or in subsequent refusals to modify, absent some evidence to the contrary from the defendant, it was concluded that the law relating to pretrial release was properly applied to him. State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993).

Substantial Violation of Statute Not Shown. — Where magistrate failed to inquire into defendant's character and mental condition, and proceeded without information regarding his financial resources, length of residence in the community and family ties, (though defendant did inform magistrate that he was married) before he was taken from the magistrate's office to the jail, defendant did not make a sufficient showing of any substantial statutory violation which would warrant dismissal of the charges against him based on a failure to inquire into every individual factor, given all the other information which the magistrate had before her in setting the bond; defendant also failed to show how inquiry into these considerations would have required the magistrate to proceed any differently in setting the conditions of pretrial release. State v. Eliason, 100 N.C. App. 313, 395 S.E.2d 702 (1990).

Applied in State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982); State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983); State v. Jefferson, 68 N.C. App. 725, 315 S.E.2d 744 (1984); State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992); State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000); State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901, 2004 N.C. App. LEXIS 2021 (2004).

Cited in State v. Gilbert, 85 N.C. App. 594, 355 S.E.2d 261 (1987); State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990); In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

§ 15A-534.1. Crimes of domestic violence; bail and pretrial release.

(a) In all cases in which the defendant is charged with assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7A, 8, 10, or 15 of Chapter 14 of the General Statutes upon a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes, the judicial official who determines the conditions of pretrial release shall be a judge, and the following provisions shall apply in addition to the provisions of G.S. 15A-534:

(1) Upon a determination by the judge that the immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged victim

and upon a determination that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury or intimidation will not occur, a judge may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.

(2) A judge may impose the following conditions on pretrial release:
  a. That the defendant stay away from the home, school, business or place of employment of the alleged victim;
  b. That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim;
  c. That the defendant refrain from removing, damaging or injuring specifically identified property;
  d. That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge.

The conditions set forth above may be imposed in addition to requiring that the defendant execute a secured appearance bond.

(3) Should the defendant be mentally ill and dangerous to himself or others or a substance abuser and dangerous to himself or others, the provisions of Article 5 of Chapter 122C of the General Statutes shall apply.

(b) A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section. (1979, c. 561, s. 4; 1989, c. 290, s. 2; 1995, c. 527, s. 3; 2001-518, s. 2; 2007-14, s. 1.)

Cross References. — As to reporting system and database on certain domestic-violence-related homicides, reports by law-enforcement agencies required, and annual report to the General Assembly, see G.S. 114-2.7.

CASE NOTES

Constitutionality. — This section does not violate procedural due process. State v. Thompson, 128 N.C. App. 547, 496 S.E.2d 597 (1998), rev'd on other grounds, 349 N.C. 483, 508 S.E.2d 277 (1998).

Under either strict scrutiny or the rational relation test, this section cannot be said to violate substantive due process. State v. Thompson, 128 N.C. App. 547, 496 S.E.2d 597 (1998), rev'd on other grounds, 349 N.C. 483, 508 S.E.2d 277 (1998).

Subsection (b) of this section is not facially unconstitutional as violative of substantive due process rights, because the subsection serves the regulatory purpose of having a judge, rather than a magistrate, determine the conditions of pretrial release in domestic violence situations. State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998).

Subsection (b) of this section is not facially unconstitutional as violative of procedural due process rights, because the subsection provides that the detainee shall appear before a magistrate to have conditions set if pretrial release conditions are not set by a judge within 48 hours. State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998).

Subsection (b) of this section does not violate the double jeopardy rights of defendants in providing both a pretrial detention period and a prosecution, because the subsection's purpose is regulatory: to allow a judge to set release conditions in alleged domestic violence cases. State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998).

Subsection (b), as applied, violated the defendant's procedural due process rights, where he was taken before a magistrate, who ordered a hearing to be held almost exactly 48 hours later as there were judges available to hear the matter more quickly. State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998).

This section does not violate the North Carolina Constitution on due process or double-jeopardy grounds (whether generally or as applied). State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

The Defendant's Procedural Due Process Rights Were Violated. — This section was unconstitutionally applied to a defendant charged with assault on a female according to State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998); defendant's release order specified that he was to be held 48 hours and brought before the court prior to that time, but, despite the availability of judges earlier in the day, defendant was not taken in front of a judge until sometime between 2:00 p.m. and 5:00 p.m., approximately thirty-nine hours after he was placed in custody. State v. Clegg, 142 N.C. App. 35, 542 S.E.2d 269, 2001 N.C. App. LEXIS 42 (2001), cert. denied, 353 N.C. 453, 548 S.E.2d 529 (2001).

The defendant's procedural due process rights were not violated under this section where there was a session of district court at approximately 9:30 a.m., but his bond hearing was delayed until 1:30 p.m. that afternoon, resulting in his being detained for approximately seven hours; his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system. State v. Jenkins, 137 N.C. App. 367, 527 S.E.2d 672, 2000 N.C. App. LEXIS 316 (2000).

Neither the delay in receiving a bond hearing nor the additional time defendant was required to remain in custody after the hearing violated the defendant's due process rights or this section. The defendant was taken into custody in the evening and brought before a judge the next day and then detained another five hours before being released on a $1,000 unsecured bond. There was no evidence that an arbitrary limit was placed on the time defendant would be held in detention before seeing a judge; defendant was brought before a judge as soon as one was available; and the additional five-hour detention was not unreasonable. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

Defendant had standing to challenge the constitutionality of this section's application where it was applied to him, whether improperly or not. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

Intent. — It is evident the intent of this section is to protect victims of domestic violence from further harm by their abusers and to provide a period of time in which inflamed tempers may abate. State v. Thompson, 128 N.C. App. 547, 496 S.E.2d 597 (1998), rev'd on other grounds, 349 N.C. 483, 508 S.E.2d 277 (1998).

This section applied to defendant's arrest for assault but not to his subsequent arrest for kidnapping. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

This section is regulatory, and not punitive in nature and therefore does not constitute punishment for purposes of double jeopardy. State v. Thompson, 128 N.C. App. 547, 496 S.E.2d 597 (1998), rev'd on other grounds, 349 N.C. 483, 508 S.E.2d 277 (1998).

Conditions of Pretrial Release. — The conditions of pretrial release found in subdivision (a)(2) are also intended to shield victims from further harm, as evidenced by the restrictions they impose on a defendant's contact with a victim's person and property. State v. Thompson, 128 N.C. App. 547, 496 S.E.2d 597 (1998), rev'd on other grounds, 349 N.C. 483, 508 S.E.2d 277 (1998).

Applied in State v. Malette, 350 N.C. 52, 509 S.E.2d 776 (1999).

OPINIONS OF ATTORNEY GENERAL

Authority to Set Conditions. — A magistrate does not have the authority to set conditions of pretrial release for a defendant arrested for a domestic violence crime for the first 48 hours after arrest; only a judge may set conditions of pre-trial release in such cases for the first 48 hours after arrest. See opinion of Attorney General to Senator Hamilton C. Horton, Jr., 20th District, Senate Chamber, 2002 N.C. AG LEXIS 10 (1/24/02).

§ 15A-534.2. Detention of impaired drivers.

(a) A judicial official conducting an initial appearance for an offense involving impaired driving, as defined in G.S. 20-4.01(24a), must follow the procedure in G.S. 15A-511 except as modified by this section. This section may not be interpreted to impede a defendant's right to communicate with counsel and friends.

(b) If at the time of the initial appearance the judicial official finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if he is released, of physical injury to himself or others or damage to property, the judicial official must order that the defendant be held in custody and inform the defendant that he will be held in custody until one of the requirements of subsection (c) is met; provided, however, that the judicial official must at this time determine the appropriate conditions of pretrial release in accordance with G.S. 15A-534.

(c) A defendant subject to detention under this section has the right to pretrial release under G.S. 15A-534 when the judicial official determines either that:

(1) The defendant's physical and mental faculties are no longer impaired to the extent that he presents a danger of physical injury to himself or others or of damage to property if he is released; or

(2) A sober, responsible adult is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired. If the defendant is released to the custody of another, the judicial official may impose any other condition of pretrial release authorized by G.S. 15A-534, including a requirement that the defendant execute a secured appearance bond.

The defendant may be denied pretrial release under this section for a period no longer than 24 hours, and after such detention may be released only upon meeting the conditions of pretrial release set in accordance with G.S. 15A-534. If the defendant is detained for 24 hours, a judicial official must immediately determine the appropriate conditions of pretrial release in accordance with G.S. 15A-534.

(d) In making his determination whether a defendant detained under this section remains impaired, the judicial official may request that the defendant submit to periodic tests to determine his alcohol concentration. Instruments acceptable for making preliminary breath tests under G.S. 20-16.3 may be used for this purpose as well as instruments for making evidentiary chemical analyses. Unless there is evidence that the defendant is still impaired from a combination of alcohol and some other impairing substance or condition, a judicial official must determine that a defendant with an alcohol concentration less than 0.05 is no longer impaired. The results of any periodic test to determine alcohol concentration may not be introduced in evidence:

(1) Against the defendant by the State in any criminal, civil, or administrative proceeding arising out of an offense involving impaired driving; or

(2) For any purpose in any proceeding if the test was not performed by a method approved by the Commission for Public Health under G.S. 20-139.1 and by a person licensed to administer the test by the Department of Health and Human Services.

The fact that a defendant refused to comply with a judicial official's request that he submit to a chemical analysis may not be admitted into evidence in any criminal action, administrative proceeding, or a civil action to review a decision reached by an administrative agency in which the defendant is a party. (1983, c. 435, s. 4; 1997-443, s. 11A.118(a); 2007-182, s. 2.)

Editor's Note. — Session Laws 1983, c. 435, which enacted this section, provided in section 41.1: "The original inclusion and ultimate deletion in the course of passing this act of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish those beverages to such persons."

CASE NOTES

Effect of Magistrate's Failure to Inform of Rights to Pretrial Release. — Statutory violations by magistrate, who failed to inform defendant of his rights to pretrial release under either the general provisions of G.S. 15A-511 or the more specific provisions of this section, did not justify dismissal of driving while impaired charges. State v. Gilbert, 85 N.C. App. 594, 355 S.E.2d 261 (1987). But see, State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Release into Custody of Another. — Magistrate had no duty to grant request to be released into friend's custody, where there was sufficient evidence that the friend was not sober and was not a responsible adult at the time in question. State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (1998).

Defendant's Rights Not Violated. — Where magistrate correctly imposed pretrial release restriction requiring a sober responsible adult to take custody of defendant pursuant to this section, there was no constitutional violation of defendant's constitutional right to secure witnesses. State v. Bumgarner, 97 N.C. App. 567, 389 S.E.2d 425, cert. denied and appeal dismissed, 326 N.C. 599, 393 S.E.2d 873 (1990).

Defendant Not Prejudiced. — Trial court did not err in denying defendant's pretrial motion to dismiss the G.S. 20-138.1 charge of driving while impaired against defendant because even though (1) there was no evidence, pursuant to G.S. 15A-534.2, that defendant was required to be held because the impairment of defendant's physical or mental faculties presented a danger, if defendant were released, of physical injury to defendant or others or damage to property, and (2) there was no evidence, pursuant to G.S. 15A-534(b), that defendant would pose a danger of injury to any person if defendant were released under conditions other than a secured bond, defendant was not irreparably prejudiced in the preparation of defendant's defense by the denial of defendant's G.S. 15A-533 right to timely pretrial release; defendant was not denied access to friends and family, such that defendant lost the opportunity to gather evidence. State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Applied in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

§ 15A-534.3. Detention for communicable diseases.

If a judicial official conducting an initial appearance or first appearance hearing finds probable cause that an individual had a nonsexual exposure to the defendant in a manner that poses a significant risk of transmission of the AIDS virus or Hepatitis B by such defendant, the judicial official shall order the defendant to be detained for a reasonable period of time, not to exceed 24 hours, for investigation by public health officials and for testing for AIDS virus infection and Hepatitis B infection if required by public health officials pursuant to G.S. 130A-144 and G.S. 130A-148. (1989, c. 499, s. 1; 2009-501, s. 1.)

Effect of Amendments. — Session Laws 2009-501, s. 1, effective August 26, 2009, substituted "had a nonsexual exposure" for "was exposed" near the beginning of the section.

§ 15A-534.4. Sex offenses and crimes of violence against child victims: bail and pretrial release.

(a) In all cases in which the defendant is charged with felonious or misdemeanor child abuse, with taking indecent liberties with a minor in violation of G.S. 14-202.1, with rape or any other sex offense in violation of Article 7A, Chapter 14 of the General Statutes, against a minor victim, with incest with a minor in violation of G.S. 14-178, with kidnapping, abduction, or felonious restraint involving a minor victim, with a violation of G.S. 14-320.1, with assault or any other crime of violence against a minor victim, or with communicating a threat against a minor victim, in addition to the provisions of G.S. 15A-534 a judicial official shall impose the following conditions on pretrial release:

(1) That the defendant stay away from the home, temporary residence, school, business, or place of employment of the alleged victim.

(2) That the defendant refrain from communicating or attempting to communicate, directly or indirectly, with the victim, except under circumstances specified in an order entered by a judge with knowledge of the pending charges.

(3) That the defendant refrain from assaulting, beating, intimidating, stalking, threatening, or harming the alleged victim.

The conditions set forth above shall be imposed in addition to any other conditions that the judicial official may impose on pretrial release.

(b) Notwithstanding the provisions of subsection (a) of this section, upon request of the defendant, the judicial official may waive one or more of the conditions required by subdivisions (1) and (2) of subsection (a) of this section if the judicial official makes written findings of fact that it is not in the best interest of the alleged victim that the condition be imposed on the defendant. (1993 (Reg. Sess., 1994), c. 723, s. 5; 2007-172, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 723, which enacted this section, in s. 6 provides: "Nothing in this act obligates the General Assembly to appropriate any funds to implement this act."

§ 15A-534.5. Detention to protect public health.

If a judicial official conducting an initial appearance finds by clear and convincing evidence that a person arrested for violation of an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 or G.S. 130A-145 poses a threat to the health and safety of others, the judicial official shall deny pretrial release and shall order the person to be confined in an area or facility designated by the judicial official. Such pretrial confinement shall terminate when a judicial official determines that the confined person does not pose a threat to the health and safety of others. These determinations shall be made only after the State Health Director or local health director has made recommendations to the court. (2002-179, s. 15.)

§ 15A-534.6. Bail in cases of manufacture of methamphetamine.

In all cases in which the defendant is charged with any violation of G.S. 90-95(b)(1a) or G.S. 90-95(d1)(2)b., in determining bond and other conditions of release, the magistrate, judge, or court shall consider any evidence that the person is in any manner dependent upon methamphetamine or has a pattern of regular illegal use of methamphetamine. A rebuttable presumption that no conditions of release on bond would assure the safety of the community or any person therein shall arise if the State shows by clear and convincing evidence both:

(1) The person was arrested for a violation of G.S. 90-95(b)(1a) or G.S. 90-95(d1)(2)b., relating to the manufacture of methamphetamine or possession of an immediate precursor chemical with knowledge or reasonable cause to know that the chemical will be used to manufacture methamphetamine.

(2) The person is in any manner dependent upon methamphetamine or has a pattern of regular illegal use of methamphetamine, and the violation referred to in subdivision (1) of this section was committed or attempted in order to maintain or facilitate the dependence or pattern of illegal use in any manner. (2005-434, s. 6; 2007-484, s. 4.)

Editor's Note. — This section was formerly G.S. 15A-736.1, as enacted by Session Laws 2005-434, s. 6. It was recodified and rewritten as this section by Session Laws 2007-484, s. 4, effective August 30, 2007.

Session Laws 2005-434, s. 10, made this section effective January 15, 2006, and applicable to offenses committed on or after that date.

§ 15A-535. Issuance of policies on pretrial release.

(a) Subject to the provisions of this Article, the senior resident superior court judge for each district or set of districts as defined in G.S. 7A-41.1(a) in consultation with the chief district court judge or judges of all the district court districts in which are located any of the counties in the senior resident superior court judge's district or set of districts, must devise and issue recommended policies to be followed within each of those counties in determining whether, and upon what conditions, a defendant may be released before trial and may include in such policies, or issue separately, a requirement that each judicial official who imposes condition (4) or (5) in G.S. 15A-534(a) must record the reasons for doing so in writing.

(b) In any county in which there is a pretrial release program, the senior resident superior court judge may, after consultation with the chief district court judge, order that defendants accepted by such program for supervision shall, with their consent, be released by judicial officials to supervision of such programs, and subject to its rules and regulations, in lieu of releasing the defendants on conditions (1), (2), or (3) of G.S. 15A-534(a). (1973, c. 1286, s. 1; 1975, c. 791, s. 1; 1987, c. 481, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 55; 2009-547, s. 5.)

OFFICIAL COMMENTARY

The section changes the provision of G.S. 15-103.1 that the chief district court judge in each district issues policies on bail matters. The bill puts this duty upon the senior resident superior court judge of the district, after consultation with the chief district court judge.

Editor's Note. — Subsection (a) was amended by Session Laws 1987 (Reg. Sess., 1988), c. 1037, s. 55, in the coded bill drafting format provided by G.S. 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-547, s. 5, effective December 1, 2009, and applicable to offenses committed on or after that date, inserted "or (5)" near the end of subsection (a).

CASE NOTES

Cited in State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

§ 15A-536. Release after conviction in the superior court.

(a) A defendant whose guilt has been established in the superior court and is either awaiting sentence or has filed an appeal from the judgment entered may be ordered released upon conditions in accordance with the provisions of this Article.

(b) If release is ordered, the judge must impose the conditions set out in G.S. 15A-534(a) which will reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community. If no single condition gives the assurance, the judge may impose the condition in G.S. 15A-534(a)(3) in addition to any other condition and may also, or in lieu of the condition in G.S. 15A-534(a)(3), place restrictions on the travel, associations, conduct, or place of abode of the defendant.

(c) In determining what conditions of release to impose, the judge must, on the basis of available information, consider the appropriate factors set out in G.S. 15A-534(c).

(d) A judge authorizing release of a defendant under this section must issue an appropriate order containing a statement of the conditions imposed, if any; inform the defendant in writing of the penalties applicable to violations of the conditions of his release; and advise him that his arrest will be ordered immediately upon any such violation. The order of release must be filed with the clerk and a copy given the defendant.

(e) An order of release may be modified or revoked by any superior court judge who has ordered the release of a defendant under this section or, if that judge is absent from the superior court district or set of districts as defined in G.S. 7A-41.1, by any other superior court judge. If the defendant is placed in custody as the result of a revocation or modification of an order of release, the defendant is entitled to an immediate hearing on whether he is again entitled to release and, if so, upon what conditions.

(f) In imposing conditions of release and in modifying and revoking orders of release under this section, the judge must take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials. (1973, c. 1286, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 56.)

OFFICIAL COMMENTARY

This section parallels G.S. 15A-534, except that after conviction in superior court release is discretionary with the judge. Section 15-183 granted absolute right to bail on appeal in noncapital cases, and gave a discretionary right on appeal when a sentence of life imprisonment had been imposed in a capital case. This section would authorize bail to be set or denied in a judge's discretion in all cases — including capital cases.

It should be noted that G.S. 15A-534(h) continues the original bail bond in force until final judgment in superior court unless the judge sooner releases the obligor. Presumably, in a case in which there would be a delay between the verdict or plea of guilty and the sentencing, and the judge determined that the risk of flight had materially increased, the judge would terminate the original conditions of pretrial release and allow release, if at all, under this section.

CASE NOTES

Right to Bail Pending Appeal Is Statutory. — In the absence of statute, an accused would have no right to bail pending an appeal. State v. Bradsher, 189 N.C. 401, 127 S.E. 349 (1925), decided under prior law.

No Such Right Under U.S. Constitution. — There is no right under the United States Constitution to have bond pending appeal, either in State or federal court. Reddy v. Snepp, 357 F. Supp. 999 (W.D.N.C. 1973).

Grant or Denial of Bail in Discretion of Trial Court. — Under this section it is within the discretion of the trial court to grant or deny bail while a case is pending on appeal following conviction of defendant in superior court. State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

This section permits but does not require a judge to order release of a convicted defendant pending appeal. The matter of granting or denying post-trial bond is within the trial court's discretion. State v. Keaton, 61 N.C. App. 279, 300 S.E.2d 471, cert. denied, 309 N.C. 463, 307 S.E.2d 369 (1983).

The terms of defendant's release pending appeal are within the discretion of the court. State v. Crabtree, 66 N.C. App. 662, 312 S.E.2d 219 (1984).

Amount of Bail Is in Discretion of Court. — The question of the amount to be fixed for bond pending appeal is largely in the discretion of the court below. State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); Reddy v. Snepp, 357 F. Supp. 999 (W.D.N.C. 1973).

Modification of Pretrial Release Orders. — After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk or district court judge or any such order entered by him at any time before defendant's guilt has been established in superior court. This section imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. State v.

Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Conditions Placed on Probationary Sentence Pending Appeal. — Trial court acted properly in imposing conditions of release upon a sentence of probation on defendant's convictions of third-degree sexual exploitation of a minor, G.S. 14-190.17A, which had been stayed pending appeal pursuant to G.S. 15A-1451(a)(4); the plain language of G.S. 15A-536 indicated that "release" meant "to set or make free" from the supervision and control of the court, as well as from imprisonment, and to apply the statute only where the defendant was in or facing custody would lead to the absurd result that the court would have no oversight over defendants with probationary sentences on appeal. State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901, 2004 N.C. App. LEXIS 2021 (2004).

Conditions of Release Held Proper. — The trial court had authority under subsection (d) of this section to require defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the county probation office and to order that defendant report to the probation office by noon each Monday, and the trial court was authorized by G.S. 15A-544(c) to enter a judgment of forfeiture of the bond upon determining that defendant failed to comply with the condition requiring him to report to the probation office and that defendant had failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault. State v. Cooley, 50 N.C. App. 544, 274 S.E.2d 274, cert. denied, 302 N.C. 631, 280 S.E.2d 442 (1981).

Applied in In re Paul, 84 N.C. App. 491, 353 S.E.2d 254 (1987).

Cited in State v. Poplin, 56 N.C. App. 304, 289 S.E.2d 124 (1982).

§ 15A-537. Persons authorized to effect release.

(a) Following any authorization of release of any person in accordance with the provisions of this Article, any judicial official must effect the release of that person upon satisfying himself that the conditions of release have been met. In the absence of a judicial official, any law-enforcement officer or custodial official having the person in custody must effect the release upon satisfying himself that the conditions of release have been met, but law-enforcement and custodial agencies may administratively direct which officers or officials are authorized to effect release under this section. Satisfying oneself whether conditions of release are met includes determining if sureties are sufficiently solvent to meet the bond obligation, but no judicial official, officer, or custodial official may be held civilly liable for actions taken in good faith under this section.

(b) Upon release of the person in question, the person effecting release must file any bond, deposit, or mortgage and other papers pertaining to the release with the clerk of the court in which release was authorized.

(c) For the limited purposes of this section, any law-enforcement officer or custodial official may administer oaths to sureties and take other actions necessary in carrying out the duties imposed by this section. Any surety bond so taken is to be regarded in every respect as any other bail bond. (1973, c. 1286, s. 1; 1977, c. 711, s. 23.)

OFFICIAL COMMENTARY

Subsection (a) as introduced concerned only judicial officials and made it plain that in addition to the order setting conditions of release that there must also, except as provided in subsections (b) and (c), be an order of the judicial official directing release from custody. As revised in the General Assembly, however, the subsection seems to authorize law-enforcement officers to effect release at any time after conditions of release have been set and a judicial official is absent — upon the officer's determination that the conditions of release are met. This makes the part of subsection (b) restricting that type of release to situations after imprisonment redundant.

Subsections (b) and (c) carry forward in modified form the provisions of G.S. 15-108.

§ 15A-538. Modification of order on motion of person detained; substitution of surety.

(a) A person who is detained or objects to the conditions required for his release which were imposed or allowed to stand by order of a district court judge may apply in writing to a superior court judge to modify the order.

(b) The power to modify an order includes the power to substitute sureties upon any bond. Substitution or addition of acceptable sureties may be made at the request of any obligor on a bond or, in the interests of justice, at the request of a prosecutor under the provisions of G.S. 15A-539. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Traditionally a defendant sought to have bail reduced or the conditions of release modified by the habeas corpus procedure. The Commission's policy as reflected in this section is to build into the procedure at various stages a requirement that conditions of release be reviewed. In addition, this section permits the defendant or any other obligor to request modification, including a substitution of sureties.

CASE NOTES

Cited in State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

§ 15A-539. Modification upon motion of prosecutor.

(a) A prosecutor may at any time apply to an appropriate district court judge or superior court judge for modification or revocation of an order of release under this Article.

(b) A district or superior court judge may, upon motion of the State or upon the judge's own motion, and for good cause shown, conduct a hearing into the source of money or property to be posted for any defendant who is about to be released on a secured appearance bond. The court may refuse to accept offered money or property as security for the appearance bond that, because of its source, will not reasonably assure the appearance of the person as required. The State shall have the burden of proving, by a preponderance of the evidence, the facts supporting the court's decision to refuse to accept the offered money or property as security for the bond.

(c) Nothing in this section shall affect the legal rights of any surety on a bail bond, bonding company, or a professional bondsman. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 2005-375, s. 1.)

OFFICIAL COMMENTARY

This section ties in with the previous one. If a solicitor believes that conditions of release imposed are not adequate to insure the defendant's appearance, or that the surety on defendant's bond is not solvent, he may apply to the appropriate judge for an order modifying the conditions. If modification is sought, and the order has been made or allowed to stand by a district court judge, subsection (a) indicates that the solicitor must apply to a superior court judge. In other cases, the modification and revocation provisions in G.S. 15A-534(e) and (f) should be consulted. Compare G.S. 15A-536(e).

Editor's Note. — This section, as rewritten by Session Laws 2005-375, s. 1, effective December 1, 2005, is applicable to bond hearings conducted on or after that date, provided that if a pretrial release order has been entered prior to December 1, 2005, the court may not revoke or modify the order of release solely on the basis of S.L. 2005-375.

§ 15A-540. Surrender of a defendant by a surety; setting new conditions of release.

(a) Going Off the Bond Before Breach. — Before there has been a breach of the conditions of a bail bond, the surety may surrender the defendant as provided in G.S. 58-71-20. Upon application by the surety after such surrender, the clerk must exonerate the surety from the bond.

(b) Surrender After Breach of Condition. — After there has been a breach of the conditions of a bail bond, a surety may surrender the defendant as provided in this subsection. A surety may arrest the defendant for the purpose of returning the defendant to the sheriff. After arresting a defendant, the surety may surrender the defendant to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded. Alternatively, a surety may surrender a defendant who is already in the custody of any sheriff by appearing in person and informing the sheriff that the surety wishes to surrender the defendant. Before surrendering a defendant to a sheriff, the surety must provide the sheriff with a certified copy of the bail bond. Upon surrender of the defendant, the sheriff shall provide a receipt to the surety.

(c) New Conditions of Pretrial Release. — When a defendant is surrendered by a surety under subsection (b) of this section, the sheriff shall without unnecessary delay take the defendant before a judicial official, along with a copy of the undertaking received from the surety and a copy of the receipt provided to the surety. The judicial official shall then determine whether the defendant is again entitled to release and, if so, upon what conditions. (1973, c. 1286, s. 1; 1995, c. 290, s. 2; 2000-133, s. 2; 2001-487, s. 46.5(a).)

OFFICIAL COMMENTARY

This section carries forward the provisions of G.S. 15-122 and G.S. 15-123. The Commission debated whether to retain the arrest provision, and decided that in some cases the professional bondsman would be more effective in tracking down an absent defendant than regular law-enforcement officers. The power of the judge to reduce the amount of the bond forfeiture provides an incentive to the bondsman to bring the defendant to court even though he has once failed to appear.

CASE NOTES

Compliance with Section Protects Surety. — Where a surety surrenders his principal in open court in discharge of himself as bail, he is acting in the clear exercise of an undoubted legal right. The entry of the fact made upon the records of the court was therefore proper, and the court could not by their subsequent action deprive the surety of the benefit of it. Underwood v. McLaurin, 49 N.C. 17 (1856), decided under prior law.

Force to Overcome Resistance of Third Party. — Sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal, although they may use only such force as is reasonably necessary under the circumstances to accomplish the arrest. State v. Mathis, 349 N.C. 503, 509 S.E.2d 155 (1998).

§ 15A-541. Persons prohibited from becoming surety.

(a) No sheriff, deputy sheriff, other law-enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, employee of the General Court of Justice, other public employee assigned to duties relating to the administration of criminal justice, or spouse of any such person may in any case become surety on a bail bond for any person other than a member of his immediate family. In addition no person covered by this section may act as agent for any bonding company or professional bondsman. No such person may have an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as bondsman.

(b) A violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1993, c. 539, s. 299; 1994, Ex. Sess., c. 24, s. 14(c).)

OFFICIAL COMMENTARY

This section expands upon the provisions contained in G.S. 15-107.1.

CASE NOTES

As to the rationale behind the prohibition of this section, see State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

The mental state required under this section is nothing more than the general intent to do the proscribed act; that is, for the attorney to intend or knowingly to become surety on a bail bond for any person other than a member of the attorney's immediate family. State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

§ 15A-542. False qualification by surety.

(a) No person may sign an appearance bond as surety knowing or having reason to know that he does not own sufficient property over and above his exemption allowed by law to enable him to pay the bond should it be ordered forfeited.

(b) A violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1993, c. 539, s. 300; 1994, Ex. Sess., c. 24, s. 14(c).)

OFFICIAL COMMENTARY

The Commission decided against freighting its 1973 bail recommendations with any proposals concerning direct regulation or licensing of commercial bondsmen. However, certain abuses sought to be cured by licensing may be eliminated by the misdemeanor of false qualification by surety.

§ 15A-543. Penalties for failure to appear.

(a) In addition to forfeiture imposed under Part 2 of this Article, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.

(b) A violation of this section is a Class I felony if:

(1) The violator was released in connection with a felony charge against him; or

(2) The violator was released under the provisions of G.S. 15A-536.

(c) If, except as provided in subsection (b) above, a violator was released in connection with a misdemeanor charge against him, a violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1983, c. 294, s. 4; 1993, c. 539, s. 301; 1994, Ex. Sess., c. 14, s. 16; c. 24, s. 14(c); 2000-133, s. 3.)

OFFICIAL COMMENTARY

This section makes willful failure to appear a criminal offense in a bail bond case as well as when a defendant was released on his own recognizance. If the violator was released in connection with a felony, or a misdemeanor after conviction in superior court, the failure to appear is a felony.

CASE NOTES

Court Properly Refused to Dismiss Failure to Appear Charge. — Trial court did not err in failing to dismiss, pursuant to G.S. 15A-954, the failure to appear charge, in violation of G.S. 15A-543, against defendant, as there was evidence that defendant was ordered by the magistrate to appear for trial, failure to appear was a substantive crime under G.S. 15A-543, and defendant failed to establish that defendant was selectively prosecuted. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Prosecution Under G.S. 15A-543 Rather Than G.S. 5A-12(a) Not a Violation of Due Process. — Defendant's prosecution for failure to appear did not violate defendant's due process rights under N.C. Const., Art. I, § 19, where defendant was prosecuted under G.S. 15A-543, and defendant could have been punished for failure to appear under the criminal contempt statute, G.S. 5A-12(a); because there was evidence from which a jury could have found that defendant violated either G.S. 15A-543 or G.S. 5A-12(a), it was within the prosecutor's discretion to decide under which statute the State wished to proceed. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

§ 15A-544: Repealed by Session Laws 2000-133, s. 4, effective January 1, 2001.

Cross References. — For present provisions as to bail bond forfeiture, see G.S. 15A-544.1 et seq.

Part 2. Bail Bond Forfeiture.

§ 15A-544.1. Forfeiture jurisdiction.

By executing a bail bond the defendant and each surety submit to the jurisdiction of the court and irrevocably consent to be bound by any notice given in compliance with this Part. The liability of the defendant and each surety may be enforced as provided in this Part, without the necessity of an independent action. (2000-133, s. 6.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

Purpose. — The purpose of former G.S. 15A-544, regulating the forfeiture of bonds in criminal proceedings, is to establish an orderly procedure for forfeiture. State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

The requirement that a complaint filed pursuant to former § 15A-544 be verified was jurisdictional; therefore, a court order remitting the bond forfeiture was invalid where it was based upon an unverified petition for relief in violation of this section. State v. Moraitis, 141 N.C. App. 538, 540 S.E.2d 756 (2000).

Remission Denied. — Under former G.S. 15A-544(e), the decision to remit surety's bond was a discretionary one where the judge had to determine whether justice required remission; trial court did not abuse its discretion in denying surety's petition for remission of $40,000 bond when surety failed to produce defendant and thus failed to ensure the production of the defendant for trial. State v. Robinson, 145 N.C. App. 658, 551 S.E.2d 460, 2001 N.C. App. LEXIS 728 (2001).

Extraordinary Cause—Interaction with Other Statutes. — Trial court erred in ruling that G.S. 1-52 and 1-46 established a statute of limitations of three years for an action involving bail and in failing to apply the "extraordinary cause" standard when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

§ 15A-544.2. Identifying information on bond.

(a) The following information shall be entered on each bail bond executed under Part 1 of this Article:

(1) The name and mailing address of the defendant.

(2) The name and mailing address of any accommodation bondsman executing the bond as surety.

(3) The name and license number of any professional bondsman executing the bond as surety and the name and license number of the runner executing the bail bond on behalf of the professional bondsman.

(4) The name of any insurance company executing the bond as surety, and the name, license number, and power of appointment number of the bail agent executing the bail bond on behalf of the insurance company.

(b) If a defendant is released upon execution of a bail bond that does not contain all the information required by subsection (a) of this section, the defendant's order of pretrial release may be revoked as provided in G.S. 15A-534(f). (2000-133, s. 6.)

§ 15A-544.3. Entry of forfeiture.

(a) If a defendant who was released under Part 1 of this Article upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond.

(b) The forfeiture shall contain the following information:

(1) The name and address of record of the defendant.

(2) The file number of each case in which the defendant's appearance is secured by the bail bond.

(3) The amount of the bail bond.

(4) The date on which the bail bond was executed.

(5) The name and address of record of each surety on the bail bond.

(6) The name, address of record, license number, and power of appointment number of any bail agent who executed the bail bond on behalf of an insurance company.

(7) The date on which the forfeiture is entered.

(8) The date on which the forfeiture will become a final judgment under G.S. 15A-544.6 if not set aside before that date.

(9) The following notice: "TO THE DEFENDANT AND EACH SURETY NAMED ABOVE: The defendant named above has failed to appear as required before the court in the case identified above. A forfeiture for the amount of the bail bond shown above was entered in favor of the State against the defendant and each surety named above on the date of forfeiture shown above. This forfeiture will be set aside if, on or before the final judgment date shown above, satisfactory evidence is

presented to the court that one of the following events has occurred: (i) the defendant's failure to appear has been stricken by the court in which the defendant was required to appear and any order for arrest that was issued for that failure to appear is recalled, (ii) all charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking a voluntary dismissal with leave, (iii) the defendant has been surrendered by a surety or bail agent to a sheriff of this State as provided by law, (iv) the defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record, (v) the defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate, (vi) the defendant was incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Department of Correction or Federal Bureau of Prisons, or (vii) the defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed. The forfeiture will not be set aside for any other reason. If this forfeiture is not set aside on or before the final judgment date shown above, and if no motion to set it aside is pending on that date, the forfeiture will become a final judgment on that date. The final judgment will be enforceable by execution against the defendant and any accommodation bondsman and professional bondsman on the bond. The final judgment will also be reported to the Department of Insurance. Further, no surety will be allowed to execute any bail bond in the above county until the final judgment is satisfied in full. (2000-133, s. 6; 2007-105, s. 2.)

CASE NOTES

***Editor's Note.** — Some of the cases cited below were decided under prior law.*

Purpose. — The purpose of former G.S. 15A-544(b) relating to entry of an order of forfeiture was to regulate the forfeiture of bonds in criminal proceedings and to establish an orderly procedure for forfeiture. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Mandatory Requirements. — Requirements of former G.S. 15A-544(b), relating to entry of an order of forfeiture, were not discretionary but mandatory. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Independent Proceeding Unnecessary. — The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. State v. Sanders, 153 N.C. 624, 69 S.E. 272 (1910).

Discretion of Court. — The power given by former G.S. 15A-544 and predecessor statutes, relating to forfeiture, was a matter of judicial discretion in the judges below, which could not be reviewed except for some error in a matter of law or legal inference. State v. Moody, 74 N.C. 73 (1876); State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Whether a judgment will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the superior court. State v. Clarke, 222 N.C. 744, 24 S.E.2d 619 (1943); State v. Wiggins, 228 N.C. 76, 44 S.E.2d 471 (1947).

Forfeiture for Failure to Report to Probation Office. — The trial court had authority under G.S. 15A-536(d) to require defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the county probation office, and to order that defendant report to the probation office by noon each Monday, and the trial court was authorized by former G.S. 15A-544(c) to enter a judgment of forfeiture of the bond upon determining that defendant failed to comply with the condition requiring him to report to the probation office and that defendant had failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault. State v. Cooley, 50 N.C. App. 544, 274 S.E.2d 274, cert. denied, 302 N.C. 631, 280 S.E.2d 442 (1981).

Forfeiture Insufficient Reason to Set Bond Aside. — Because the evidence supporting a surety's motion to set aside a bond forfeiture, specifically, computer printouts of inmate records from the county sheriff's office indicating that defendant was not in custody, and deportation was an insufficient reason to set a bond aside under G.S. 15A-544.5(b), the bond was improperly set aside. State v. Lazaro, 190 N.C. App. 670, 660 S.E.2d 618, 2008 N.C. App. LEXIS 993 (2008).

Judgment Against Bond on Same Day Defendant Failed to Appear Held Error. — The trial court erred in entering judgment absolute against defendant's cash bond on the same day that defendant was called and failed to appear. State v. Hawkins, 14 N.C. App. 127, 187 S.E.2d 418 (1972).

Cited in State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005); State v. Escobar, 187 N.C. App. 267, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007); State v. Rodrigo, 190 N.C. App. 661, 660 S.E.2d 615, 2008 N.C. App. LEXIS 995 (2008).

§ 15A-544.4. Notice of forfeiture.

(a) The court shall give notice of the entry of forfeiture by mailing a copy of the forfeiture to the defendant and to each surety whose name appears on the bail bond.

(b) The notice shall be sent by first-class mail to the defendant and to each surety named on the bond at the surety's address of record.

(c) If a bail agent on behalf of an insurance company executed the bond, the court shall also provide a copy of the forfeiture to the bail agent, but failure to provide notice to the bail agent shall not affect the validity of any notice given to the insurance company.

(d) Notice given under this section is effective when the notice is mailed.

(e) Notice under this section shall be mailed not later than the 30th day after the date on which the defendant fails to appear as required and a call and fail is ordered. If notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance. (2000-133, s. 6; 2009-550, s. 1.)

Effect of Amendments. — Session Laws 2009-550, s. 1, effective August 28, 2009, rewrote the first sentence of subsection (e), which formerly read: "Notice under this section shall be mailed not later than the thirtieth day after the date on which the forfeiture is entered."

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

Surety Entitled to Notice. — Surety on an appearance bond was an obligor and therefore was entitled to notice as required under former G.S. 15A-544(b). State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Because the bond company admitted that it was properly given notice of a bond forfeiture under G.S. 15A-544.4, it could only obtain relief from the final judgment of forfeiture if extraordinary circumstances existed. State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

G.S. 15A-544.4(e) states that notice is effective when the notice of bond forfeiture is mailed; it does not require that a surety receive the notice of bond forfeiture for notice to be effective. State v. Ferrer, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Trial court properly denied a surety's motion under G.S. 15A-544.8 to set aside a bond forfeiture; while the surety presented evidence that it had not received notice of forfeiture, an assistant clerk's testimony as to her actions and her office's procedures was sufficient to support the trial court's finding that the clerk mailed notice to the surety as required by G.S. 15A-544.4. State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

Motion for Relief from Forteiture. — When a surety moved for relief from the forfeiture of a bond it posted in a criminal case, claiming it did not received notice of the forfeiture within 30 days of its entry, as required by G.S. 15A-544.4(e), this was not one of the exclusive grounds for relief from forfeiture stated in G.S. 15A-544.5, so the trial court lacked the authority to grant the surety's motion. State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Forfeiture Vacated. — Where surety on appearance bond was not personally served, nor was he mailed a copy of the order of forfeiture or notice, although the sheriff had a record of the surety's address throughout the proceedings, and he had no knowledge of the order of forfeiture and notice, that the judgment was made absolute, or that the matter was transferred to the sheriff's department for execution, the sheriff's department did not comply with the statutory requirements of former G.S. 15A-544(b), and the judgment of forfeiture was null and void and would be vacated. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Forfeiture not Vacated. — Insurer was not entitled to have the judgment, in which it was found that a forfeiture of the bond posted by the insurer had occurred, vacated, and the trial court did not abuse its discretion under G.S. 15A-544.8(b) in refusing to vacate the judgment; the State submitted sufficient evidence, in the form of the bond forfeiture notice with the certificate of mailing, to support the trial court's determination that the insurer received notice under G.S. 15A-544.4. State v. Lopez, 169 N.C. App. 816, 611 S.E.2d 197, 2005 N.C. App. LEXIS 806 (2005).

Surety was required to pay a bond forfeiture judgment because a presumption of regularity arose where a county clerk of court followed the procedures in G.S. 15A-544.4 by mailing notice to the surety. State v. Ferrer, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Cited in State v. Escobar, 187 N.C. App. 267, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

§ 15A-544.5. Setting aside forfeiture.

(a) Relief Exclusive. — There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section. Subsections (f), (g), and (h) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. — Except as provided by subsection (f) of this section, a forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Department of Correction or Federal Bureau of Prisons, including an electronic record.

(7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

(c) Procedure When Failure to Appear Is Stricken. — If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise.

(d) Motion Procedure. — If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (b) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

(4) If neither the district attorney nor the board of education has filed a written objection to the motion by the twentieth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

a. The date of the hearing.

b. The date of final judgment specified in G.S. 15A-544.6.

(8) If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursu-

ant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. A motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing. If the court concludes that a sanction should be ordered, in addition to ordering the denial of the motion to set aside, sanctions shall be imposed as follows: (i) twenty-five percent (25%) of the bond amount for failure to sign the motion; (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation; and (iii) not less than one hundred percent (100%) of the bond amount for the filing of fraudulent documentation. Sanctions awarded under this subdivision shall be docketed by the clerk of superior court as a civil judgment as provided in G.S. 1-234. The clerk of superior court shall remit the clear proceeds of the sanction to the county finance officer as provided in G.S. 115C-452. This subdivision shall not limit the criminal prosecution of any individual involved in the creation or filing of any fraudulent documentation.

(e) Only One Motion Per Forfeiture. — No more than one motion to set aside a specific forfeiture may be considered by the court.

(f) Set Aside Prohibited in Certain Circumstances. — No forfeiture of a bond may be set aside for any reason in any case in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed. Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

(g) No Final Judgment After Forfeiture Is Set Aside. — If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.

(h) Appeal. — An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions the court considers appropriate. (2000-133, s. 6; 2007-105, s. 1; 2009-437, ss. 1, 1.1, 2.)

Editor's Note. — Session Laws 2009-437, s. 3 made the amendments to this section by Session Laws 2009-437, s. 1, applicable to all motions to set aside filed on or after January 1, 2010, and made the amendments by Session Laws 2009-437, ss. 1.1 and 2, applicable to bail bonds executed on or after January 1, 2010.

Effect of Amendments. — Session Laws 2009-437, ss. 1, 1.1 and 2, effective January 1, 2010, in subsection (b), substituted "Except as provided by subsection (f) of this section, a forfeiture" for "A forfeiture" in the introductory language; in subsection (d), substituted "twentieth day" for "tenth day" in subdivision (d)(4), and in subsection (d)(8), in the first sentence, inserted "motion to set aside was not signed or that the" near the beginning, and "sign the motion or" near the end, and added the present second through fifth sentences; and in subsection (f), in the subsection heading, substituted "Set Aside Prohibited in Certain Circumstances" for "No More Than Two Forfeitures May Be Set Aside Per Case," rewrote the first sentence, and added the two last sentences. For applicability, see Editor's note.

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under prior law.

Construction. — Because in G.S. 15A-544.5(b)(7), "still" indicates the continuance of incarceration, the plain language of the statute refers to one continuous period of incarceration which begins at the time of the failure to appear and ends no earlier than ten days after the date that the district attorney for the county in which the charges are pending was notified of the defendant's incarceration, however, the statute in no way indicates that the incarceration must be regarding the same charges, but only that the defendant's period of incarceration be continuous; a defendant could be incarcerated consecutively on numerous different charges, but if there is no interruption in his incarceration during the time period specified by the statute, it falls within the purview of § 15A-544.5(b)(7), but if a defendant is incarcerated at the time he fails to appear and then is later released, only to be incarcerated again at the time notice is provided to the district attorney and for ten days thereafter, he is not still incarcerated, and this does not fall within § 15A-544.5(b)(7). State v. Largent, — N.C. App. —, 677 S.E.2d 514, 2009 N.C. App. LEXIS 720 (2009).

Exclusive Grounds for Relief. — Exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in G.S. 15A-544.5. State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Authority to Review Another Judge's Forfeiture Order. — A superior court judge had authority to review an order of bond forfeiture entered by another superior court judge. State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Injunction to Restrain Enforcement of Execution. — A motion by the surety asking that the forfeiture theretofore entered upon the appearance bond be stricken out, due to the fact that defendant had been subsequently arrested, is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, and does not serve to stay execution on the judgment entered against the surety; therefore, the court, while the motion is pending, may hear and determine the surety's application for injunction to restrain enforcement of the execution issued on the judgment. The remedy for a reduction or remission of the forfeiture was by application under former statute. Tar Heel Bond Co. v. Krider, 218 N.C. 361, 11 S.E.2d 291 (1940), followed in State v. Brown, 218 N.C. 368, 11 S.E.2d 294 (1940).

Apprehension and Delivery of Defendant after Judgment. — Where judgment absolute has been entered against the surety on an appearance bond, the surety is entitled, upon the later apprehension and delivery of the defendant to the authorities of that county for trial, to be heard upon its motion to modify or vacate the judgment absolute. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

Subsequent Arrest Does Not Automatically Discharge Forfeiture. — The arrest of defendant in a criminal proceeding and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered after defendant has been arrested. In such case the defendant is not arrested and surrendered by the surety. Surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. Tar Heel Bond Co. v. Krider, 218 N.C. 361, 11 S.E.2d 291 (1940), followed in State v. Brown, 218 N.C. 368, 11 S.E.2d 294 (1940).

Where surety's answer amounts to nothing more than a plea for additional time, without allegation of facts disclosing excusable neglect or constituting a legal defense or appealing to the conscience and sense of fair play, the surety is not entitled to a hearing as a matter of right, and judgment absolute against the surety is proper. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

"Notice" Under Subsection (f) Includes Constructive Notice. — Type of "notice" contemplated by G.S. 15A-544.5(f) included constructive notice, and where a release order contained the notations "DWLR" and "OFA/FTA" in the section of the release order labeled "Offense(s)," a professional bondsman such as a surety should have reasonably been expected to understand an "OFA/FTA" notation on a release order stood for "order for arrest/failure to appear;" the surety, especially in light of his status as a professional bondsman, could have discovered the release order by exercising proper diligence, and the denial of his motion to set aside the bond forfeiture was affirmed. State v. Poteat, 163 N.C. App. 741, 594 S.E.2d 253, 2004 N.C. App. LEXIS 594 (2004), cert. denied, 358 N.C. 548, 599 S.E.2d 915, 599 S.E.2d 916 (2004).

Authority of Court. — Superior courts have authority to lessen or remit forfeited recognizances upon the petition of the party aggrieved, either before or after final judgment. State v. Moody, 74 N.C. 73 (1876); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

"Final Order". — When a surety appealed the denial of its motion for relief from a forfeiture of a bond it posted, no party addressed whether the trial court's order was interlocutory or, alternatively, a "final order" within the meaning of G.S. 15A-544.5(h). State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Court May Remit Penalty Without Setting Aside Forfeiture. — Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

Imprisonment in Mexico No Excuse. — Fact that principal was prevented from appearing in superior court by reason of his own criminal acts, committed after his pretrial release, rendering him subject to imprisonment pursuant to the criminal laws of Mexico, did not excuse him from appearing, and the liability of the sureties being correspondent with that of their principal, would afford no excuse to sureties for his failure to appear. State v. Vikre, 86 N.C. App. 196, 356 S.E.2d 802 (1987).

Deportation Insufficient Reason to Set Bond Aside. — Because the evidence supporting a surety's motion to set aside a bond forfeiture, specifically, computer printouts of inmate records from the county sheriff's office indicating that defendant was not in custody, and deportation was an insufficient reason to set a bond aside under G.S. 15A-544.5(b), the bond was improperly set aside. State v. Lazaro, 190 N.C. App. 670, 660 S.E.2d 618, 2008 N.C.-App. LEXIS 993 (2008).

Extraordinary Cause. — Under prior law surety-bondsman's efforts to locate defendant, where the surety had posted an appearance bond on defendant's behalf and defendant failed to appear, were not extraordinary because the surety did not make any trips to Georgia, where defendant was found, to pick up defendant, nor did he show any other efforts or excess expenses to recover defendant. State v. McCarn, 151 N.C. App. 742, 566 S.E.2d 751, 2002 N.C. App. LEXIS 868 (2002).

Surrender of an accused by a surety does not constitute extraordinary circumstances under G.S. 15A-544.8 as a matter of law. State v. Edwards, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

Court's Discretion Not Abused. — Where the facts conclusively showed that defendant was not incarcerated, and there was no evidence of personal sickness or death, the trial court did not abuse its discretion in refusing to recognize the sureties' defense of excusable absence because of defendant's inability to attend court. State v. Horne, 68 N.C. App. 480, 315 S.E.2d 321 (1984).

Trial court's denial of a surety's motion to set aside the judgment of forfeiture with regard to a bond was upheld on appeal because the surety failed to present any evidence that it tried to apprehend defendant for a court date that defendant failed to appear at and, instead, presented evidence of efforts to apprehend defendant only after notice of the forfeiture was made; as such, no extraordinary circumstances under G.S. 15A-544.5(b)(3) existed. State v. Edwards, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

Court's Discretion Abused in Granting Motion to Set Aside Forfeiture. — Trial court erred in granting a surety's motions to set aside bond forfeitures because the documents the surety submitted in support of his motions did not support a finding that a defendant was incarcerated in a unit of the North Carolina Department of Correction at the time of his failure to appear in court; the documents the surety presented indicated that defendant was released from the county sheriff's office in July 2006, and defendant's court dates were scheduled in August 2006. State v. Rodrigo, 190 N.C. App. 661, 660 S.E.2d 615, 2008 N.C. App. LEXIS 995 (2008).

Denial of Motion for Relief Held Proper. — Because a surety established a pattern of conduct that denied the statutory required time period for a response from the county board of education on his motion to set aside a bond forfeiture, he was properly denied his motion for relief from a final judgment of forfeiture. State v. McFayden, 166 N.C. App. 512, 601 S.E.2d 888, 2004 N.C. App. LEXIS 1728 (2004), aff'd, 359 N.C. 409, 610 S.E.2d 199 (2005).

Since a surety engaged in a pattern of conduct that denied a county board of education its statutory time to respond to his motion to set aside a bond forfeiture, the trial court properly denied the surety's motion for relief from a final judgment ordering forfeiture. State v. Fisher, 166 N.C. App. 510, 601 S.E.2d 887, 2004 N.C. App. LEXIS 1730 (2004), aff'd, 359 N.C. 408, 610 S.E.2d 199 (2005).

Trial court properly denied a surety's motion to set aside a bond forfeiture because G.S. 15A-544.5(b)(7) was not applicable when defendant's incarceration was not continuous; the surety provided notice to the district attorney's office regarding defendant's incarceration while defendant was incarcerated in Tennessee for a second time, but that period of incarceration was not continuous with the period of incarceration during which defendant failed to appear in court. State v. Largent, — N.C. App. —, 677 S.E.2d 514, 2009 N.C. App. LEXIS 720 (2009).

Appeals. — When a surety appealed the denial of its motion for relief from a forfeiture of a bond it posted, because it allegedly did not receive notice of the forfeiture within 30 days of its entry, the appeal was not based on any of the

"Reasons for Set Aside" in G.S. 15A-544.5(b). State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Cited in State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

§ 15A-544.6. Final judgment of forfeiture.

A forfeiture entered under G.S. 15A-544.3 becomes a final judgment of forfeiture without further action by the court and may be enforced under G.S. 15A-544.7, on the one hundred fiftieth day after notice is given under G.S. 15A-544.4, if:

(1) No order setting aside the forfeiture under G.S. 15A-544.5 is entered on or before that date; and

(2) No motion to set aside the forfeiture is pending on that date. (2000-133, s. 6.)

CASE NOTES

Cited in State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); State v. Escobar, 187 N.C. App. 267, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

§ 15A-544.7. Docketing and enforcement of final judgment of forfeiture.

(a) Final Judgment Docketed As Civil Judgment. — When a forfeiture has become a final judgment under this Part, the clerk of superior court, under G.S. 1-234, shall docket the judgment as a civil judgment against the defendant and against each surety named in the judgment.

(b) Judgment Lien. — When a final judgment of forfeiture is docketed, the judgment shall become a lien on the real property of the defendant and of each surety named in the judgment, as provided in G.S. 1-234.

(c) Execution; Copy to Commissioner of Insurance. — After docketing a final judgment under this section, the clerk shall:

(1) Issue execution on the judgment against the defendant and against each accommodation bondsman and professional bondsman named in the judgment and shall remit the clear proceeds to the county finance officer as provided in G.S. 115C-452.

(2) If an insurance company or professional bondsman is named in the judgment, send the Commissioner of Insurance a notice of the judgment, showing the date on which the judgment was docketed.

(d) Sureties May Not Execute Bonds in County. — After a final judgment is docketed as provided in this section, no surety named in the judgment shall become a surety on any bail bond in the county in which the judgment is docketed until the judgment is satisfied in full. (2000-133, s. 6; 2006-188, s. 2.)

CASE NOTES

Bond forfeiture proceeding was a civil matter, and a trial court therefore erred in denying a school board's motion for a new trial, after granting surety's motion for relief from a forfeiture judgment, on the grounds that the board improperly attempted to proceed under the North Carolina Rules of Civil Procedure. State v. Pelletier, 168 N.C. App. 218, 606 S.E.2d 907, 2005 N.C. App. LEXIS 163 (2005).

When Execution Mandatory. — Execution was mandatory under former G.S. 15A-544(f) if a judgment was not remitted within the period provided in former G.S. 15A-544(e). State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

§ 15A-544.8. Relief from final judgment of forfeiture.

(a) Relief Exclusive. — There is no relief from a final judgment of forfeiture except as provided in this section.

(b) Reasons. — The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:

(1) The person seeking relief was not given notice as provided in G.S. 15A-544.4.

(2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

(c) Procedure. — The procedure for obtaining relief from a final judgment under this section is as follows:

(1) At any time before the expiration of three years after the date on which a judgment of forfeiture became final, the defendant or any surety named in the judgment may make a written motion for relief under this section, stating the reasons and setting forth the evidence in support of each reason.

(2) The motion is filed in the office of the clerk of superior court of the county in which the final judgment was entered, and a copy shall be served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) A hearing on the motion shall be scheduled within a reasonable time in the trial division in which the defendant was bonded to appear.

(4) At the hearing the court may grant the party any relief from the judgment that the court considers appropriate, including the refund of all or a part of any money paid to satisfy the judgment.

(d) Only One Motion. — No more than one motion by any party for relief under this section may be considered by the court.

(e) Finality of Judgment as to Other Parties Not Affected. — The finality of a final judgment of forfeiture shall not be affected, as to any party to the judgment, by the filing of a motion by, or the granting of relief to, any other party.

(f) Appeal. — An order on a motion for relief from a final judgment of forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions it considers appropriate. (2000-133, s. 6.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

Constitutionality of Former Remission Provision. — Former G.S. 15A-544(h) did not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Extraordinary Cause Standard. — Trial court erred in ruling that G.S. 1-52 and 1-46 established a statute of limitations of three years for an action involving bail, and in failing to apply the "extraordinary cause" standard of former G.S. 15A-544(h) when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

Surrender of an accused by a surety does not constitute extraordinary circumstances under G.S. 15A-544.8 as a matter of law. State v. Edwards, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

Petition for Relief After Final Judgment. — A surety on a bail bond may present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. State v. Bradsher, 189 N.C. 401, 127 S.E. 349 (1925); State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

Insurer was not entitled to have the judgment, in which it was found that a forfeiture of the bond posted by the insurer had occurred, vacated, and the trial court did not abuse its discretion under G.S. 15A-544.8(b) in refusing to vacate the judgment; the State submitted sufficient evidence, in the form of the bond forfeiture notice with the certificate of mailing, to support the trial court's determination that the insurer received notice under G.S. 15A-544.4. State v. Lopez, 169 N.C. App. 816, 611 S.E.2d 197, 2005 N.C. App. LEXIS 806 (2005).

Error of Court in Failing to Make Findings. — Trial court erred in failing to make any findings of fact and conclusions of law in its order denying the petition for remission of a judgment of forfeiture where petitioner-surety submitted affidavits and some 20 pages of exhibits detailing the time, effort and expense its agents incurred in finding, arresting and returning the defendant to the proper authorities; judge's observation that the school board needed the funds more than the surety did not fulfill the required test as to whether "extraordinary cause" was shown. State v. Lanier, 93 N.C. App. 779, 379 S.E.2d 109 (1989).

Bond forfeiture proceeding was a civil matter, and a trial court therefore erred in denying a school board's motion for a new trial, after granting surety's motion for relief from a forfeiture judgment, on the grounds that the board improperly attempted to proceed under the North Carolina Rules of Civil Procedure. State v. Pelletier, 168 N.C. App. 218, 606 S.E.2d 907, 2005 N.C. App. LEXIS 163 (2005).

Authority of Court. — Superior courts have authority to lessen or remit forfeited recognizances upon the petition of the party aggrieved, either before or after final judgment. State v. Moody, 74 N.C. 73 (1876); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Court May Remit Penalty Without Setting Aside Forfeiture. — Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

When Remission Authorized. — After entry of judgment of forfeiture, former G.S. 15A-544(e) and (h) provided two situations in which the court was authorized to order remission. State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

Under G.S. 15A-544.8, relief from a forfeiture judgment could not be granted except as provided under the statute for, inter alia, lack of notice, under G.S. 15A-544.4, or other extraordinary circumstances that the trial court determined warranted relief. State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Sureties are not without recourse where notices of forfeiture are not in compliance with G.S. 15A-544.4, pursuant to G.S. 15A-544.8(b)(1), but the fact that the general assembly specifically made allowance for relief from final judgment of forfeiture for faulty notice, and omitted the same as a ground for relief from an entry of forfeiture, suggested the legislature made a conscious choice in this regard. State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Discretion of Court to Order Remission. — Since former G.S. 15A-544(e) said "may" remit, the decision to do so or not was a discretionary one. In order to exercise judicial discretion in a manner favorable to a surety, the judge had to determine in his discretion that justice required remission. State v. Horne, 68 N.C. App. 480, 315 S.E.2d 321 (1984).

Justice Guides Judge's Discretion. — Under former G.S. 15A-544(e), the court is guided in its discretion as "justice requires." State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

Findings and Conclusions as to "Extraordinary Cause" Required. — Even if the record contains ample evidence to support a conclusion that "extraordinary cause" has been shown, the trial court should make brief, definite, pertinent findings and conclusions to that effect. State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

"Extraordinary Cause" Shown. — The trial court did not err in finding that the surety on a forfeited criminal appearance bond had shown "extraordinary cause" for remission to the surety of a portion of the amount forfeited where, after defendant was arrested for driving under the influence, the surety's personal efforts led to denial of any further bond for the defendant and resulted in defendant's detention on the assault charge for which the bondsman had secured defendant's appearance. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Where a trial court found that a surety's "diligent" efforts to bring defendant before the court for trial constituted extraordinary circumstances that entitled the surety to remission of a bond, there was no abuse of discretion. State v. Nixon, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2091 (May 21, 2002).

Defendant's federal incarceration was not evidence of extraordinary cause meriting bond company relief from liability under the bond when defendant failed to appear for scheduled court date; thus bond company failed to demonstrate extraordinary circumstances or efforts sufficient to set aside the bond forfeiture pursuant to G.S. 15A-544.8. State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

Expenses Incurred May Not Constitute Extraordinary Cause. — The fact that sureties incurred expenses in connection with a forfeiture does not necessarily constitute extraordinary cause. State v. Vikre, 86 N.C. App. 196, 356 S.E.2d 802 (1987).

Extraordinary Cause Not Shown. — Trial court's denial of a surety's motion to set aside the judgment of forfeiture with regard to a bond was upheld on appeal because the surety failed to present any evidence that it tried to apprehend defendant for a court date that defendant failed to appear at and, instead, presented evidence of efforts to apprehend defendant only after notice of the forfeiture was made; as such, no extraordinary circumstances under G.S. 15A-544.5(b)(3) existed. State v. Edwards, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

When a trial court denied a surety's motion for relief from a bond forfeiture, and the surety did not assign error to the notice the surety received regarding the forfeiture, the surety had to demonstrate extraordinary circumstances justifying relief from the forfeiture, under G.S. 15A-544.8(b)(2), but the surety was not entitled to relief because the surety did not show such extraordinary circumstances when the surety claimed that the district attorney had agreed to extradite the fugitive for whom the forfeited bond was posted upon the surety's promise to pay associated transportation costs because the surety's offer to pay such costs was not extraordinary and the surety assigned no error to the trial court's finding stating that the surety's motion for relief from the forfeiture did not allege extraordinary circumstances justifying remission of the bond, since findings to which no error was assigned were presumed to be supported by competent evidence and were binding on appeal. State v. Bakri, 186 N.C. App. 467, 651 S.E.2d 266, 2007 N.C. App. LEXIS 2187 (2007).

Extraordinary circumstances entitling a bonding company to relief from a judgment of forfeiture did not exist where the bonding company was aware of the defendant's ties to Mexico, failed to verify the defendant's falsified Social Security number, did not stay abreast of the defendant's location prior to the defendant's court date, and was not responsible for the defendant's capture. State v. Escobar, 187 N.C. App. 267, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

Failure to Appeal Denial of Motion to Set Aside Forfeitures Divested Surety of Right to Appellate Review of the Merits. — Regardless of whether the trial court erred in denying a surety's motions to set aside bond forfeitures, the surety's failure to appeal those orders divested him of the right to appellate review of their merits; the appellate court would not resurrect the arguments of that appeal or ignore the effect of failing to properly appeal those orders by holding, as a matter of law, that the trial court abused its discretion when it abstained from equating an arguably erroneous denial of a motion to set aside forfeiture with "extraordinary circumstances" under G.S. 15A-544.8. State v. Evans, 166 N.C. App. 432, 601 S.E.2d 877, 2004 N.C. App. LEXIS 1746 (2004), aff'd, 359 N.C. 404, 610 S.E.2d 198 (2005).

Surety was required to pay a bond forfeiture judgment because a presumption of regularity arose where a county clerk of court followed the procedures in G.S. 15A-544.4 by mailing notice to the surety. State v. Ferrer, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Relief from Forfeiture Denied. — Trial court properly denied a surety's motion under G.S. 15A-544.8 to set aside a bond forfeiture; while the surety presented evidence that it had not received notice of forfeiture, an assistant clerk's testimony as to her actions and her office's procedures was sufficient to support the trial court's finding that the clerk mailed notice to the surety as required by G.S. 15A-544.4. State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

§ 15A-545: Reserved for future codification purposes.

OFFICIAL COMMENTARY

This section, pertaining to the procedure applicable to the premium-secured appearance bond, was deleted by the General Assembly.

Part 3. Other Provisions.

Editor's Note. — Sections 15A-546 to 15A-547.6 have been designated as Part 3 of Article 26 in Chapter 15A at the direction of the Revisor of Statutes.

§ 15A-546. Contempt.

Nothing in this Article is intended to interfere with or prevent the exercise by the court of its contempt powers. (1973, c. 1286, s. 1.)

§ 15A-547. Right to habeas corpus.

Nothing in this Article is intended to abridge the right of habeas corpus. (1973, c. 1286, s. 1.)

§ 15A-547.1. Remit bail bond if defendant sentenced to community or intermediate punishment.

If a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending, then the court shall remit the bail bond to the obligor in accordance with the provisions of this Article and shall not require that the bail bond continue to be posted while the defendant serves his or her sentence. (1995, c. 290, s. 4.)

§§ 15A-547.2 through 15A-547.6: Reserved for future codification purposes.

ARTICLE 27.

§§ 15A-548 through 15A-574: Reserved for future codification purposes.

ARTICLE 28.

§§ 15A-575 through 15A-600: Reserved for future codification purposes.

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance Before District Court Judge.

OFFICIAL COMMENTARY

In cases in the original jurisdiction of the superior court, primarily felonies, the defendant must be brought as soon as possible before a district court judge. No witnesses are required at this first appearance. The main purposes of it are:

(1) To make sure the defendant's right to counsel is assured for the further proceedings.

(2) To determine the sufficiency of the charge.

(3) To review or determine the conditions of pretrial release.

(4) Set the date for, or secure a waiver of, the probable-cause hearing.

A defendant may not waive this first appearance before the judge, but he may appear through counsel. Section 15A-601(a) states that it is not a critical stage of the proceedings.

This step in the procedure is a new one so far as our statutes are concerned, though something of this nature has been utilized in several districts. It is considered important to have a district court judge process cases slated for trial in superior court at an early stage. Many delays are caused now when a defendant shows up at subsequent proceedings without counsel; a prime responsibility of the judge is to make sure the defendant has or gets counsel. Also, a date set by a judge for a probable-cause hearing is more likely to be met by the parties, without a continuance, than one set by a magistrate.

In drafting this Article and Article 30, Probable-Cause Hearing, the Commission consulted, among others, the following: Article 180 of the New York Criminal Procedure Law; a preliminary draft of what is now American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 5, Article 310, First Appearance (1972); and Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, Rules 5 (Initial Appearance Before the Magistrate) and 5.1 (Preliminary Examination) (January 1970).

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court; use of two-way audio and video transmission.

(a) Any defendant charged in a magistrate's order under G.S. 15A-511 or criminal process under Article 17 of this Chapter, Criminal Process, with a crime in the original jurisdiction of the superior court must be brought before a district court judge in the district court district as defined in G.S. 7A-133 in which the crime is charged to have been committed. This first appearance before a district court judge is not a critical stage of the proceedings against the defendant.

(a1) A first appearance in a noncapital case may be conducted by an audio and video transmission between the judge and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding.

(a2) Prior to the use of audio and video transmission pursuant to subsection (a1) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.

(b) When a district court judge conducts an initial appearance as provided in G.S. 15A-511, he may consolidate those proceedings and the proceedings under this Article.

(c) Unless the defendant is released pursuant to Article 26 of this Chapter, Bail, first appearance before a district court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first. If the defendant is not taken into custody, or is released pursuant to Article 26 of this Chapter, Bail, within 96 hours after being taken into custody, first appearance must be held at the next session of district court held in the county. This subsection does not apply to a defendant whose first appearance before a district court judge has been set in a criminal summons pursuant to G.S. 15A-303(d).

(d) Upon motion of the defendant, the first appearance before a district court judge may be continued to a time certain. The defendant may not waive the holding of the first appearance before a district court judge but he need not appear personally if he is represented by counsel at the proceeding.

(e) The clerk of the superior court in the county in which the defendant is taken into custody may conduct a first appearance as provided in this Article if a district court judge is not available in the county within 96 hours after the defendant is taken into custody. The clerk, in conducting a first appearance, shall proceed under this Article as would a district court judge. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 139, 140; 1979, c. 651; 1987 (Reg. Sess., 1988), c. 1037, s. 58; 1993, c. 30, s. 2.)

OFFICIAL COMMENTARY

The first appearance is required to occur in all events within 96 hours if the defendant is in custody. In some counties with infrequent regular sessions of court, this will require that a district court judge come into the county for a special session or that the defendant be taken to another county in the district to appear before a district court judge. It should be noted that Article 3, Venue, sets pretrial venue except for the probable-cause hearing in the judicial district rather than the county.

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Purpose. — This statute was designed not only to ensure the protection of a defendant's constitutional rights, but also to ensure the orderly progression of a criminal proceeding. The first appearance is a clear and specific directive of the General Statutes and the appropriate officials would be well advised to abide by the prescribed procedures. Indeed, the State runs the risk, in failing to provide the first appearance, of being forced to trial again for an obviously guilty, but prejudiced, defendant. State v. Pruitt, 42 N.C. App. 240, 256 S.E.2d 249 (1979).

Right to Counsel Attached During First Appearance. — Where defendant in a murder case made his first appearance within 96 hours of when he was taken into custody, although the initial appearance itself was not a critical stage of criminal judicial proceedings at which a defendant was entitled to counsel, defendant's Sixth Amendment right to counsel attached during his first appearance when the state's position against him solidified as to the murder charges and counsel was appointed. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Section does not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. State v. Burgess, 33 N.C. App. 76, 234 S.E.2d 40 (1977); State v. Pruitt, 42 N.C. App. 240, 256 S.E.2d 249 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979), cert. denied, 299 N.C. 332, 265 S.E.2d 399 (1980).

Practice Under Former § 15-88. — See Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

Applied in State v. Selph, 33 N.C. App. 157, 234 S.E.2d 453 (1977); State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

Cited in State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663 (1977); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997).

§ 15A-602. Warning of right against self-incrimination.

Except when he is accompanied by his counsel, the judge must inform the defendant of his right to remain silent and that anything he says may be used against him. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Section 15-89 required that a defendant at a preliminary hearing be advised of his right to silence; this provision, borrowing from the Miranda warnings, also tells him that anything he does say can be used against him.

CASE NOTES

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-603. Assuring defendant's right to counsel.

(a) The judge must determine whether the defendant has retained counsel or, if indigent, has been assigned counsel.

(b) If the defendant is not represented by counsel, the judge must inform the defendant that he has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of assistance to the defendant in advising him and acting in his behalf. The judge must inform the defendant of his right to be represented by counsel and that he will be furnished counsel if he is indigent. The judge shall also advise the defendant that if he is convicted and placed on probation, payment of the expense of counsel assigned to represent him may be made a condition of probation, and that if he is acquitted, he will have no obligation to pay the expense of assigned counsel.

(c) If the defendant asserts that he is indigent and desires counsel, the judge must proceed in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes.

(d) If the defendant is found not to be indigent and indicates that he desires to be represented by counsel, the judge must inform him that he should obtain counsel promptly.

(e) If the defendant desires to waive representation by counsel, the waiver must be in writing in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes except as otherwise provided in this Article. (1973, c. 1286, s. 1; 1981, c. 409, s. 1.)

OFFICIAL COMMENTARY

This provision is intended to place responsibility on the judge to take the necessary steps to see that the defendant secures counsel for the next stages of the proceedings — or to see that a valid waiver of counsel is entered.

CASE NOTES

Section 7A-457 presupposes that a defendant has been informed of his rights and given an opportunity to act on the information as provided in this section. This involves a determination of defendant's indigency and entitlement to court appointed counsel. However, whether or not a defendant is indigent, any waiver must be in accordance with G.S. 7A-457, notwithstanding the limiting language thereof. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

A defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by this section. Where the defendant nevertheless wishes to waive counsel, the court must find that this section has been complied with before a valid waiver can be made. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Cited in State v. Brown, 325 N.C. 427, 383 S.E.2d 910 (1989).

§ 15A-604. Determination of sufficiency of charge.

(a) The judge must examine each criminal process or magistrate's order and determine whether each charge against the defendant charges a criminal offense within the original jurisdiction of the superior court.

(b) If the judge determines that the process or order fails to charge a criminal offense within the original jurisdiction of the superior court, he must notify the prosecutor and take further appropriate action, including one or more of the following:

(1) Dismiss the charge.

(2) Permit the State to amend the statement of the crime in the process or order.

(3) Continue the proceedings, for not more than 24 hours, to permit the State to initiate new charges.

(4) With the consent of the prosecutor, set the case for trial in the district court if the charge is found to be within the original jurisdiction of the district court. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The judge must review the charge to make sure it is properly stated. Doing this here may save much trouble later. The section contains two new provisions.

(1) If there is a technical defect in the charge but the facts indicate the defendant has committed an offense, the judge may continue the proceedings up to 24 hours. This is to keep the defendant from taking this opportunity to flee the jurisdiction. See the commentary to G.S. 15A-956.

(2) The section allows the case to be set for trial in district court if it turns out to be in the jurisdiction of the district court. The consent of the solicitor is required for this type of diversion of the case.

CASE NOTES

Sufficiency of the charges is not determined in an adversarial setting through the introduction of evidence with examination and cross-examination of witnesses. Instead, this section simply recognizes that much time and trouble can be saved if the district court judge has the authority at the initial appearance to dispose of cases where it is obvious from the relevant process papers that they are insufficient on their face to adequately bring a charge against the defendant. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-605. Additional proceedings at first appearance before judge.

The judge must:

(1) Inform the defendant of the charges against him;

(2) Determine that the defendant or his counsel has been furnished a copy of the process or order; and

(3) Determine or review the defendant's eligibility for release under Article 26 of this Chapter, Bail. (1973, c. 1286, s. 1.)

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

§ 15A-606. Demand or waiver of probable-cause hearing.

(a) The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. A defendant represented by counsel, or who desires to be represented by counsel, may not before the date of the scheduled hearing waive his right to a probable-cause hearing without the written consent of the defendant and his counsel.

(b) Evidence of a demand or waiver of a probable-cause hearing may not be admitted at trial.

(c) If the defendant waives a probable-cause hearing, the district court judge must bind the defendant over to the superior court for further proceedings in accordance with this Chapter.

(d) If the defendant does not waive a probable-cause hearing, the district court judge must schedule a hearing not later than 15 working days following the initial appearance before the district court judge; if no session of the district court is scheduled in the county within 15 working days, the hearing must be scheduled for the first day of the next session. The hearing may not be scheduled sooner than five working days following such initial appearance without the consent of the defendant and the prosecutor.

(e) If an unrepresented defendant is not indigent and has indicated his desire to be represented by counsel, the district court judge must inform him that he has a choice of appearing without counsel at the probable-cause hearing or of securing the attendance of counsel to represent him at the hearing. The judge must further inform him that the judge presiding at the hearing will not continue the hearing because of the absence of counsel except for extraordinary cause.

(f) Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State. Except for extraordinary cause, a motion is not timely unless made at least 48 hours prior to the time set for the probable-cause hearing.

(g) If after the first appearance before a district court judge a defendant with consent of counsel desires to waive his right to a probable-cause hearing, he may do so in writing filed with the court signed by defendant and his counsel. Upon waiver the defendant must be bound over to the superior court. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

If a defendant fully apprised of his rights does not wish to have a lawyer and also wishes to waive the probable-cause hearing, he may do so. But if he has counsel or wishes to have counsel, whether appointed or retained, waiver is only allowed if the defendant and his counsel waive in writing — either at the first appearance before the judge, or at a later time prior to the scheduled date of the probable-cause hearing. The purpose is to put more certainty in the scheduling, and holding, of probable-cause hearings.

A fairly strict time period of three weeks (15 working days) is set as the outside limit for scheduling the probable-cause hearing. In order to give the parties time to prepare, it may not be set sooner than a week (five working days) without the consent of both parties.

To prevent the common problem of inconveniencing witnesses who show up at a hearing only to discover that it is continued and they must return at a later time, a motion for continuance of the probable-cause hearing by either party must be made at least 48 hours in advance of the scheduled hearing except in highly unusual cases. If the continuance is granted, a 48-hour period should be sufficient to allow the witnesses to be notified not to come to the hearing until the later date.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Hearing Not Required Prior to Enactment of Section. — See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

Purpose of a probable cause hearing is to determine whether the accused should be discharged or whether sufficient probable cause exists to bind the case over to superior court and to seek an indictment against the defendant. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

No Right to Hearing After Indictment. — This section does not entitle a criminal defendant to a probable-cause hearing as a matter of right after a bill of indictment has been returned. State v. Dangerfield, 32 N.C. App. 608, 233 S.E.2d 663, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

There is nothing in this Chapter or its legislative history which demonstrates the legislature's intention to alter the preexisting rule which dispensed with the requirement for a preliminary, or probable-cause, hearing when the defendant has been charged by indictment. State v. Sutton, 31 N.C. App. 697, 230 S.E.2d 572 (1976).

Subsection (a) of this section requires a probable-cause hearing only in those situations in which no indictment has been returned by a grand jury. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

A probable-cause hearing is unnecessary after the grand jury finds an indictment. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

Denial of post-indictment motions for a probable-cause hearing did not violate subsection (a) of this section or deprive defendants of equal protection and due process of law. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Hearing Within Specific Time Not Required by Due Process. — Due process does not require that a probable-cause hearing be held within a specific number of days following arrest. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Effect of Waiver. — A defendant may waive the preliminary hearing and consent to be bound over to the superior court to await grand jury action without forfeiting any defense or right available to him. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968), decided before enactment of this section.

The preliminary hearing may be waived, in which case the defendant is bound over to the superior court to await grand jury action without forfeiting any right or defense available to him. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972), decided before enactment of this section.

Purpose of Subsection (f). — Subsection (f) of this section is designed to prevent unnecessary delay in the procedure leading to charges or dismissal of charges against a defendant. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Court Determines "Good Cause" and "Extraordinary Cause". — The determinations of "good cause" and "extraordinary cause" for purposes of a continuance are for the trial court. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

It is the trial court's duty to determine good cause and extraordinary cause. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982).

Denial of Motion Upheld. — Where there was no evidence in the record to support a finding of prejudicial error other than the passage of time following defendant's arrest and defendant did not explain how he was prejudiced by this passage of time, there was no prejudicial error in the denial of defendant's motions for a probable cause hearing. State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Beam, 70 N.C. App. 181, 319 S.E.2d 616 (1984); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003).

Cited in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985); State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986).

§§ 15A-607 through 15A-610: Reserved for future codification purposes.

ARTICLE 30.

Probable-Cause Hearing.

OFFICIAL COMMENTARY

The procedure in Article 9 of Chapter 15 was called a "preliminary examination"; it was more commonly known as the "preliminary hearing." This code has two preliminary hearings before a judge in district court: the first appearance before a district court judge and the probable-cause hearing. "Probable-cause hearing" was chosen deliberately to emphasize that the purpose is to screen the case to make sure it warrants being bound over to superior court; affording discovery opportunities to the defendant is not a purpose of the proceeding.

Although the Article does not specifically so state, it is clear from the provisions of Article 29, First Appearance before District Court Judge, that probable-cause hearings are only held in cases within the original jurisdiction of the superior court.

Several of the sources consulted by the Commission in drafting this Article are cited at the end of the general commentary to Article 29, First Appearance before District Court Judge.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-611. Probable-cause hearing procedure.

(a) At the probable-cause hearing:

(1) A prosecutor must represent the State.

(2) The defendant may be represented by counsel.

(3) The defendant may testify as a witness in his own behalf and call and examine other witnesses, and produce other evidence in his behalf.

(4) Each witness must testify under oath or affirmation and is subject to cross-examination.

(b) The State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, except:

(1) A report or copy of a report made by a physicist, chemist, firearms identification expert, fingerprint technician, or an expert or technician in some other scientific, professional, or medical field, concerning the results of an examination, comparison, or test performed by him in connection with the case in issue, when stated by such person in a report made by him, is admissible in evidence.

(2) If there is no serious contest, reliable hearsay is admissible to prove value, ownership of property, possession of property in another than the defendant, lack of consent of the owner, possessor, or custodian of property to its taking or to the breaking or entering of premises, chain of custody, authenticity of signatures, and the existence and text of a particular ordinance or regulation of a governmental unit or agency.

The district court judge is not required to exclude evidence on the ground that it was acquired by unlawful means.

(c) If a defendant appears at a probable-cause hearing without counsel, the judge must determine whether counsel has been waived. If he determines that counsel has been waived, he may proceed without counsel. If he determines that counsel has not been waived, except in a situation covered by G.S. 15A-606(e) he must take appropriate action to secure the defendant's right to counsel.

(d) A probable-cause hearing may not be held if an information in superior court is filed upon waiver of indictment before the date set for the hearing. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Section 15-89 appeared to provide that a magistrate examine the defendant at a preliminary hearing, and the defendant was not put under oath. Under the new procedure, it is specified that a solicitor must appear for the State and that the defendant may, but obviously need not, testify. If the defendant testifies, however, it must be upon oath, and he is subject to cross-examination.

Section 15-87 indicated that prosecution witnesses must testify upon oath in preliminary hearings, but did not specify the nature of admissible evidence. This section stipulates that the evidence must be nonhearsay except for (1) traditional exceptions to the hearsay rule, (2) reports by certain technical experts, and (3) certain types of hearsay when there is no serious contest. There was some controversy within the Commission on this point, and the provision is a compromise between those who wished to require evidence that would be competent at a trial and those who wished to allow reliable hearsay generally. The Commission believes that its compromise would prevent the State from holding back a truly key witness, for example, the victim in a rape case, but would not force the State to bring all its witnesses to the probable-cause hearing and in effect turn it into a mini-trial.

Another controversial provision on which a compromise position was reached deals with the exclusion of evidence at the probable-cause hearing on the ground that it was unlawfully obtained. Some felt that the State simply should not be permitted at any stage to use unconstitutionally obtained evidence, and that the district court judge, should be forced to rule on the matter. Others noted that some of the most difficult five-to-four decisions of the Supreme Court of the United States have involved the exclusion of evidence assertedly acquired by unlawful means, and that the district court judge should not take the time and trouble to decide such an issue — as it almost inevitably would have to be decided again at the superior court level. (If no probable cause were found after exclusion of vital evidence, the solicitor would be free to reopen the case through submission of an indictment to the grand jury; if probable cause were found, it is clear that neither party would consider himself bound by the district court judge's ruling on the motion to suppress.) The compromise wording states that the district court judge is not required to exclude the evidence. In a difficult case involving close questions of law or fact, the judge could decline to exclude and pass the matter on to the superior court if he otherwise found probable cause. In a clear-cut or flagrant case, however, the district court would be free to exclude the evidence and likely wash out at an early stage a case doomed to be lost in any event. The Commission searched for language that would embody the ideas here expressed, but the several drafts studied raised more problems than they solved. It finally decided to leave the matter in the discretion of the district court judge.

Subsection (c) allows a defendant to appear without counsel if a proper, knowing waiver has been effected in writing. If a defendant who can afford to retain counsel appears without counsel, despite the warning given him as provided in G.S. 15A-606(e), the probable-cause hearing may proceed without counsel for the defendant.

The Commission's proposal contained a subsection stating that once the judge heard sufficient evidence to make out probable cause, he could decline to hear further evidence. This refusal to hear further evidence applied to witnesses of the State and the defense. An exception was made for the defendant himself if he desired to testify. In the General Assembly this passage was deleted because it was thought district court judges might be encouraged by it to cut proceedings too short. In answer to objections that deletion would prolong probable-cause hearing unduly, the proponents of deletion pointed out that under the rules of evidence a judge may bar testimony that is repetitious or merely cumulative.

Another matter governing witnesses may be appropriate at this point. Section 15-90 permitted sequestration of witnesses. This provision is omitted from this Article because the Commission deemed it unnecessary. The judge already has discretionary power to sequester witnesses if the need arises.

Subsection (d) as introduced expressed the theory embraced by a majority of the Commission that the district court loses jurisdiction if an indictment or information is filed in superior court — therefore rendering null any further proceedings in the district court. At one stage, however, a legislative committee amended the proposal to restrict the power of a solicitor to bypass the probable-cause hearing and deleted reference to the indictment. Subsequently this restriction on the power to submit indictments was itself deleted, but there was a failure to restore mention of the indictment in subsection (d). In view of the preexisting jurisdictional law and the fairly clear legislative intent, however, it seems certain that no probable-cause hearing may be held in district court once the superior court has gained jurisdiction through the return of a true bill of indictment.

Cross References. — As to the right of an accused to testify as a witness, see G.S. 8-54. As to hearing by the coroner in lieu of other preliminary hearings, see G.S. 152-10.

Legal Periodicals. — For comment on admissibility of confessions, see 43 N.C.L. Rev. 972 (1965).

For article surveying recent criminal procedure decisions by the North Carolina Supreme Court, see 49 N.C.L. Rev. 262 (1971).

For article, "The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power," see 84 N.C. L. Rev. 1935 (2006).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former law.*

Purpose of a preliminary hearing is to determine whether there has been an offense committed, and, if so, whether there is probable cause to believe that the accused committed it. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

A probable-cause hearing may afford the opportunity for a defendant to discover the strengths and weaknesses of the State's case. However, discovery is not the purpose for such a hearing. The function of a probable-cause hearing is to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it. The establishment of probable cause ensures that a defendant will not be unjustifiably put to the trouble and expense of trial. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Preliminary hearing is not a constitutional requirement, nor is it essential to the finding of an indictment. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

There is no constitutional requirement for a preliminary hearing. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

There is no provision in the North Carolina Constitution or United States Constitution requiring a preliminary hearing. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

Not Required Absent Statute. — The general rule in the United States is that in absence of a statute, a preliminary hearing is not a prerequisite or an indispensable step in the prosecution of a person accused with crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

Statute does not prescribe mandatory procedures affecting the validity of a trial. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971), cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972).

Hearing Not Means of Discovery. — A probable-cause hearing is not designed to afford a means of discovery to defendant. Its function is to determine whether there is probable cause to believe the crime has been committed and that defendant committed it. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Preliminary hearing is not an arraignment. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

Nor is it a trial. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

It is merely a course of procedure whereby a possible abuse of power may be prevented. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966), cert. denied, 390 U.S. 969, 88 S. Ct. 1085, 19 L. Ed. 2d 1176 (1968).

Preliminary hearing is a critical stage in a criminal proceeding. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

At which assistance of counsel for an indigent accused is required. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Under G.S. 7A-451(b)(4), a preliminary hearing is a critical stage in a criminal proceeding and an indigent person is entitled to services of counsel at such hearing. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Person Charged Must Be Present. — There can be no examination in the absence of the person charged. Lovick v. Atlantic C.L.R.R., 129 N.C. 427, 40 S.E. 191 (1901).

Not Essential to Finding Indictment. — A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968), quoting State v. Hackney, 240 N.C. 230, 81 S.E.2d 778 (1954); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971), cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

The State may dispense with the proceeding, since it is not essential to the finding of an indictment. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

The hearing of probable cause before a committing magistrate or inferior judge can be readily dispensed with by the State in this jurisdiction, since a preliminary hearing is not an essential prerequisite to the finding of an indictment. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 888 (1968).

And Hearing Not Required If Indictment Found. — If the grand jury finds an indictment, there is no need to conduct a preliminary examination. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

A probable-cause hearing is unnecessary after the grand jury finds an indictment. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

This section does not require a preliminary hearing after defendant is indicted for a felony and the superior court acquires jurisdiction. State v. Page, 32 N.C. App. 478, 232 S.E.2d 460,

cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

It is proper to try the defendant upon a bill of indictment without a preliminary hearing. State v. Hargett, 255 N.C. 412, 121 S.E.2d 589 (1961); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971), cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972); State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

There is nothing in this Chapter or its legislative history which demonstrates the legislature's intention to alter the preexisting rule which dispensed with the requirement for a preliminary, or probable-cause, hearing when the defendant has been charged by indictment. State v. Sutton, 31 N.C. App. 697, 230 S.E.2d 572 (1976).

Accused may introduce his own witnesses. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Cross-examination of Witnesses. — The testimony of witnesses at the hearing is subject to cross-examination by the accused, or by his lawyer should he have counsel. Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

Waiver by Defendant. — A preliminary hearing may be held unless waived by defendant. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

Failure to Provide Hearing Held Not to Preclude Prosecution. — Where nothing in the record disclosed that defendant was adversely affected at trial on account of the postponement of the scheduled preliminary hearings and the eventual abandonment of this procedure after the grand jury had returned the indictments, those irregularities as may have occurred in connection with the failure to provide a preliminary hearing for defendant were insufficient to preclude prosecution of defendant for the crimes for which he was indicted. State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972).

Cited in State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978); State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984).

§ 15A-612. Disposition of charge on probable-cause hearing.

(a) At the conclusion of a probable-cause hearing the judge must take one of the following actions:

(1) If he finds that the defendant probably committed the offense charged, or a lesser included offense of such offense within the original jurisdiction of the superior court, he must bind the defendant over to a superior court for further proceedings in accordance with this Chapter. The judge must note his findings in the case records.

(2) If he finds no probable cause as to the offense charged but probable cause with respect to a lesser included offense within the original jurisdiction of the district court, he may set the case for trial in the district court in accordance with the terms of G.S. 15A-613. In the absence of a new pleading, the judge may not set a case for trial in the district court on any offense which is not lesser included.

(3) If he finds no probable cause pursuant to subdivisions (1) or (2) as to any charge, he must dismiss the proceedings in question.

(b) No finding made by a judge under this section precludes the State from instituting a subsequent prosecution for the same offense. (1973, c. 1286, s. 1; 1975, c. 166, s. 14.)

OFFICIAL COMMENTARY

This section sets out the options a judge has after conducting a probable-cause hearing. The provision in subsection (b) simply states existing law. According to prevailing custom, neither the solicitor nor anyone else would attempt to start the case again in district court through issuance of a warrant or other process unless there was new evidence. The solicitor, if he disagreed with the decision of the district court judge, would also have the option of submitting a bill to the grand jury despite the finding in district court.

Legal Periodicals. — For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

Preliminary hearing is not a trial; and the district judge, in his capacity as committing magistrate, passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972), decided under former law.

Discharge of Accused by District Judge Sitting as Committing Magistrate Is Not Acquittal. — The district judge, when sitting as a committing magistrate as authorized by G.S. 7A-272(b), does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972), decided under former law.

Subsequent Prosecution Not Precluded by State's Voluntary Dismissal. — Voluntary dismissal taken by the State at a probable cause hearing does not preclude the State from instituting a subsequent prosecution for the same offense. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Former § 15A-701(a1)(3) Not an Exception to Subsection (b) of This Section. — Where there was a finding of no probable cause at a probable cause hearing, and where the State instituted a subsequent prosecution for the same offense, the period for computation of the time within which trial had to be commenced under former G.S. 15A-701(a1)(3) began to run from the date of defendant's indictment on the new charge rather than from the date of his arrest on the original charge, since the General Assembly did not intend by the 1979 amendment to former G.S. 15A-701(a1)(3), where the phrase "or a finding of no probable cause pursuant to G.S. 15A-612" was inserted, to carve out an exception to the clear intent of subsection (b) of this section to permit subsequent prosecution for the same offense where a finding of no probable cause had been entered. State v. Boltinhouse, 49 N.C. App. 665, 272 S.E.2d 148 (1980).

Under former G.S. 15A-701(a1)(3), when a charge was dismissed pursuant to this section as a result of a finding of no probable cause, the computation of time for the purpose of applying the former Speedy Trial Act commenced with the last of the items listed in former G.S. 15A-701(a1)(3) ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than the original charge. Otherwise, the clearly expressed intent of the Legislature, that no finding made by a judge in a probable cause hearing will preclude the State from instituting a subsequent prosecution for the same offense, would have been defeated. State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983).

Applied in State v. Simpson, 60 N.C. App. 436, 299 S.E.2d 257 (1983); State v. Gross, 66 N.C. App. 364, 311 S.E.2d 41 (1984).

Cited in In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980); State v. Lay, 56 N.C. App. 796, 290 S.E.2d 405 (1982); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994).

§ 15A-613. Setting offense for trial in district court.

If an offense set for trial in the district court under the terms of G.S. 15A-604(b)(4) or any provision of G.S. 15A-612 is a lesser included offense of the charge before the court on a pleading, the judge may:

(1) Accept a plea of guilty or no contest, with the consent of the prosecutor; or

(2) Proceed to try the offense immediately, with the consent of both the defendant and the prosecutor.

Otherwise, the judge must enter an appropriate order for subsequent calendaring of the case for trial in the district court. The trial so ordered may not be earlier than five working days nor later than 15 working days from the date of the order. The judge must note in the case records the new offense with which the defendant is charged, has been tried, or to which he entered a plea of guilty or no contest. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section governs district court disposition of charges on lesser included offenses of those in the criminal pleadings before the court. At the probable-cause hearing, the district court judge may then and there accept a guilty plea or plea of no contest to an included offense in the district court's trial jurisdiction, with the consent of the solicitor. If both parties are ready, trial on the included misdemeanor may be held immediately. If both parties do not consent, however, the included offense must be set for trial at a later date. The minimum time period of a week (five working days) should permit the solicitor to dismiss and secure appropriate new charges at the felony or misdemeanor level if he believes the district court judge was mistaken in finding no probable cause as to any higher offense. This time would even permit him to secure a superior court judge's order convening a special session of the grand jury if he thought the case warranted this action.

CASE NOTES

Applied in State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

§ 15A-614. Review of eligibility for pretrial release.

Upon binding a defendant in custody over to the superior court for trial or upon entering an order for subsequent calendaring of the case of such a defendant for trial in the district court, the judge must again review the eligibility of the defendant for release under Article 26 of this Chapter, Bail. (1973, c. 1286, s. 1.)

§ 15A-615. Testing of certain persons for sexually transmitted infections.

(a) After a finding of probable cause pursuant to the provisions of Article 30 of Chapter 15A of the General Statutes or indictment for an offense that involves nonconsensual vaginal, anal, or oral intercourse; an offense that involves vaginal, anal, or oral intercourse with a child 12 years old or less; or an offense under G.S. 14-202.1 that involves vaginal, anal, or oral intercourse with a child less than 16 years old; the victim or the parent, guardian, or guardian ad litem of a minor victim may request that a defendant be tested for the following sexually transmitted infections:

(1) Chlamydia;
(2) Gonorrhea;
(3) Hepatitis B;
(3a) Herpes;
(4) HIV; and
(5) Syphilis.

In the case of herpes, the defendant, pursuant to the provisions of this section, shall be examined for oral and genital herpetic lesions and, if a suggestive but nondiagnostic lesion is present, a culture for herpes shall be performed.

(b) Upon a request under subsection (a) of this section, the district attorney shall petition the court on behalf of the victim for an order requiring the defendant to be tested. Upon finding that there is probable cause to believe that the alleged sexual contact involved in the offense would pose a significant risk of transmission of a sexually transmitted infection listed in subsection (a) of this section, the court shall order the defendant to submit to testing for these infections. A defendant ordered to be tested under this section shall be tested not later than 48 hours after the date of the court order. A test for HIV ordered pursuant to this section shall use the HIV-RNA Detection Test for determining HIV infection.

(c) If the defendant is in the custody of the Department of Correction, the defendant shall be tested by the Department of Correction. If the defendant is not in the custody of the Department of Correction, the defendant shall be tested by the local health department. The Department of Correction shall inform the local health director of all test results. The local health director shall ensure that the victim is informed of the results of the tests and counseled appropriately. The agency conducting the tests shall inform the defendant of the results of the tests and ensure that the defendant is counseled appropriately. The results of the tests shall not be admissible as evidence in any criminal proceeding. (1993, c. 489, s. 1; 1994, Ex. Sess., c. 8, s. 1; 2006-226, s. 10; 2006-264, s. 33(a); 2007-403, s. 1.)

Editor's Note. — Session Laws 2006-264, s. 33(a), which amended subsection (a) of this section, was repealed by Session Laws 2006-264, s. 33(b), which provided that: "If Senate Bill 1479, 2005 Regular Session [2006-226], becomes law, this section is repealed."

§§ 15A-616 through 15A-620: Reserved for future codification purposes.

Article 31.

The Grand Jury and Its Proceedings.

OFFICIAL COMMENTARY

Although a clear majority of the Commission believed that the grand jury as presently constituted serves little in the way of a truly functional purpose in the administration of criminal justice, the Commission determined early that it should not burden its 1973 recommendations with a proposed constitutional amendment to abolish the grand jury in whole or in part. Among the reasons for favoring retention of the grand jury was that it brings desirable citizen participation into the administration of the criminal justice system.

Following the decision to retain the grand jury, the Commission studied drafts based on New York law that would have greatly expanded various powers of the grand jury. For various reasons most of the provisions working an expansion of powers were eliminated. The result was a grand jury very much like the present one so far as processing bills of indictment is concerned; as for its other duties, the Article generally restricts the grand jury even more than before.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-621. "Grand jury" defined.

A grand jury is a body consisting of not less than 12 nor more than 18 persons, impaneled by a superior court and constituting a part of such court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is intended to restate existing law.

Legal Periodicals. — For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of State v. Cofield, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

Grand Jury Transcripts. — Federal courts will not require North Carolina Superior Courts to have grand jury transcripts produced to defendants; to do so would be to act as a state appellate court and reverse an order by the Superior Court and to intrude into what is a statutorily defined part of the state court. Shell v. Wall, 760 F. Supp. 545 (W.D.N.C. 1991).

Cited in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15A-622. Formation and organization of grand juries; other preliminary matters.

(a) The mode of selecting grand jurors and of drawing and impaneling grand jurors is governed by this Article and Chapter 9 of the General Statutes, Jurors. Challenges to the panel from which grand jurors were drawn are governed by the procedure in G.S. 15A-1211.

(b) To impanel a new grand jury, the presiding judge must direct that the names of all persons returned as jurors be separately placed in a container. The clerk must draw out the names of 18 persons to serve as grand jurors. Of these 18, the first nine drawn serve until the first session of court at which criminal cases are heard held in the county after the following January 1, and thereafter until their replacements are selected and sworn. The next nine serve until the first session of court at which criminal cases are heard held in the county after the following July 1, and thereafter until their replacements are selected and sworn. If this formula results in any term likely to be shorter than two months or longer than 15 months, the presiding judge impaneling the grand jury may modify the terms. Thereafter, beginning with the first session of superior court at which criminal cases are heard held in the county following January 1 and July 1 of each year, nine new grand jurors must be selected in the manner provided above to replace the jurors whose terms have expired. All new grand jurors so selected serve until the first session of court at which criminal cases are heard held after January 1 or July 1 which most nearly results in a 12-month term, and thereafter until their replacements are selected and sworn. If a vacancy occurs in the membership of the grand jury, the superior court judge next convening the jury or next holding a session of court at which criminal cases are heard in the county may order that a new juror be drawn in the manner provided above to fill the vacancy.

The senior resident superior court judge of the district may impanel a second grand jury in any county of the district to serve concurrently with the first. The second grand jury shall be impaneled as provided in the first paragraph of this subsection. The court shall continue to have two grand juries until the senior resident superior court judge orders the second grand jury to terminate.

In any county the senior resident superior court judge, if he finds that grand jury service is placing a disproportionate burden on grand jurors and their employers, may fix the term of service of a grand juror at six months rather than 12 months. In doing so, he shall prescribe procedures, consistent with this section, for replacement of half of the jurors of the grand jury or grand juries approximately every three months.

(c) Neither the grand jury panel nor any individual grand juror may be challenged, but a superior court judge may:

(1) At any time before new grand jurors are sworn, discharge them, or discharge the grand jury, and cause new grand jurors or a new grand

jury to be drawn if he finds that jurors have not been selected in accordance with law or that the grand jury is illegally constituted; or

(2) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service, incapable of performing his duties, or guilty of misconduct in the performance of his duties so as to impair the proper functioning of the grand jury.

(d) The presiding judge may excuse a grand juror from service of the balance of his term, upon his own motion or upon the juror's request for good cause shown. The foreman may excuse individual jurors from attending particular sessions of the grand jury, except that he may not excuse more than two jurors for any one session.

(e) After the impaneling of a new grand jury, or the impaneling of nine new jurors under the terms of this section, the presiding judge must appoint one of the grand jurors as foreman and may appoint another to act as foreman during any absence or disability of the foreman. Unless removed for cause by a superior court judge, the foreman serves until his successor is appointed and sworn.

(f) The foreman and other new grand jurors must take the oath prescribed in G.S. 11-11. After new grand jurors have been sworn, the presiding judge may give the grand jurors written or oral instructions relating to the performance of their duties. At subsequent sessions of court, the presiding judge is not required to give any additional instructions to the grand jurors.

(g) At any time when a grand jury is in recess, a superior court judge may, upon application of the prosecutor or upon his own motion, order the grand jury reconvened for the purpose of dealing with a matter requiring grand jury action.

(h) A written petition for convening of grand jury under this section may be filed by the district attorney, the district attorney's designated assistant, or a special prosecutor requested pursuant to G.S. 114-11.6, with the approval of a committee of at least three members of the North Carolina Conference of District Attorneys, and with the concurrence of the Attorney General, with the Clerk of the North Carolina Supreme Court. The Chief Justice shall appoint a panel of three judges to determine whether to order the grand jury convened. A grand jury under this section may be convened if the three-judge panel determines that:

(1) The petition alleges the commission of or a conspiracy to commit a violation of G.S. 90-95(h) or G.S. 90-95.1, any part of which violation or conspiracy occurred in the county where the grand jury sits, and that persons named in the petition have knowledge related to the identity of the perpetrators of those crimes but will not divulge that knowledge voluntarily or that such persons request that they be allowed to testify before the grand jury; and

(2) The affidavit sets forth facts that establish probable cause to believe that the crimes specified in the petition have been committed and reasonable grounds to suspect that the persons named in the petition have knowledge related to the identity of the perpetrators of those crimes.

The affidavit shall be based upon personal knowledge or, if the source of the information and basis for the belief are stated, upon information and belief. The panel's order convening the grand jury as an investigative grand jury shall direct the grand jury to investigate the crimes and persons named in the petition, and shall be filed with the Clerk of the North Carolina Supreme Court. A grand jury so convened retains all powers, duties, and responsibilities of a grand jury under this Article. The contents of the petition and the affidavit shall not be disclosed. Upon receiving a petition under this subsection, the

Chief Justice shall appoint a panel to determine whether the grand jury should be convened as an investigative grand jury.

A grand jury authorized by this subsection may be convened from an existing grand jury or grand juries authorized by subsection (b) of this section or may be convened as an additional grand jury to an existing grand jury or grand juries. Notwithstanding subsection (b) of this section, grand jurors impaneled pursuant to this subsection shall serve for a period of 12 months, and, if an additional grand jury is convened, 18 persons shall be selected to constitute that grand jury. At any time for cause shown, the presiding superior court judge may excuse a juror temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused. (1779, c. 157, s. 11, P.R.; R.C., c. 31, s. 33; 1879, c. 12; Code, ss. 404, 1742; Rev., ss. 1969, 1971; C.S., ss. 2333, 2336; 1929, c. 228; 1967, c. 218, s. 1; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 711, s. 24; 1979, c. 177, s. 1; 1981, c. 440, s. 1; 1985 (Reg. Sess., 1986), c. 843, ss. 2, 6; 1987 (Reg. Sess., 1988), c. 1040, ss. 1, 3; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 686, ss. 1, 3; 1995, c. 362, s. 1.)

OFFICIAL COMMENTARY

This section replaces certain procedural provisions relating to grand jurors in Article 4 of Chapter 9, Grand Jurors, which is slated for repeal. The rest of Chapter 9, though, is left intact and is cross-referenced in subsection (a). The provisions as to length of tenure are essentially similar to the former statute in Chapter 9, though it is rewritten and modified in minor ways.

Subsection (c) embodies a change, as G.S. 9-22(b) authorized a superior court judge to discharge an entire grand jury panel in his discretion. This section requires him to find cause for discharging either a panel or individual jurors. The kinds of sufficient cause are set out in the subsection.

The procedural provisions of subsection (d) have never been codified before.

Subsection (f) for the first time grants the judge explicit authority to give a written charge to the grand jury. It also specifies that at subsequent sessions after the installation of nine new members the judge need not charge the grand jurors further.

Subsection (g) states the underlying purposes of that part of G.S. 9-22(b) which authorized the judge to order the grand jurors assembled at any time for the purpose of hearing his charge.

Editor's Note. — Session Laws 1991, c. 686, s. 3 amended Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete an October 1, 1991 expiration provision. The 1991 act, which is in the coded bill drafting format set out in G.S. 120-20.1, did not mention Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, which amended the 1985 act, as amended, to change the expiration date to October 1, 1993.

Legal Periodicals. — For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of State v. Cofield, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

I. General Consideration.
II. Discrimination in Selecting Jurors.

I. GENERAL CONSIDERATION.

Editor's Note. — Some of the cases cited below were decided under former law.

Always 18 Grand Jurors Serving. — Nine grand jurors are drawn in January of each year and nine grand jurors are drawn in July of each year, but there are always 18 grand jurors serving. State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

Noncompliance with Directory Proce-

dure Does Not Void Indictment. — Noncompliance with a procedure merely directory for the preparation of the jury list does not void a bill of indictment returned by a grand jury drawn from a jury box so composed. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Written Order to Reconvene Not Required. — Defendant could show no prejudice from the lack of a written application or order of the trial court to have the grand jury reconvened. State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

Issue of Discrimination Raised for First Time on Appeal. — Capital murder defendant waived any claim that his constitutional rights were denied because of racial discrimination in selection of foreman to the grand jury that indicted him where the defendant made no motion challenging any aspect of the indictment and only raised the issue for the first time on appeal. State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

Complete Exclusion of Class from Eligibility. — Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

Erroneously Summoned Juror. — While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake. State v. Paramore, 146 N.C. 604, 60 S.E. 502 (1908).

Qualifications Judged at Time of Service. — The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served. State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898).

Son of Prosecutor Member of Grand Jury. — The fact that the son of the prosecutor in an indictment for larceny was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground. State v. Sharp, 110 N.C. 604, 14 S.E. 504 (1892).

Foreman Interested in Prosecution. — A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution was denied when it appeared that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Grand Juror on Perjury Indictment Also Member of Petit Jury. — The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889).

Court May Exercise Discretion. — The trial court made findings in support of its conclusion that defendants were not entitled to investigative grand jury documents. Although the court concluded that defendants were not entitled to the documents as a matter of law, there was no indication in the record that the court reached this conclusion under the mistaken belief that it was required to so hold as a matter of law, i.e., that it had no discretion. Thus, defendant's assignment of error was overruled. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

Applied in State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (1999).

Cited in State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978); State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

II. DISCRIMINATION IN SELECTING JURORS.

Racial discrimination in the selection of a grand jury foreman from a panel of grand jurors selected in a nondiscriminatory manner violates N.C. Const., Art. 1, § 19 and § 26. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

A black defendant may make out a prima facie case of racial discrimination in the grand jury foreman's selection by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past relatively few blacks had served in the position of foreman, even though a substantial number had been selected to serve as members of grand juries. The State may rebut such a prima facie case on remand by offering evidence that the process used in selecting the grand jury foreman was in fact racially neutral. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

Exclusion of Members of Defendant's Race. — The selection of a legally constituted grand jury is a constitutionally protected right, and the indictment of a defendant by a grand jury from which members of his race have been systematically excluded is a denial of his right to equal protection of the laws. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

Burden of Showing Discrimination in Selecting Jurors. — U.S. Const., Amend. XIV forbids any discrimination against blacks in the selection of a grand jury, and the burden is on the defendants to establish the discrimination against their race. State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963), rev'd on other grounds, 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. 2d 77 (1964).

Objection to Discriminatory Selection Not Waived by Guilty Plea. — Under North Carolina law, a guilty plea does not waive objections to racial exclusion in the selection of the grand jury if, before the plea of guilty, the defendant raises his objection in a motion to quash the indictment. Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970).

Right to Constitutionally Selected Jury Held Not Waived. — Where there is no evidence that petitioner, after intelligent consultation with his attorney, had understandingly and knowingly waived the right of trial by an indictment returned by a constitutionally selected grand jury, there is no basis to support a finding that he has waived that right by his failure to enter a timely motion to quash the indictment. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

Question of racial exclusion in the selection of a state grand jury is cognizable in federal habeas corpus, despite the fact that under former G.S. 9-23 an objection to the composition of the grand jury was waived unless raised by motion to quash the indictment prior to the entry of the guilty plea. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

Role of the foreman of a North Carolina grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985), cert. denied, 316 N.C. 197, 341 S.E.2d 586 (1986).

§ 15A-623. Grand jury proceedings and operation in general.

(a) The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury.

(b) The foreman presides over all hearings and has the power to administer oaths or affirmations to all witnesses.

(c) The foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment.

(d) During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to a witness being examined, may, as the occasion requires, also be present:

(1) An interpreter, if needed.

(2) A law-enforcement officer holding a witness in custody.

Any person other than a witness who is permitted in the grand jury room must first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

(e) Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions.

(f) The presiding judge may direct that a bill of indictment be kept secret until the defendant is arrested or appears before the court. The clerk must seal the bill of indictment and no person including a witness may disclose the finding of the bill of indictment, or the proceedings leading to the finding, except when necessary for the issuance and execution of an order of arrest.

(g) Any grand juror or other person authorized to attend sessions of the grand jury and bound to keep its secrets who discloses, other than to his attorney, matters occurring before the grand jury other than in accordance with the provisions of this section is in contempt of court and subject to proceedings in accordance with law.

(h) If a grand jury is convened pursuant to G.S. 15A-622(h), notwithstanding subsection (d) of this section, a prosecutor shall be present to examine witnesses, and a court reporter shall be present and record the examination of witnesses. The record shall be transcribed. If the prosecutor determines that it is necessary to compel testimony from the witness, he may grant use immunity to the witness. The grant of use immunity shall be given to the witness in writing by the prosecutor and shall be signed by the prosecutor. The written grant of use immunity shall also be read into the record by the prosecutor and shall include an explanation of use immunity as provided in G.S. 15A-1051. A witness shall have the right to leave the grand jury room to consult with his counsel at reasonable intervals and for a reasonable period of time upon the request of the witness. Notwithstanding subsection (e) of this section, the record of the examination of witnesses shall be made available to the examining prosecutor, and he may disclose contents of the record to other investigative or law-enforcement officers, the witness or his attorney to the extent that the disclosure is appropriate to the proper performance of his official duties. The record of the examination of a witness may be used in a trial to the extent that it is relevant and otherwise admissible. Further disclosure of grand jury proceedings convened pursuant to this act may be made upon written order of a superior court judge if the judge determines disclosure is essential:

(1) To prosecute a witness who appeared before the grand jury for contempt or perjury; or
(2) To protect a defendant's constitutional rights or statutory rights to discovery pursuant to G.S. 15A-903.

Upon the convening of the investigative grand jury pursuant to approval by the three-judge panel, the district attorney shall subpoena the witnesses. The subpoena shall be served by the investigative grand jury officer, who shall be appointed by the court. The name of the person subpoenaed and the issuance and service of the subpoena shall not be disclosed, except that a witness so subpoenaed may divulge that information. The presiding superior court judge shall hear any matter concerning the investigative grand jury in camera to the extent necessary to prevent disclosure of its existence. The court reporter for the investigative grand jury shall be present and record and transcribe the in camera proceeding. The transcription of any in camera proceeding and a copy of all subpoenas and other process shall be returned to the Chief Justice or to such member of the three-judge panel as the Chief Justice may designate, to be filed with the Clerk of the North Carolina Supreme Court. The subpoena shall otherwise be subject to the provisions of G.S. 15A-801 and Article 43 of Chapter 15A. When an investigative grand jury has completed its investigation of the crimes alleged in the petition, the investigative functions of the grand jury shall be dissolved and such investigation shall cease. The District Attorney shall file a notice of dissolution of the investigative functions of the grand jury with the Clerk of the North Carolina Supreme Court. (1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, ss. 3, 6; 1987 (Reg. Sess., 1988), c. 1040, ss. 1, 4; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 686, ss. 2, 3.)

OFFICIAL COMMENTARY

In general the provisions of this section spell out procedural provisions that were observed through custom, common law, or provisions of Article 4 of Chapter 9 of the General Statutes. Among the new provisions are:

(1) Express permission for interpreters and law-enforcement officers keeping witnesses in custody to enter the grand jury room. The Commission quite deliberately decided against authorizing any bailiff or deputy sheriff attend-

ing the grand jury any authority to enter the grand jury room at any time the jurors are in session.

(2) Express direction to swear the nonwitnesses to secrecy.

(3) An express bar against disclosure.

(4) The procedure for sealing a bill of indictment until a defendant can be brought within the control or custody of the court.

The Commission's proposal allowed disclosure of grand jury proceedings in certain instances, e.g., a witness could disclose his own testimony or a court could order disclosure if a case involved alleged contempt or perjury before a grand jury. The General Assembly, however, was fearful of opening the door at all in a manner to enhance the use of the grand jury as an investigative tool of the prosecutor's office, and rewrote subsection (e). It is not clear to what extent, if at all, a court could invoke the common law to override the statutory command, though if a defendant's constitutional rights were compromised by the statutory bar it seems obvious that the statute should be disregarded.

The Commission debated the idea of allowing the solicitor in the grand jury room to examine witnesses at least when investigations were being undertaken. It finally decided in all cases to preserve the present arrangement whereby all questioning is by the jurors — and unrecorded.

Cross References. — See also G.S. 15A-644.

Editor's Note. — The reference in subsection (h) of this section to "this act" refers to Session Laws 1985 (Reg. Sess., 1986), c. 843, which amended G.S. 5A-12, 8-57, 15A-622, and 15A-1051, as well as this section.

Session Laws 1991, c. 686, s. 3 amended Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete an October 1, 1991, expiration provision. The 1991 act, which is in the coded bill drafting format set out in G.S. 120-20.1, did not mention Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, which amended the 1985 act, as amended, to change the expiration date to October 1, 1993.

Legal Periodicals. — For note dealing with a witness' access to his own grand jury testimony, see 13 Wake Forest L. Rev. 216 (1977).

For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of State v. Cofield, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former law.*

Public Policy Underlying Subsection (e). — The public policy of this State against allowing a defendant at trial to cross-examine the witnesses before the grand jury in order to show the nature and character of the evidence upon which the bill of indictment was founded is codified in subsection (e) of this section. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

It is against the public policy of this state to allow a defendant to expose the nature of the evidence upon which a true bill was returned; for this reason a defendant is not allowed to cross-examine the witnesses before a grand jury. State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251, cert. denied, 320 N.C. 173, 358 S.E.2d 61, cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987).

A grand jury hearing constitutes a judicial proceeding within the meaning of the absolute privilege rule. Houpe v. City of Statesville, 128 N.C. App. 334, 497 S.E.2d 82 (1998), cert. denied, 348 N.C. 72, 505 S.E.2d 871 (1998).

Failure to Mark Names of Witnesses on Bill. — The provision that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, was directory merely, and the omission of the foreman to comply therewith was no ground for quashing the bill, where the proof was that the witnesses were sworn. State v. Hines, 84 N.C. 810 (1881); State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932); State v. Lancaster, 210 N.C. 584, 187 S.E. 802 (1936); State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

The statute requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the jury is directory, and the fact that it does not appear by endorsement on a bill that the witness had been sworn and examined is no ground for quashing the indictment or arresting the judgment. State v. Hollingsworth, 100 N.C. 535, 6 S.E. 417 (1888).

The statutory requirement that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury is directory and not mandatory, and the mere absence of such an endorsement is not sufficient to overcome the presumption of validity of the indictment arising from its return by the grand jury as "a true bill." State v. Tudor, 14 N.C. App. 526, 188 S.E.2d 583 (1972).

Mere absence of an endorsement on a bill of indictment indicating that the witnesses were duly examined is not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as "a true bill." State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906).

Witnesses Sworn by Clerk. — The statute, authorizing the foreman of the grand jury to swear witnesses to be examined before the jury is directory merely. The fact that witnesses are sworn by the clerk of court rather than by the foreman is not grounds for arresting judgment or quashing an indictment. State v. Allen, 83 N.C. 680 (1880); State v. White, 88 N.C. 698 (1883).

Return of New Bill After Quashal Without Reexamination of Witnesses. — Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court, "a true bill," without a reexamination of the witnesses, this bill should be quashed. State v. Ivey, 100 N.C. 539, 5 S.E. 407 (1888).

Trial court did not err in denying defendant's request for a transcript of the grand jury proceedings concerning his indictment, since such proceedings are considered secret, and defendant is adequately protected by his right to object to improper evidence and to cross-examine the witnesses presented against him at trial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Transcripts Not Required by Federal Courts. — Federal courts will not require North Carolina Superior Courts to have grand jury transcripts produced to defendants; to do so would be to act as a state appellate court and reverse an order by the Superior Court and to intrude into what is a statutorily defined part of the state court. Shell v. Wall, 760 F. Supp. 545 (W.D.N.C. 1991).

Where State Seeks Deceased Client's Statements to His Attorney and No Investigative Grand Jury Is Convened. — When the State sought the production of a deceased client's statements to his attorney in a murder investigation, and the State did not convene an investigative grand jury, under G.S. 15A-623(h), or strictly comply with G.S. 1A-1, Rule 3, it, nonetheless, filed its petition in the superior court, which was the proper court to hear a "special proceeding," under G.S. 7A-246, and it could, to accommodate the exigent circumstances presented, hear the matter. In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

Applied in State v. Dukes, 305 N.C. 387, 289 S.E.2d 561 (1982); State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985); State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003); State v. Allen, 164 N.C. App. 665, 596 S.E.2d 261, 2004 N.C. App. LEXIS 1018 (2004).

Cited in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983); In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984); Ragan v. County of Alamance, 98 N.C. App. 636, 391 S.E.2d 825 (1990); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Basden, 110 N.C. App. 449, 429 S.E.2d 740 (1993); State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993).

§ 15A-624. Grand jury the judge of facts; judge the source of legal advice.

(a) The grand jury is the exclusive judge of the facts with respect to any matter before it.

(b) The legal advisor of the grand jury is the presiding or convening judge. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the common law followed in North Carolina. Subsection (b) reflects a policy decision of the Commission. In many jurisdictions the prosecuting attorney may advise the grand jury on matters of law, but these of course are jurisdictions in which the prosecutor routinely enters the grand jury room to examine the witnesses.

CASE NOTES

Grand Jury the Exclusive Judge of the Facts. — G.S. 15A-624(a) provides that a grand jury is the exclusive judge of the facts with respect to any matter before it. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Applied in State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-625: Reserved for future codification purposes.

OFFICIAL COMMENTARY

For comment on the section here deleted, see the commentary under G.S. 15A-1053.

§ 15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge.

(a) Except as provided in this section, no person has a right to call a witness or appear as a witness in a grand jury proceeding.

(b) In proceedings upon bills of indictment submitted by the prosecutor to the grand jury, the clerk must call as witnesses the persons whose names are listed on the bills by the prosecutor. If the grand jury desires to hear any witness not named on the bill under consideration, it must through its foreman request the prosecutor to call the witness. The prosecutor in his discretion may call, or refuse to call, the witness.

(c) In considering any matter before it a grand jury may swear and hear the testimony of a member of the grand jury.

(d) Any person not called as a witness who desires to testify before the grand jury concerning a criminal matter which may properly be considered by the grand jury must apply to the district attorney or to a superior court judge. The judge or the district attorney in his discretion may call the witness to appear before the grand jury.

(e) An official who is required or authorized to call a witness before the grand jury does so by issuing a subpoena for the witness or by causing one to be issued. If the official is assured that the witness will appear when requested without issuance of a subpoena, he may call the witness simply by notifying him of the time and place his presence is requested before the grand jury. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section is a key one in placing restrictions on any independent powers the grand jury may possess. The grand jury may not call its own witnesses; in fact, even volunteer witnesses may not appear before the grand jury without the permission of the solicitor or the judge.

As originally drafted this section stated that a grand jury investigating a matter expressly referred to it by a solicitor or a judge had the right to secure all necessary witnesses; otherwise, it was within the discretion of the judge or the solicitor. The General Assembly deleted these provisions and in fact left no specific provision for the jurors to request that witnesses be called. Nevertheless, from the overall context of the section it is clear that either a judge or a solicitor would have the discretion to call, or refuse to call, any person as a witness upon the request of the grand jurors.

Subsection (e) authorizes witnesses to be called without the formality of a subpoena when it is clear that the witness will come at the time requested.

Legal Periodicals. — For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

CASE NOTES

Purpose of subsection (b) of this section is to provide that the clerk only call as witnesses persons whose names appear on the indictment. State v. McLain, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

The logical purpose of subsection (b) of this section is not to insure that all witnesses must be called by the clerk. State v. McLain, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

Failure to Name Witness Did Not Render Indictment Fatally Defective. — Although the habitual offender indictment did not clearly indicate that a detective, listed by the State as a witness on the bill of indictment, was called as a witness before the grand jury, the absence of such an endorsement did not render an otherwise valid indictment fatally defective. State v. Sinclair, 191 N.C. App. 485, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (2008).

Applied in State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Cited in State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984).

§ 15A-627. Submission of bill of indictment to grand jury by prosecutor.

(a) When a defendant has been bound over for trial in the superior court upon any charge in the original jurisdiction of such court, the prosecutor, unless he dismisses the charge under the terms of Article 50 of this Chapter, Voluntary Dismissal by the State, or proceeds upon a bill of information, must submit a bill of indictment charging the offense to the grand jury for its consideration.

(b) A prosecutor may submit a bill of indictment charging an offense within the original jurisdiction of the superior court. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Subsection (a) codifies existing practice. The Commission determined that it was not necessary to complicate this section by setting time limits in which the solicitor must act. It was believed that the rights granted defendants elsewhere to assure speedy trials would be sufficient to cover this matter.

Subsection (b) originally restricted the power of solicitors to submit a bill of indictment to the grand jury on a charge as to which a district court judge had found no probable cause without the written consent of a superior court judge. As amended, it merely states the solicitor's unrestricted common-law power to submit a bill of indictment within the jurisdictional limits of G.S. 7A-271(a).

CASE NOTES

State may bypass the preliminary hearing entirely, and initially seek an indictment from the grand jury. State v. Lay, 56 N.C. App. 796, 290 S.E.2d 405, cert. denied and appeal dismissed, 306 N.C. 390, 294 S.E.2d 216 (1982).

Finding of probable cause by district court is not a prerequisite to the returning of a true bill of indictment. State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Actions of grand jury are not limited by charges presented or determined at a probable cause hearing in the district court. State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Effect of Finding of No Probable Cause. — Despite a finding of no probable cause made by a district court, the State may subsequently seek an indictment on the same felony charge. State v. Lay, 56 N.C. App. 796, 290 S.E.2d 405, cert. denied and appeal dismissed, 306 N.C. 390, 294 S.E.2d 216 (1982).

Cited in State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

(a) A grand jury:

(1) Must return a bill submitted to it by the prosecutor as a true bill of indictment if it finds from the evidence probable cause for the charge made.

(2) Must return a bill submitted to it by the prosecutor as not a true bill of indictment if it fails to find probable cause for the charge made. Upon returning a bill of indictment as not a true bill, the grand jury may request the prosecutor to submit a bill of indictment as to a lesser included or related offense.

(3) May return the bill to the court with an indication that the grand jury has not been able to act upon it because of the unavailability of witnesses.

(4) May investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more criminal offenses if it has found probable cause for the charges made. An investigation may be initiated upon the concurrence of 12 members of the grand jury itself or upon the request of the presiding or convening judge or the prosecutor.

(5) Must inspect the jail and may inspect other county offices or agencies and must report the results of its inspections to the court.

(b) In proceeding under subsection (a), the grand jury may consider any offense which may be prosecuted in the courts of the county, or in the courts of the superior court district or set of districts as defined in G.S. 7A-41.1 when there has been a waiver of venue in accordance with Article 3 of this Chapter, Venue.

(c) Bills of indictment submitted by the prosecutor to the grand jury, whether found to be true bills or not, must be returned by the foreman of the grand jury to the presiding judge in open court. Presentments must also be returned by the foreman of the grand jury to the presiding judge in open court.

(d) The clerk must keep a permanent record of all matters returned by the grand jury to the judge under the provisions of this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1987 (Reg. Sess., 1988), c. 1037, s. 59.)

OFFICIAL COMMENTARY

An early draft of this section within the Commission permitted the grand jury to issue critical reports of public officials following investigations of them or their offices. This was coupled with some fairly elaborate additional sections allowing officials to see critical reports and defend themselves against any false charges before the reports could be made public. Reports about public agencies that were not critical of identifiable persons were also permitted. The Commission finally decided that the grand jury is an unwieldly investigative body; there is simply too much danger that through ignorance of budgetary and other restraints it could by general or specific criticism unfairly ruin the career of conscientious public officials who are doing the best that can be expected. The draft reflected the Commission's policy choice: The grand jury's investigations may only result in indictments (with the cooperation of the solicitor) or presentments. The section as introduced did not explicitly prohibit reports; it said they were not necessary. The tenor of the entire Article, though, was such that the courts would undoubtedly rule out of order any report of the grand jury that criticized any identifiable person unless that report was accompanied with an indictment or presentment against the person. These careful limitations of the grand jury's powers, however, were thrown awry by amendatory language of the General Assembly in subdivision (a)(5), which requires the grand jury to inspect the jail, in keeping with the provisions of G.S. 9-26, and to permit inspection of "other county offices or agencies"; as for reports, if inspections are made, the jury must report to the court.

This leaves the question of critical reports of county officials and employees not specifically settled, but would probably authorize any criticism that was a necessary part of the report. Critical reports of other persons would apparently, now that the statute has been amended to the point that it is ambiguous on the question, be a question of decision under North Carolina's common law.

A new feature of the section is in subdivision (a)(3), providing that a grand jury may return a bill of indictment without acting upon it if witnesses are unavailable.

Subsection (c) as introduced provided that its procedure applied in capital cases as well as noncapital cases. This was designed to abolish the custom now followed that all the grand jurors must come into open court upon the return of an indictment in a capital case. The General Assembly removed that specification, but did not address the question whether the old procedure should be retained in capital cases. One minor change might be noted: The foreman must now return indictments and presentments to the court; it has been customary in noncapital cases to send them to the judge by a bailiff or deputy sheriff or deputy sheriff assigned to the grand jury.

Legal Periodicals. — For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under former law.

Indictment to Be Returned in Open Court. — It is the returning of the bill of indictment, publicly, in open court and its being there recorded, that makes it effectual. State v. Cox, 28 N.C. 440 (1846).

Presence of Defendant When Indictment Returned. — Defendant is not entitled to be present in court, either in person or by his attorney, when the indictments are returned as true bills by the grand jury, and his motion to quash the indictments because neither he nor his attorney was present in court when the indictments were returned was properly overruled. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971), citing State v. Stanley, 227 N.C. 650, 44 S.E.2d 196 (1947).

It is not mandatory that the foreman personally deliver bills of indictment to the court. State v. Reep, 12 N.C. App. 125, 182 S.E.2d 623 (1971).

A bill of indictment was not improperly delivered to the court where the foreman delivered it to the officer serving the grand jury, and the officer gave the indictment to the solicitor (now prosecutor) who carried it into the courtroom. State v. Reep, 12 N.C. App. 125, 182 S.E.2d 623 (1971).

Minutes of Court as Evidence of Compliance. — The minutes of the court show that statutory requirements as to return of an indictment in a capital case in open court were strictly complied with. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971).

Transcript Not Required by Federal Courts. — Federal courts will not require North Carolina Superior Courts to have grand jury transcripts produced to defendants; to do so would be to act as a state appellate court and reverse an order by the Superior Court and to intrude into what is a statutorily defined part of the state court. Shell v. Wall, 760 F. Supp. 545 (W.D.N.C. 1991).

Applied in State v. Taylor, 311 N.C. 266, 316 S.E.2d 225 (1984); State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985); State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843 (1984); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

OPINIONS OF ATTORNEY GENERAL

Grand jury does not have authority to compel county commissioners to repair county buildings. See opinion of Attorney General to Mr. R. Wendel Hutchins, County Attorney, Plymouth, N.C., 46 N.C.A.G. 221 (1977).

§ 15A-629. Procedure upon finding of not a true bill; release of defendant, etc.; institution of new charge.

(a) Upon the return of a bill of indictment as not a true bill, the presiding judge must immediately examine the case records to determine if the defendant is in custody or subject to bail or conditions of pretrial release. If so, except as provided in subsection (b), the judge must immediately order release from custody, exoneration of bail, or release from conditions of pretrial release, as the case may be.

(b) Upon the return of a bill of indictment as not a true bill but with a request that the prosecutor submit a bill of indictment to a lesser included or related offense, the judge may defer the action required in subsection (a) for a reasonable period, not to extend past the end of that session of superior court, to allow the institution of the new charge. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section contains a new provision. It authorizes the judge to defer a defendant's release from custody or bail obligations until new process, or a new indictment, may be secured when the jury finds not a true bill to the offense charged but recommends prosecution for a lesser included or related offense. (See the commentary to G.S. 15A-956.) The General Assembly removed a provision from this section which restricted the solicitor's discretionary power to submit a new bill of indictment upon the same charge to the same or a new grand jury following the return of a bill as not a true bill.

CASE NOTES

Applied in State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901, 2004 N.C. App. LEXIS 2021 (2004).

Cited in In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984).

§ 15A-630. Notice to defendant of true bill of indictment.

Upon the return of a bill of indictment as a true bill the presiding judge must immediately cause notice of the indictment to be mailed or otherwise given to the defendant unless he is then represented by counsel of record. The notice must inform the defendant of the time limitations upon his right to discovery under Article 48 of this Chapter, Discovery in the Superior Court, and a copy of the indictment must be attached to the notice. If the judge directs that the indictment be sealed as provided in G.S. 15A-623(f), he may defer the giving of notice under this section for a reasonable length of time. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 143.)

OFFICIAL COMMENTARY

In its provisions as to timeliness of discovery requests, the Commission started the clock running for most defendants when the probable-cause hearing is held or waived. But, defendants not then represented by counsel, or for whom the probable-cause hearing is bypassed, require a different starting point. The Commission determined that at or shortly after the issuance of an indictment was the appropriate time, and this necessitated giving those defendants notice of the indictment. This section is drafted to conform with the provisions of G.S. 15A-902(d).

CASE NOTES

Mailing Not Jurisdictional. — There is nothing in this section to indicate that the mailing of the return of indictment is jurisdictional. State v. Williams, 77 N.C. App. 136, 334 S.E.2d 491 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 877 (1986).

Defendant Held Not Entitled to Notice. — Where counsel was appointed for a defendant on November 14, 1978, and a bill of indictment was returned on December 11, 1978, clearly defendant was not entitled to the benefits of the notice requirement of this section, since a reading of the statute reveals that its provisions are applicable to defendants "unless [they are] then represented by counsel of record." State v. Miller, 42 N.C. App. 342, 256 S.E.2d 512 (1979).

Service of Superseding Indictments on Defendants Not Required Where They Were Represented by Counsel. — Allegation that superseding indictments were not "filed" within the meaning of G.S. 15A-646, because they were not served on defendants prior to trial, was without merit, as there was no requirement that defendants be served with copies of superseding indictments, where they were represented by counsel at the time those indictments were returned by the grand jury. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Indictments with Dates Different from Those of the Arrest Warrants Not Prejudicial to Defendant. — The trial court committed no error, plain or otherwise, with respect to defendant not having been served with the bills of indictment or with respect to the State offering evidence that the offenses occurred on dates different from those alleged in the arrest warrants where the defendant alleged sex offender was represented by counsel of record on the date of the return of the true bills of indictment, where he and his counsel waived formal arraignment, at which they would have been informed of the allegations contained in the bills of indictment, where the defendant presented evidence that he was never alone with the victim during any of the times during which the State's evidence showed the offenses occurred, and where he did not rely solely upon alibi but also presented evidence through his own testimony and the testimony of others directly contradicting the victim's account of the incidents. State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258, 2000 N.C. App. LEXIS 811 (2000).

Applied in State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825 (1982).

§ 15A-631. Grand jury venue.

In the General Court of Justice, the place for returning a presentment or indictment is a matter of venue and not jurisdiction. A grand jury shall have venue to present or indict in any case where the county in which it is sitting has venue for trial pursuant to the laws relating to trial venue. (1985, c. 553, s. 1.)

CASE NOTES

Under law prior to enactment of this section, grand jury had no jurisdiction to indict defendants for rapes committed in another county. State v. Flowers, 318 N.C. 208, 347 S.E.2d 773 (1986).

Return of Indictment Is Matter of Venue, Not Jurisdiction. — The enactment of this section has changed the common law rule regarding a county's jurisdiction to indict. It states that the place for returning a presentment or indictment is a matter of venue, not jurisdiction. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 57 (1987).

Even if trafficking indictment failed to name Wake County as a county in which offense occurred, and venue was therefore technically incorrect in Wake County, the Superior Court of Wake County nevertheless had jurisdiction to try the offense, as under this section the return of an indictment is a matter of venue, not jurisdiction. State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620, cert. denied, 326 N.C. 365, 389 S.E.2d 817 (1989).

Indictment in County Other Than Where Offense Occurred Not a Material Variance. — Where a defendant is charged with felonious possession of stolen property, and is indicted in one county, and proof of the offense indicates that it occurred in another county, the variance is not material. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 57 (1987).

Questions of venue are waived by the failure to make a pre-trial motion, even if the problem of venue arises from a variance between the indictment and the proof at trial. State v. Brown, 85 N.C. App. 583, 355 S.E.2d

225, cert. denied, 320 N.C. 172, 358 S.E.2d 57 (1987).

Defendant's challenge to venue was waived by defendant's failure to make a pretrial motion regarding venue. State v. Spencer, 187 N.C. App. 605, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Applied in State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

Cited in State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

§§ 15A-632 through 15A-640: Reserved for future codification purposes.

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

(a) Any indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses.

(b) An information is a written accusation by a prosecutor, filed with a superior court, charging a person represented by counsel with the commission of one or more criminal offenses.

(c) A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so. (1797, c. 474, s. 3, P.R.; R.C., c. 35, s. 6; 1879, c. 12; Code, s. 1175; Rev., s. 3240; C.S., s. 4607; 1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section is intended to set out the North Carolina common law relating to the definitions of indictment, information, and presentment. One change was made in conformity with the commission's decision to require a separate pleading for each defendant. Indictments and informations may charge only a single person. Presentments, as they are not pleadings, may charge two or more persons jointly.

Cross References. — As to indictment for murder, see G.S. 15-144. As to indictment for perjury, see G.S. 15-145. As to indictment for subornation of perjury, see G.S. 15-146. As to manner of alleging joint ownership of property, see G.S. 15-148. As to description in bill for larceny of money, see G.S. 15-149. As to description in bill for embezzlement, see G.S. 15-150. As to indictment alleging intent to defraud, and indictment for larceny and receiving stolen goods, see G.S. 15-151. For provision that indictment shall not be quashed for informality, see G.S. 15-153.

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former law.*

Effect on § 15-1. — There is no stated purpose in this section that indicates the legislature intended to repeal G.S. 15-1. Furthermore this section appears to be an effort by the legislature to codify the common law that permitted the use of presentments by grand juries but prohibited the arrest and trial of defendants on a presentment. Thus, G.S. 15-1 has not been repealed and remains a part of the law of this State; it would support the order of the trial court denying defendant's motion to dismiss. State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

There can be no trial, conviction, or punishment without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966); State v. Cassada, 6 N.C. App. 629, 170 S.E.2d 575 (1969).

Court not required to instruct indicting grand jury on elements of crime in question. State v. Treadwell, 99 N.C. App. 769, 394 S.E.2d 245 (1990).

Sentencing of Defendant Who Pleaded Guilty But Who Was Not Formally Accused. — When the court sentenced petitioner, who had been indicted for one offense upon his plea of guilty of another offense, when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violated petitioner's rights as guaranteed by N.C. Const., Art. I, § 19, and by U.S. Const., Amend. XIV, and would be vacated in post-conviction proceedings. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

"Presentment.“. — A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others without any bill of indictment. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

Presentment does not institute a criminal proceeding, but is only a device whereby the grand jury brings to the attention of the district attorney subject matter which requires investigation by the district attorney and the submission of a properly drawn indictment by him to the grand jury when the facts so warrant. State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Trials upon presentments have been abolished, and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

The experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute. Since the adoption of the action of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

Indictment Defective for Failure to Specify Weight of Marijuana Possessed. — Appeals court vacated defendant's conviction of possession of more than 42 grams of marijuana under G.S. 90-95(a)(3), (d)(4) since the trial court lacked jurisdiction to try him for that charge as the indictment did not charge an essential element of that crime (the weight of marijuana he possessed), and remanded the case to the trial court to impose a judgment of conviction and sentence of the lesser-included offense of Class 3 possession of marijuana since the essential elements of that crime, other than weight, were the same as the G.S. 90-95(a)(3), (d)(4) offense of which he was indicted and convicted. State v. Partridge, 157 N.C. App. 568, 579 S.E.2d 398, 2003 N.C. App. LEXIS 735 (2003).

Defective Indictment Not Subject to Harmless Error Review. — Harmless error analysis is generally not appropriate in cases where the indictment is fatally defective. State v. Partridge, 157 N.C. App. 568, 579 S.E.2d 398, 2003 N.C. App. LEXIS 735 (2003).

Defective Indictment Remedies. — Indictment is fatally defective if it wholly fails to charge some offense or fails to state some essential and necessary element of the offense of which the defendant is found guilty and when such a defect is present, a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal; when the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. State v. Partridge, 157 N.C. App. 568, 579 S.E.2d 398, 2003 N.C. App. LEXIS 735 (2003).

Where an indictment is fatally defective as to one charge but sufficient to support a lesser-included offense, and the jury would necessarily have found all the elements of the lesser-included offense, the case is remanded for imposition of judgment and sentencing on the lesser-included offense. State v. Partridge, 157

N.C. App. 568, 579 S.E.2d 398, 2003 N.C. App. LEXIS 735 (2003).

Defective Indictment Convictions. — Defendant indicted for a criminal offense may be convicted of the offense charged or of a lesser-included offense, but may not be convicted of any other offense not supported by the indictment whatever the evidence against him may be. State v. Partridge, 157 N.C. App. 568, 579 S.E.2d 398, 2003 N.C. App. LEXIS 735 (2003).

Applied in State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978); State v. Bollinger, — N.C. App. —, 665 S.E.2d 136, 2008 N.C. App. LEXIS 1518 (2008).

Cited in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986); State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989); State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996).

§ 15A-642. Prosecutions originating in superior court to be upon indictment or information; waiver of indictment.

(a) Prosecutions originating in the superior court must be upon pleadings as provided in Article 49 of this Chapter, Pleadings and Joinder.

(b) Indictment may not be waived in a capital case or in a case in which the defendant is not represented by counsel.

(c) Waiver of indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information. (1907, c. 71; C.S., s. 4610; 1951, c. 726, ss. 1, 2; 1971, c. 377, s. 30.1; 1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section simplifies somewhat the waiver provisions in G.S. 15-140 and G.S. 15-140.1. The provisions of G.S. 15-140.2 were omitted as unnecessary.

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under former law.

New Indictment Not Required for Lesser Included Offense. — It is not necessary that accused be tried under a new indictment charging him with assault with intent to commit rape, since assault with intent to commit rape is a lesser included offense of rape and accused therefore could be tried on the original indictment. Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966).

A defendant may waive a defect within an indictment if he does so expressly and intelligently. For example, numerous North Carolina courts have held that an indictment defective for duplicity may be waived by a plea of guilty. Burgess v. Griffin, 585 F. Supp. 1564 (W.D.N.C.), aff'd, 743 F.2d 1064 (4th Cir. 1984).

Under North Carolina law, an accused may waive a defect within an indictment if the facts of the case unmistakably indicate that the purpose of the indictment to protect the accused has been accomplished, and that the accused expressly and intelligently waived the defect. Burgess v. Griffin, 585 F. Supp. 1564 (W.D.N.C.), aff'd, 743 F.2d 1064 (4th Cir. 1984).

Prerequisites for Waiver. — A defendant can waive a bill of indictment in a felony case only when represented by counsel and when both the defendant and his counsel sign a written waiver of indictment. State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964); State v. Daniel, 19 N.C. App. 313, 198 S.E.2d 464 (1973).

Sufficiency of Waiver. — The North Carolina courts, in applying subsection (c), have held that neither a tendering of a guilty plea by defendant, nor the tendering to the trial court of an unsigned waiver, could be considered sufficient waivers of a defendant's right to a formal indictment. State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

Request for an Instruction Not a Waiver. — Defendant's request for an instruction on felonious restraint did not constitute a formal waiver of his right to be charged under a sufficient indictment. State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

Waiver Not Found. — Order denying defendant's motion to suppress evidence was void because the trial court was without jurisdiction to entertain and rule upon the motion as defendant had not been indicted and had not waived indictment at the time of the hearing and defendant's conduct in filing a motion to suppress did not validate the void order. State v. Wolfe, 158 N.C. App. 539, 581 S.E.2d 117, 2003 N.C. App. LEXIS 1182 (2003).

"Represented by Counsel.". — The provision that a defendant can waive a bill of indictment in a felony case only when represented by counsel, and when both defendant and his counsel sign a written waiver of indictment, presupposes counsel selected and employed by the defendant himself or assigned to him by the judge, and certainly does not include counsel assigned by the prosecuting attorney. State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964).

Waiver of finding of indictment also includes waiver of return. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

Applied in State v. Ragland, 80 N.C. App. 496, 342 S.E.2d 532 (1986); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Taylor, 354 N.C. 28, 550 S.E.2d 141, 2001 N.C. LEXIS 832 (2001).

Cited in State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State v. Neville, 108 N.C. App. 330, 423 S.E.2d 496 (1992); State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

§ 15A-643. Joinder of offenses and defendants and consolidation of indictments and informations.

The rules with respect to joinder of offenses and defendants and the consolidation of charges in indictments and informations are provided in Article 49 of this Chapter, Pleadings and Joinder. (1917, c. 168; C.S., s. 4622; 1921, c. 100; 1973, c. 1286, s. 1.)

§ 15A-644. Form and content of indictment, information or presentment.

(a) An indictment must contain:

(1) The name of the superior court in which it is filed;

(2) The title of the action;

(3) Criminal charges pleaded as provided in Article 49 of this Chapter, Pleadings and Joinder;

(4) The signature of the prosecutor, but its omission is not a fatal defect; and

(5) The signature of the foreman or acting foreman of the grand jury attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment.

(b) An information must contain everything required of an indictment in subsection (a) except that the accusation is that of the prosecutor and the provisions of subdivision (a)(5) do not apply. The information must also contain or have attached the waiver of indictment pursuant to G.S. 15A-642(c).

(c) A presentment must contain everything required of an indictment in subsection (a) except that the provisions of subdivisions (a)(4) and (5) do not apply and the foreman must by his signature attest the concurrence of 12 or more grand jurors in the presentment. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

Cross References. — As to grand jury proceedings and operations, see G.S. 15A-623.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of State v. Cofield, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former law.*

Purpose of Indictment. — The office of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare his defense. State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

Power of Legislature as to Form of In-

dictment. — The legislature has the undoubted right to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907).

Technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923). See also, State v. Morrison, 202 N.C. 60, 161 S.E. 725 (1932).

Language of Statute Sufficient. — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Indictment must charge all the essential elements of the alleged criminal offense. State v. Lewis, 58 N.C. App. 348, 293 S.E.2d 638 (1982), cert. denied, 311 N.C. 766, 321 S.E.2d 152 (1984).

When Indictment Sufficient. — If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In every indictment, the facts and circumstances must be stated with such certainty that the defendant may judge whether they constitute an indictable offense or not. Thus where an indictment sets forth the substance of the offense charged in a plain, intelligible and explicit manner, with such fullness that the court can see that it is charged, and it gives the defendant such information as it is necessary to enable him to make defense on the trial and in case of a subsequent prosecution, it is sufficient. State v. Murphy, 101 N.C. 697, 8 S.E. 142 (1888).

Trial court did not err by denying defendant's motion to dismiss an indictment against him for possession of firearms by a felon in violation of G.S. 14-415.1 because the indictment was not fatally defective under G.S. 15A-644, despite the fact that the indictment failed to state the statutory penalty for the underlying felony conviction. Because the provision under G.S. 14-415.1(c) requiring the indictment to state the penalty for the prior offense is not material and does not affect a substantial right, defendant was no less apprised of the conduct that was the subject of the accusation than he would have been if the indictment had included the prior conviction's penalty; furthermore, G.S. 15A-644 did not require the quashing of the bill of indictment under the circumstances in defendant's case because doing so would attribute to the legislature an intent to paramount mere form over substance. State v. Boston, 165 N.C. App. 214, 598 S.E.2d 163 (2004).

Effect of Unnecessary Averment. — An averment in an indictment or warrant not necessary in charging the offense may be treated as exceeding what is requisite and should be disregarded. State v. Lewis, 58 N.C. App. 348, 293 S.E.2d 638 (1982), cert. denied, 311 N.C. 766, 321 S.E.2d 152 (1984).

Evidence Describing Manner and Means of Commission Is Unnecessary. — The bill is complete without evidentiary matters descriptive of the manner and means by which the offense was committed. A verdict of guilty, or not guilty, is only as to the offense charged, not of surplus or evidential matters alleged. State v. Lewis, 58 N.C. App. 348, 293 S.E.2d 638 (1982), cert. denied, 311 N.C. 766, 321 S.E.2d 152 (1984).

Lack of Expression "True Bill." — An indictment is not invalid merely because there is no specific expression in the indictment that it is "a true bill." State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

The grand jury foreman's failure to check boxes on the indictments designating "True Bill" or not a "True Bill" did not render the indictments defective or invalid, where both indictments were signed by the foreman and they clearly indicated the charges against the defendant, and neither the state nor the defendant provided the appellate court with any evidence of presentation of the bill of indictment to the trial court. State v. Hall, 131 N.C. App. 427, 508 S.E.2d 8 (1998), aff'd, 350 N.C. 303, 513 S.E.2d 561 (1999).

Mistake in Caption. — A misrecital of the county in the caption is not ground for arrest of judgment. State v. Sprinkle, 65 N.C. 463 (1871); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Omission of Caption. — While every indictment properly should have a caption, it is no part of the indictment, and its omission is no ground for arresting judgment. State v. Wasden, 4 N.C. 596 (1816); State v. Brickell, 8 N.C. 354 (1821); State v. Lane, 26 N.C. 113 (1843); State v. Dula, 61 N.C. 437 (1868); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Indictment need not necessarily be signed by anyone. State v. Cox, 28 N.C. 440 (1846); State v. Mace, 86 N.C. 668 (1882); State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Signature of Prosecutor Not Essential. — It is regular and orderly for the bill to be signed by the solicitor (now prosecutor), but such signing is not essential to its validity. State v. Cox, 28 N.C. 440 (1846); State v. Mace, 86 N.C. 668 (1882); State v. Arnold, 107 N.C. 861, 11 S.E. 990 (1890).

Subdivision (a)(5) is merely directory; an indictment is not invalid because it contained no attestation clause that 12 or more grand jurors concurred in the findings of a true bill. State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

Although it is better practice for the foreman's entry upon the bill of indictment, over his signature, to state expressly that 12 or more grand jurors concurred in such finding, since even a directory provision of a statute should be obeyed, this is not necessary to the validity of the bill of indictment where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

No endorsement by the foreman or otherwise was essential to the validity of an indictment which had been duly returned into court by the grand jury and entered upon its records. State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932).

Lack of Endorsement Held Not to Support Motion to Quash. — When a bill of indictment in a capital case had been returned in open court by a majority of the grand jury as a true bill, and the action of the grand jury was duly recorded in the court's records, the lack of endorsement on the bill would not support a motion to quash. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

It is not required that the indictment for first-degree burglary describe the property which the defendant intended to steal, or that which he did steal. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976), overturned by State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Cases decided prior to the enactment of G.S. 15A-924(a)(5) holding that an "indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony" are no longer controlling on this issue. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Indictment for first-degree burglary was sufficient, even though it did not specify the felony the defendant intended to commit when he entered victim's apartment. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 22 and 23 for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Failure to Allege Specific Dates of Offenses Not Fatal. — Indictments for embezzlement were not invalid because they failed to allege the specific dates on which the offenses occurred but instead alleged that they occurred on or about January 1 of each year for which an indictment was returned since defendant presented no statute of limitations or alibi defense, and the time of the offenses was therefore not an essential fact; furthermore, defendant was not prejudiced by the issuance of one indictment for each year rather than separate indictments for each offense committed during that year. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense. State v. Simmons, 57 N.C. App. 548, 291 S.E.2d 815 (1982).

Changes to Indictment. — Where initial indictment was changed by superseding habitual felon indictment so that there was a substitution, with two of the three felonies remaining the same, there was a substantial change to the indictment. State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980); State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Cited in State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981); State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

§ 15A-644.1. Filing of information when plea of guilty or no contest in district court to Class H or I felony.

A defendant who pleads guilty or no contest in district court pursuant to G.S. 7A-272(c)(1) shall enter that plea to an information complying with G.S. 15A-644(b), except it shall contain the name of the district court in which it is filed. (1995 (Reg. Sess., 1996), c. 725, s. 3.)

§ 15A-645. Allegations of previous convictions.

Trial upon indictments and informations involving allegation of previous convictions is subject to the provisions of G.S. 15A-928. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

See the commentary under G.S. 15A-928.

§ 15A-646. Superseding indictments and informations.

If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge. The first instrument is not, however, superseded with respect to any count contained therein which charged an offense not charged in the second indictment or information. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The provisions of this section are based on a section in the New York Criminal Procedure Law. This section must be compared with Article 3, Venue. If a crime chargeable in two or more counties is charged in one county, the county in which the charge is first laid becomes the county with exclusive venue. See G.S. 15A-132. This section does not change that rule; it applies to superseding indictments and informations filed in the same court.

CASE NOTES

Existence of former bills of indictment for an offense constitutes no legal impediment to putting defendant on trial upon the last and more perfect bill. Adoption of this section did not modify such time honored practices in any way. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Dismissal of Prior Indictments as Ministerial Act. — The legislative mandate that prior indictments for an offense be dismissed at the time of a defendant's arraignment upon a superseding indictment or information was intended solely to require a ministerial act. Failure of the trial court to do so does not render the superseding indictment void or defective. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Service of Superseding Indictments on Defendants Not Required Where They Were Represented by Counsel. — Allegation that superseding indictments were not "filed" within the meaning of this section, because they were not served on defendants prior to trial, was without merit, as there was no requirement that defendants be served with copies of superseding indictments, where they were represented by counsel at the time those indictments were returned by the grand jury. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Due Process Not Violated. — Where the state obtained a second indictment charging the defendant as a violent habitual felon after the first indictment was quashed, so that the second indictment replaced the technically-deficient first indictment, the second indictment attached to the ongoing armed robbery proceeding, because the defendant had not been sentenced and because the first indictment placed him on notice that he was being tried as a violent habitual felon. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

No Fatal Variance Occurred. — Fact that the state presented evidence tending to show that defendant committed indecent liberties as a principal as well as an aider and abettor did not mean the state offered evidence of commission of an offense not charged in the indictment; therefore, no fatal variance occurred and the trial judge did not err in instructing the jury that it could convict defendant of indecent liberties under either a principal or aiding and abetting theory. State v. Fuller, 179 N.C. App. 61, 632 S.E.2d 509, 2006 N.C. App. LEXIS 1674 (2006).

Reservation of Ruling on Validity of Superseding Indictments. — Argument that valid superseding indictments were not "filed" within the meaning of this section, because the trial court failed to rule on defendants' objections to proceeding on those indictments until all of the evidence in the case had been presented, was without merit, as the fact that the trial court reserved its ruling on the validity vel non of the indictments until after the trial had commenced could not make such indictments void or defective. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Applied in State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981).

Cited in State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633 (1978); State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986); State v. Dorsett, 81 N.C. App. 515, 344 S.E.2d 342 (1986); State v. Keys, 87 N.C. App. 349, 361 S.E.2d 286 (1987); State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814, 2001 N.C. App. LEXIS 578 (2001).

ARTICLE 33.

§§ 15A-647 through 15A-673: Reserved for future codification purposes.

ARTICLE 34.

§§ 15A-674 through 15A-700: Reserved for future codification purposes.

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

Editor's Note. — The "Official Commentary" under this Article has been omitted in light of the extensive rewriting of this Article by Session Laws 1977, c. 787, s. 1, and subsequent repeal by Session Laws 1989, c. 688, s. 1.

§§ 15A-701 through 15A-710: Repealed by Session Laws 1989, c. 688, s. 1.

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

OFFICIAL COMMENTARY

There are included here provisions with regard to securing the presence of the defendant for trial when he is confined in a State or federal institution. In addition, in sections 16 and 22 of the act inserting this Chapter, there are sections which will transfer to Subchapter VII the provisions of the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

(a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.

(b) If the defendant whose presence is sought is confined pursuant to another criminal proceeding in a different prosecutorial district as defined in G.S. 7A-60, the defendant and the prosecutor prosecuting the other criminal action must be given reasonable notice and opportunity to object to the temporary release. Objections must be heard by a superior court judge having authority to act in criminal cases in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the defendant is confined, and he must make appropriate orders as to the precedence of the actions.

(c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

(d) Detainer. —

(1) When a criminal defendant is imprisoned in this State pursuant to prior criminal proceedings, the clerk upon request of the prosecutor, must transmit to the custodian of the institution in which he is imprisoned, a copy of the charges filed against the defendant and a detainer directing that the prisoner be held to answer to the charges made against him. The detainer must contain a notice of the prisoner's right to proceed pursuant to G.S. 15A-711(c).

(2) Upon receipt of the charges and the detainer, the custodian must immediately inform the prisoner of its receipt and furnish him copies of the charges and the detainer, must explain to him his right to proceed pursuant to G.S. 15A-711(c).

(3) The custodian must notify the clerk who transmitted the detainer of the defendant's impending release at least 30 days prior to the date of

release. The notice must be given immediately if the detainer is received less than 30 days prior to the date of release. The clerk must direct the sheriff to take custody of the defendant and produce him for trial. The custodian must release the defendant to the custody of the sheriff, but may not hold the defendant in confinement beyond the date on which he is eligible for release.

(4) A detainer may be withdrawn upon request of the prosecutor, and the clerk must notify the custodian, who must notify the defendant. (1949, c. 303; 1953, c. 603; 1957, c. 349, s. 10; c. 1067, ss. 1, 2; 1967, c. 996, ss. 13, 15; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 107, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 61; 1989, c. 688, s. 3.)

OFFICIAL COMMENTARY

Rather than requiring the solicitor to go through the traditional, and cumbersome, "habeas corpus ad prosequendum," the Commission here provides for a simple request by the solicitor, made directly to the official having custody of the defendant. In case of a problem with regard to a defendant whose presence is desired by two solicitors, subsection (b) provides for a judge of superior court to settle the matter.

The right of the defendant to require the solicitor to proceed pursuant to this section should be read in conjunction with Article 35, Speedy Trial.

Notwithstanding the right of the defendant to a speedy trial, and his right to require the solicitor to proceed, there will doubtless remain occasions for the placing of a detainer, so that the defendant will be released to a law-enforcement officer, to be held for trial. Thus subsection (d) provides for the placing of a detainer, with notice to the defendant, but also provides that the detainer will not prolong his period of confinement in the institution in which he has been imprisoned.

CASE NOTES

Filing Requirement Not Waived by Statement in Handbook for Inmates. — Where the defendant did not comply with subsection (c), by serving a copy of his request for trial on the prosecutor in the manner provided by G.S. 1A-1, Rule 5(b), he was not entitled to have his case dismissed under this section. The State did not waive the provisions of subsection (c) by the issuance of a handbook by the North Carolina Department of Corrections which instructed inmates that they had to file the request for a trial only with the clerk of superior court. State v. Hege, 78 N.C. App. 435, 337 S.E.2d 130 (1985).

Legislature envisioned that trial following a request under subsection (c) would be held within eight months, i.e., the six-month period provided by subsection (c) of this section plus the 60-day release period provided by subsection (a) of this section. This coincides with the eight-month period set out in G.S. 15-10.2(a). State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

G.S. 15A-711 does not guarantee a prisoner the right to a "speedy trial" within a specified period of time, and a prosecutor complies with the statute by making a written request to secure defendant's presence at trial within six months of the defendant's request that he do so, whether or not the trial actually takes place during the statutory period of six months plus the 60 days temporary release to local law-enforcement officials. State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886, 2004 N.C. App. LEXIS 188 (2004).

State Must Proceed Within Six Months to Request Defendant's Release for Trial. — Subsection (c) provides that following defendant's request the State must proceed within six months "pursuant to subsection (a)," that is, not to trial but to request a defendant's temporary release for trial, which "temporary release may not exceed 60 days." State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Effect of Request for Delivery of Defendant. — The fact that the defendant's trial was not held within the six-month period was not a violation of subsection (c) of this section, where the State proceeded within the six-month period by making a request for delivery of the defendant for trial. State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

Subsection (c) did not give a superior court judge the power to require a trial at a certain session or order a dismissal. The statute requires that the request for speedy trial be served on the solicitor (prosecutor), who then has six months to proceed. State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

Defendant properly served the prosecutor with the request under G.S. 15A-711 as there had been no formal transfer of authority for the case to the attorney general. State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886, 2004 N.C. App. LEXIS 188 (2004).

Defendant's motion to dismiss due to violations of G.S. 15A-711 was improperly denied because (1) the motion should not have been treated as a speedy trial demand, (2) the statute provided no basis for an order purporting to deny the request, and (3) the only time period that began to run with the filing of defendant's request was for the prosecutor to write to the department of corrections seeking defendant's temporary return to the county. State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886, 2004 N.C. App. LEXIS 188 (2004).

Applied in State v. Davis, 66 N.C. App. 137, 310 S.E.2d 424 (1984).

Cited in State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997).

§§ 15A-712 through 15A-720: Reserved for future codification purposes.

Article 37.

Uniform Criminal Extradition Act.

OFFICIAL COMMENTARY

Transferred by section 16 of the act from its previous location in the General Statutes, Article 8 of Chapter 15.

Cross References. — For the North Carolina Extradition Manual, see the Annotated Rules of North Carolina.

§ 15A-721. Definitions.

Where appearing in this Article the term "Governor" includes any person performing the functions of Governor by authority of the law of this State. The term "executive authority" includes the Governor, and any person performing the functions of governor in a state other than this State. The term "state," referring to a state other than this State, includes any other state or territory, organized or unorganized, of the United States of America. (1937, c. 273, s. 1; 1973, c. 1286, s. 16.)

CASE NOTES

Constitutionality of Section. — Former G.S. 15-48 was procedurally deficient under the due process clause of U.S. Const., Amend. XIV, in these respects: (1) It was not required that an impartial judicial officer determine probable cause, i.e., that a felony had been committed and that the person proposed to be outlawed probably committed it. (2) Alternatively, it was not required that an arrest warrant be issued or an indictment returned by a grand jury. (3) It was not required that an arrest warrant or other process be served, or an attempt made to serve it, and a return made that the accused is not to be found within the county. (4) There was no provision for notice and opportunity to be heard. Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976).

The State failed to demonstrate a compelling governmental interest in the apprehension of all fleeing accused felons, and former G.S. 15-48 as drawn and as administered violates the equal protection clause of U.S. Const., Amend. XIV. Autry v. Mitchell, 420 F. Supp. 967 (E.D.N.C. 1976).

An extradition proceeding is intended to be a summary and mandatory executive

proceeding. State v. Carter, 42 N.C. App. 325, 256 S.E.2d 535, cert. denied, 298 N.C. 301, 259 S.E.2d 302 (1979); State v. Owen, 53 N.C. App. 121, 280 S.E.2d 44, cert. denied, 304 N.C. 200, 285 S.E.2d 107 (1981).

"Fugitive from Justice" Defined. — A fugitive from justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape punishment. State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894).

Former § 15-48 only applied so long as defendant remained at large. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

But Rescission of Order Not Required Once in Custody. — Neither statutory provision nor necessity required the rescission of an order declaring defendant an outlaw once defendant is in custody. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

§ 15A-722. Duty of Governor as to fugitives from justice of other states.

Subject to the provisions of this Article, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this State. (1937, c. 273, s. 2; 1973, c. 1286, s. 16.)

CASE NOTES

The necessity for a Governor's warrant is a procedural requirement for proceedings under the Uniform Criminal Extradition Act and is expressly exempted as a procedural right in proceedings under the Interstate Agreement on Detainers (see G.S. 15A-761 Article IV(d)). In re Morris, 563 F. Supp. 1289 (W.D.N.C. 1983), certificate of probable cause denied and dismissed, 718 F.2d 1092 (4th Cir. 1983).

Governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. State v. Owen, 53 N.C. App. 121, 280 S.E.2d 44, cert. denied, 304 N.C. 200, 285 S.E.2d 107 (1981).

Power of Court Considering Release on Habeas Corpus. — Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. State v. Owen, 53 N.C. App. 121, 280 S.E.2d 44, cert. denied, 304 N.C. 200, 285 S.E.2d 107 (1981).

OPINIONS OF ATTORNEY GENERAL

Requirements of Agents' Commission Form. — See opinion of Attorney General to Mrs. Claire Nickels, Office of the Governor, 40 N.C.A.G. 169 (1970), rendered under former law.

§ 15A-723. Form of demand for extradition.

No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under G.S. 15A-726, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand. (1937, c. 273, s. 3; 1973, c. 1286, s. 16.)

CASE NOTES

What Law Determines Whether Indictment Charges Crime. — The law of the demanding State furnishes the test of whether the indictment has substantially charged a crime. Dodd v. State, 56 N.C. App. 214, 287 S.E.2d 435 (1982).

Affidavit Requirement. — The provision of this section requiring a demand for extradition to be accompanied by information support by affidavit in the state having jurisdiction of the crime does not require that the supporting affidavits be dated prior to or contemporaneous with the information, and the trial information, the bench warrant, and the fugitive warrant, coupled with affidavits dated subsequent to the information, gave adequate assurance that the person sought was substantially charged with a crime in the demanding state as required by this section. In re Armstrong, 49 N.C. App. 175, 270 S.E.2d 619 (1980).

Petitioner had the burden of showing beyond a reasonable doubt that she was not the person named in the extradition papers. Dodd v. State, 56 N.C. App. 214, 287 S.E.2d 435 (1982).

Applied in Hodges v. Hodges, 156 N.C. App. 404, 577 S.E.2d 121, 2003 N.C. App. LEXIS 105 (2003).

Cited in Batten v. Gomez, 324 F.3d 288, 2003 U.S. App. LEXIS 3329 (4th Cir. 2003).

§ 15A-724. Governor may cause investigation to be made.

When a demand shall be made upon the Governor of this State by the executive authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (1937, c. 273, s. 4; 1973, c. 1286, s. 16.)

§ 15A-725. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.

When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution in this State is terminated.

The Governor of this State may also surrender on demand of the executive authority of any other state any person in this State who is charged in the manner provided in G.S. 15A-743 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily. (1937, c. 273, s. 5; 1973, c. 1286, s. 16.)

§ 15A-726. Extradition of persons not present in demanding state at time of commission of crime.

The Governor of this State may also surrender, on demand of the executive authority of any other state, any person in this State charged in such other state in the manner provided in G.S. 15A-723 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this Article, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. (1937, c. 273, s. 6; 1973, c. 1286, s. 16.)

§ 15A-727. Issue of Governor's warrant of arrest; its recitals.

If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the State seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. (1937, c. 273, s. 7; 1973, c. 1286, s. 16.)

CASE NOTES

Cited in Batten v. Gomez, 324 F.3d 288, 2003 U.S. App. LEXIS 3329 (4th Cir. 2003).

§ 15A-728. Manner and place of execution of warrant.

Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the State, and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this Article, to the duly authorized agent of the demanding state. (1937, c. 273, s. 8; 1973, c. 1286, s. 16.)

§ 15A-729. Authority of arresting officer.

Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance. (1937, c. 273, s. 9; 1973, c. 1286, s. 16.)

§ 15A-730. Rights of accused person; application for writ of habeas corpus.

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this State, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. (1937, c. 273, s. 10; 1973, c. 1286, s. 16.)

CASE NOTES

Failure to Comply with Technical Procedures. — This Article contains no provision requiring dismissal of an underlying indictment where technical procedures are not complied with. State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

Assertion of Right Under Law of Another State. — The trial court properly denied the defendant's motion to dismiss on the ground that he was detained in New York beyond the period provided for by New York law, since the courts of North Carolina are not the place for the defendant to assert alleged rights under New York law. State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

Findings in adult and juvenile proceedings need not be the same; however, G.S. 7A-689 [see now G.S. 7B-2805] requires some findings of fact to protect a juvenile in this State from being improperly returned to the demanding state. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

Cited in State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980); Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983); Batten v. Gomez, 324 F.3d 288, 2003 U.S. App. LEXIS 3329 (4th Cir. 2003).

§ 15A-731. Penalty for noncompliance with § 15A-730.

Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant, in willful disobedience to G.S. 15A-730, shall be guilty of a Class 2 misdemeanor. (1937, c. 273, s. 11; 1973, c. 1286, s. 16; 1993, c. 539, s. 302; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 15A-732. Confinement in jail when necessary.

The officer or person executing the Governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this State with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping: Provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this State. (1937, c. 273, s. 12; 1973, c. 1286, s. 16.)

§ 15A-733. Arrest prior to requisition.

Whenever any person within this State shall be charged on the oath of any credible person before any judge or magistrate of this State with the commission of any crime in any other state and, except in cases arising under G.S. 15A-726, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this State, setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state, and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under G.S. 15A-726, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this State, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this State, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (1937, c. 273, s. 13; 1973, c. 1286, s. 16.)

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-734. Arrest without a warrant.

The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in G.S. 15A-733; and thereafter his answer shall be heard as if he had been arrested on a warrant. (1937, c. 273, s. 14; 1973, c. 1286, s. 16.)

CASE NOTES

Cited in State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002); Batten v. Gomez, 324 F.3d 288, 2003 U.S. App. LEXIS 3329 (4th Cir. 2003).

§ 15A-735. Commitment to await requisition; bail.

If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under G.S. 15A-726, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time, not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in G.S. 15A-736, or until he shall be legally discharged. (1937, c. 273, s. 15; 1973, c. 1286, s. 16.)

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-736. Bail in certain cases; conditions of bond.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this State may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the Governor of this State. (1937, c. 273, s. 16; 1973, c. 1286, s. 16.)

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-736.1: Recodified as G.S. 15A-534.6 by Session Laws 2007-484, s. 4, effective August 30, 2007.

Editor's Note. — This section was enacted as G.S. 15A-736.1 and was recodified as G.S. 15A-534.6 by Session Laws 2007-484, s. 4, effective August 30, 2007.

§ 15A-737. Extension of time of commitment; adjournment.

If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days, or a judge or magistrate may again take bail for his appearance and surrender, as provided in G.S. 15A-736, but within a period not to exceed 60 days after the date of such new bond. (1937, c. 273, s. 17; 1973, c. 1286, s. 16.)

§ 15A-738. Forfeiture of bail.

If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this State. Recovery may be had on such bond in the name of the State as in the case of other bonds given by the accused in criminal proceedings within this State. (1937, c. 273, s. 18; 1973, c. 1286, s. 16.)

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-739. Persons under criminal prosecution in this State at time of requisition.

If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this State. (1937, c. 273, s. 19; 1973, c. 1286, s. 16.)

§ 15A-740. Guilt or innocence of accused, when inquired into.

The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime. (1937, c. 273, s. 20; 1973, c. 1286, s. 16.)

CASE NOTES

Applied in Ewing v. Waldrop, 397 F. Supp. 509 (W.D.N.C. 1975); State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-741. Governor may recall warrant or issue alias.

The Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. (1937, c. 273, s. 21; 1973, c. 1286, s. 16.)

§ 15A-742. Fugitives from this State; duty of governors.

Whenever the Governor of this State shall demand a person charged with a crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this State from the executive authority of any other state, or from the chief justice or an associate justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this State, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this State in which the offense was committed. (1937, c. 273, s. 22; 1973, c. 1286, s. 16.)

CASE NOTES

Procedure Not Exclusive. — While this section provides a procedure for the Governor to demand the return of a person charged with a crime in this state, nothing in this statute, or the Uniform Criminal Extradition Act as a whole, suggests that this procedure is exclusive and precludes the voluntary return of the accused for formal arraignment and trial. State v. Speller, 345 N.C. 600, 481 S.E.2d 284 (1997).

Voluntary Return to State. — Where defendant was advised of his rights, including the right to issuance and service of a warrant of extradition, and he voluntarily consented to return to North Carolina, his voluntary return to the state conferred jurisdiction on the Superior court as fully and effectively as a Governor's warrant would have. State v. Speller, 345 N.C. 600, 481 S.E.2d 284 (1997).

§ 15A-743. Application for issuance of requisition; by whom made; contents.

(a) When the return to this State of a person charged with crime in this State is required, the prosecuting attorney shall present to the Governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this State for trial and that the proceeding is not instituted to enforce a private claim.

(b) When the return to this State is required of a person who has been convicted of a crime in this State and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the Director of Prisons or sheriff of the county from which escape was made, shall present to the Governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(c) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. A copy of all papers shall be forwarded with the Governor's requisition. (1937, c. 273, s. 23; 1973, c. 1286, s. 16; 1975, c. 132; 1993, c. 83, s. 1.)

CASE NOTES

Findings in adult and juvenile proceedings need not be the same; however, G.S. 7A-689 [see now G.S. 7B-2805] requires some findings of fact to protect a juvenile in this State from being improperly returned to the demanding state. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

§ 15A-744. Costs and expenses.

Subject to the requirements and restrictions set forth in this section, if the crime is a felony or if a person convicted in this State of a misdemeanor has broken the terms of his probation or parole, reimbursements for expenses shall be paid out of the State treasury on the certificate of the Governor. In all other cases, such expenses or reimbursements shall be paid out of the county treasury of the county wherein the crime is alleged to have been committed according to such regulations as the board of county commissioners may promulgate. In all cases, the expenses, for which repayment or reimbursement may be claimed, shall consist of the reasonable and necessary travel expense and subsistence costs of the extradition agent or fugitive officer, as well as the fugitive, together with such legal fees as were paid to the officials of the state on whose governor the requisition is made. The person or persons designated to return the fugitive shall not be allowed, paid or reimbursed for any expenses in connection with any requisition or extradition proceeding unless the expenses are itemized, the statement of same be sworn to under oath, and shall not then be paid or reimbursed unless a receipt is obtained showing the amount, the purpose for which said item or sum was expended, the place, date and to whom paid, and said receipt or receipts attached to said sworn statement and filed with the Governor. The Governor shall have the authority, upon investigation, to increase or decrease any item or expenses shown in said sworn statement, or to include items of expenses omitted by mistake or inadvertence. The decision or determination of the Governor as to the correct amount to be paid for such expenses or reimbursements shall be final. When it is deemed necessary for more than one agent, extradition agent, fugitive officer or person, to be designated to return a fugitive from another state to this State, the district attorney or prosecuting officer shall file with his written application to the Governor of this State an affidavit setting forth in detail the grounds or reasons why it is necessary to have more than one extradition agent, fugitive officer or person to be so designated. Among other things, and not by way of limitation, the affidavit shall set forth whether or not the alleged fugitive is a dangerous person, his previous criminal record if any, and any record of said fugitive on file with the Federal Bureau of Investigation or with the prison authorities of this State. As a further ground or reason for more than one extradition agent or fugitive officer to be designated, it may be shown in said affidavit the number of fugitives to be returned to this State and any other grounds or reasons for which more than one extradition agent or fugitive officer is desired. If the Governor finds or determines from his own investigation and from the information made available to him that more than one extradition agent or fugitive officer is necessary for the return of a fugitive or fugitives to this State, he may designate more than one extradition agent or fugitive officer for such purpose. All travel for which expenses or reimbursements are paid or allowed under this section shall be by the nearest, direct, convenient route of travel. If the extradition agent or agents or person or persons designated to return a fugitive or fugitives from another state to this State shall elect to travel by automobile, a sum not exceeding seven cents (7¢) per mile may be allowed in lieu of all travel expense, and which shall be paid upon a basis of mileage for the complete trip. The Governor may promulgate executive orders, rules and regulations governing travel, forms of statements, receipts or any other matter or objective provided for in this section. The Governor may delegate any or all of the duties, powers and responsibilities conferred upon him by this section to any executive agent or executive clerk on his staff or in his office, and such executive agent or executive clerk, when properly authorized, may perform any or all of the duties, powers and responsibilities conferred upon the Governor. Provided that if the fugitive from justice is an alleged felon, and he be returned without the service of extradition papers by the sheriff or the agent of the sheriff of the county in which the felony was alleged to have been committed, the expense of said return shall be borne by the State of North Carolina under the rules and regulations made and promulgated by the Governor of North Carolina or the executive agent or the executive clerk to whom the said Governor may have delegated his duties under this section. (1937, c. 273, s. 24; 1953, c. 1203; 1955, c. 289; 1973, c. 1286, s. 16; 1975, c. 166, s. 27; 1981, c. 859, s. 13.9.)

§ 15A-745. Immunity from service of process in certain civil actions.

A person brought into this State by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited. (1937, c. 273, s. 25; 1973, c. 1286, s. 16.)

§ 15A-746. Written waiver of extradition proceedings.

Any person arrested in this State charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in G.S. 15A-727 and 15A-728 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this State or a clerk of the superior court a writing which states that he consents to return to the demanding state: Provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge or clerk of superior court to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in G.S. 15A-730.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this State and filed therein. The judge or clerk of superior court shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent: Provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this State. (1937, c. 273, s. 25a; 1959, c. 271; 1973, c. 1286, s. 16.)

CASE NOTES

This section governs the procedure for securing the delivery of an accused from North Carolina to a demanding state, not for returning someone accused in North Carolina to this state. State v. Speller, 345 N.C. 600, 481 S.E.2d 284 (1997).

Cited in Batten v. Gomez, 324 F.3d 288, 2003 U.S. App. LEXIS 3329 (4th Cir. 2003).

OPINIONS OF ATTORNEY GENERAL

Waiver May Not Be Made Before Magistrate. — See opinion of Attorney General to Mr. E. Maurice Braswell, 42 N.C.A.G. 267 (1973).

§ 15A-747. Nonwaiver by this State.

Nothing in this Article contained shall be deemed to constitute a waiver by this State of its right, power or privilege to try such demanded person for crime committed within this State, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this State, nor shall any proceedings had under this Article which result in, or fail to result in, extradition be deemed a waiver by this State of any of its rights, privileges or jurisdiction in any way whatsoever. (1937, c. 273, s. 25b; 1973, c. 1286, s. 16.)

§ 15A-748. No right of asylum; no immunity from other criminal prosecution while in this State.

After a person has been brought back to this State by, or after waiver of, extradition proceedings, he may be tried in this State for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition. (1937, c. 273, s. 26; 1973, c. 1286, s. 16.)

§ 15A-749. Interpretation.

The provisions of this Article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (1937, c. 273, s. 27; 1973, c. 1286, s. 16.)

§ 15A-750. Short title.

This Article may be cited as the Uniform Criminal Extradition Act. (1937, c. 273, s. 30; 1973, c. 1286, s. 16.)

§§ 15A-751 through 15A-760: Reserved for future codification purposes.

ARTICLE 38.

Interstate Agreement on Detainers.

OFFICIAL COMMENTARY

Transferred by Section 22 of the act from its previous location in the General Statutes, Article 10 of Chapter 148.

§ 15A-761. Agreement on Detainers entered into; form and contents.

This Agreement on Detainers is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows: The contracting states solemnly agree:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: And provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1965, c. 295, s. 1; 1973, c. 1286, s. 22.)

Legal Periodicals. — For article on the former North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Editor's Note. *— Some of the cases cited below were decided under former law.*

When Agreement on Detainers Inapplicable. — The Agreement on Detainers has no application to proceedings which involve a North Carolina prosecution and a defendant incarcerated in North Carolina. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Order for arrest served on defendant while in the county jail was not a detainer and the provisions of the Interstate Agreement on Detainers, G.S. 15A-761, were not applicable to defendant because, although defendant did have an untried indictment in that county when he was served with the order while in federal custody, (1) there was nothing in the record to suggest that the order for arrest was ever filed with the Federal Bureau of Prisons, or any institution; and (2) there was nothing in the record to suggest that the State requested federal officials to hold defendant at the end of his federal sentence or notify it prior to defendant's release from federal custody. State v. Prentice, 170 N.C. App. 593, 613 S.E.2d 498, 2005 N.C. App. LEXIS 1086 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Agreement clearly relates only to those charges which are the basis for the issuance of the detainer. State v. Parr, 65 N.C. App. 415, 308 S.E.2d 881 (1983).

Defendant cannot complain of delay in his trial when caused by his own motion. State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

The delay of 121 days in bringing the defendant to trial after arrival in North Carolina was "for good cause shown," where it was due to defendant's own motion for continuance due to his inability to obtain witnesses. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Fugitive Warrant Held Not to Be "Untried Indictment, Information or Complaint". — Where a fugitive warrant was not based upon a warrant charging the offense of escape, but was to secure the return of the defendant to serve the unexpired portion of sentences already imposed, the defendant had no "untried indictment, information or complaint" pending against him. State v. Pfeifer, 11 N.C. App. 183, 180 S.E.2d 469 (1971).

The guarantee of a disposition of a defendant's case within 180 days is not a constitutional requirement but rather it is mandated by the General Assembly. State v. Treece, 129 N.C. App. 93, 497 S.E.2d 124 (1998), appeal dismissed, 348 N.C. 290, 501 S.E.2d 924 (1998).

Interpretation of 180 Day Language. — The 180 day language in Article III of this section cannot be interpreted as requiring the district attorney to inquire as to whether a defendant has mailed written notice of his request for final disposition of his case. State v. Treece, 129 N.C. App. 93, 497 S.E.2d 124 (1998), appeal dismissed, 348 N.C. 290, 501 S.E.2d 924 (1998).

Petition Must Comply with Article III. — A petition for a speedy trial will not be considered as a request for final disposition under Article III, unless the prisoner complies with the terms of that provision in order to put the appropriate authorities on notice that he is proceeding thereunder. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Inability of Jury to Agree on Verdict. — Article III(a) of this section requires that the defendant be brought to trial within 180 days after he has given the appropriate notice to the solicitor. The State, of course, cannot control the fact that a jury is unable to agree upon a verdict and is not chargeable with responsibility under these conditions. State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Prosecutor's Knowledge of Place of Imprisonment Irrelevant Where Petition for Speedy Trial Insufficient. — Defendant's argument that the prosecutor had knowledge of the place of his imprisonment is irrelevant to the fact that the bare motion for a speedy trial, filed without any of the accompanying information required by Article III(a), was insufficient to put the prosecutor on notice that the defendant was availing himself of the benefits of the provision and that the prosecutor would be required to put him to trial within 180 days. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Speedy Trial Held Not Denied. — Defendant was not denied his right to a speedy trial under Article III(a) of this section because he was not brought to trial within 180 days of his first request for a speedy trial where defendant first requested a speedy trial while he was in custody in New York awaiting trial in that state but before a detainer had been filed against him, and the period from the date a detainer was filed against defendant after his conviction in New York and his trial was less than 180 days. State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979).

Applicability of Article IV(c). — Article IV(c), requiring a prisoner to be tried within 120 days after his arrival in North Carolina, can be invoked only when the prisoner has been returned to the State at the request of the solicitor. It does not apply where the prisoner was brought back to North Carolina upon his own request and not that of the solicitor. State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Time Limit Inapplicable Absent Evidence of Compliance by Foreign State. — Where the record contained no evidence establishing compliance by a foreign state with the requirements of Article IV(b) of this section, there was no showing that the trial court erred in concluding that defendant's return to North Carolina was not procured pursuant to the Interstate Agreement on Detainers and that the provision requiring trial within 120 days of defendant's return to North Carolina was thus inapplicable. State v. Rose, 53 N.C. App. 608, 281 S.E.2d 404 (1981).

As to effect of mistrial on 120-day limit in Article IV(c), see State v. Williams, 33 N.C. App. 344, 235 S.E.2d 269 (1977), cert. denied, 303 N.C. 712, 283 S.E.2d 138 (1981).

The necessity for a Governor's warrant is a procedural requirement for proceedings under the Uniform Criminal Extradition Act and is expressly exempted as a procedural right in proceedings under Article IV(d) of this section. In re Morris, 563 F. Supp. 1289 (W.D.N.C. 1983), certificate of probable cause denied and dismissed, 718 F.2d 1092 (4th Cir. 1983).

Good Cause for Continuance Held to Exist. — Where the State had some, but not all, of its witnesses available, and where it was approximately six years after the crime for which defendant was apprehended, there was "good cause" within the meaning of Article IV(c) of this section to extend the date of defendant's trial beyond the 120-day period. State v. Collins, 29 N.C. App. 478, 224 S.E.2d 647 (1976).

Applied in State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819 (1983); State v. Lyszaj, 314 N.C. 256, 333 S.E.2d 288 (1985); State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991).

Cited in State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Fate, 38 N.C. App. 68, 247 S.E.2d 310 (1978); State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979); State v. Dunlap, 57 N.C. App. 175, 290 S.E.2d 744 (1982); State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983); State v. Dorsett, 81 N.C. App. 515, 344 S.E.2d 342 (1986).

§ 15A-762. Meaning of "appropriate court."

The phrase "appropriate court" as used in the Agreement on Detainers shall, with reference to the courts of this State, mean court of record with criminal jurisdiction. (1965, c. 295, s. 2; 1973, c. 1286, s. 22.)

§ 15A-763. Cooperation in enforcement.

All courts, departments, agencies, officers and employees of this State and its political subdivisions are hereby directed to enforce the Agreement on Detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. (1965, c. 295, s. 3; 1973, c. 1286, s. 22.)

§ 15A-764. Escape from temporary custody.

Any prisoner released to temporary custody under the provisions of the Agreement on Detainers from a place of imprisonment in North Carolina who shall escape or attempt to escape from such temporary custody, whether within or without the borders of this State, shall be dealt with in the same manner as if the escape or attempt to escape were from the original place of imprisonment. (1965, c. 295, s. 4; 1973, c. 1286, s. 22.)

§ 15A-765. Authority and duty of official in charge of institution.

It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers. (1965, c. 295, s. 5; 1973, c. 1286, s. 22.)

§ 15A-766. Designation of central administrator of and information agent for agreement.

The Governor is hereby authorized and empowered to designate the officer who shall serve as central administrator of and information agent for the Agreement on Detainers, pursuant to the provisions of Article VII of the agreement. (1965, c. 295, s. 6; 1973, c. 1286, s. 22.)

§ 15A-767. Distribution of copies of Article.

Copies of this Article shall, upon its approval, be transmitted to the governor of each state, the Attorney General and the Administrator of General Services of the United States, and the Council of State Governments. (1965, c. 295, s. 7; 1973, c. 1286, s. 22.)

§§ 15A-768 through 15A-770: Reserved for future codification purposes.

ARTICLE 39.

Other Special Process for Attendance of Defendants.

OFFICIAL COMMENTARY

Since corporations are amenable to the criminal law, it was thought convenient to set out this system of service of criminal process and appearance. The section is similar to New York Criminal Procedure Law, G.S. 600.10.

§ 15A-771. Securing attendance of defendants confined in federal prisons.

(a) A defendant against whom a criminal action is pending in this State, and who is confined in a federal prison or custody either within or outside the State, may, with the consent of the Attorney General of the United States, be produced in such court for the purpose of criminal prosecution, pursuant to the provisions of:

(1) Section 4085 of Title 18 of the United States Code; or

(2) Subsection (b) of this section.

(b) When such a defendant is in federal custody as specified in subsection (a), a superior court may, upon application of the prosecutor, issue a certificate, addressed to the Attorney General of the United States, certifying the charges and the court in which they are pending, and that attendance of the defendant in such court for the purpose of criminal prosecution thereon is necessary in the interest of justice, and requesting the Attorney General of the United States to cause such defendant to be produced in such court, under custody of a federal public servant, upon a designated date and for a period of time necessary to complete the prosecution. Upon issuing such a certificate, the court may deliver it, or cause or authorize it to be delivered, together with a certified copy of the charges upon which it is based, to the Attorney General of the United States or to his representative authorized to entertain the request. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

CASE NOTES

Cited in State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983).

§ 15A-772. Securing attendance of defendants who are outside the United States.

(a) When a criminal action for an offense committed in this State is pending in a criminal court of this State against a defendant who is in a foreign country with which the United States has an extradition treaty, and when the offense charged is one which is declared in such treaty to be an extraditable one, the prosecutor may make an application to the Governor, requesting him to make an application to the President of the United States to institute extradition proceedings for the return of the defendant to this country and State for the purpose of prosecution of such action. The prosecutor's application must comply with rules, regulations, and guidelines established by the Governor for such applications and must be accompanied by all the charges, affidavits, and other documents required thereby.

(b) Upon receipt of the prosecutor's application, the Governor, if satisfied that the defendant is in the foreign country in question, that the offense charged is an extraditable one pursuant to the treaty in question, and that there are no factors or impediments which in law preclude such an extradition, may in his discretion make an application, addressed to the Secretary of State of the United States, requesting that the President of the United States institute extradition proceedings for the return of the defendant from such foreign country. The Governor's application must comply with applicable treaties and acts of Congress and with rules, regulations, and guidelines established by the Secretary of State for such applications and must be accompanied by all the charges, affidavits, and other documents required thereby.

(c) The provisions of this section apply equally to extradition or attempted extradition of a person who is a fugitive following the entry of a judgment of conviction against him in a criminal court of this State. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-773. Securing attendance of organizations; appearance.

(a) The court attendance of an organization for purposes of commencing or prosecuting a criminal action against it may be accomplished by:

(1) Issuance and service of a criminal summons; or

(2) Issuance of an information and waiver of indictment by an authorized officer or agent of the organization and by counsel for the organization, as provided in G.S. 15A-642(c); or

(3) Service of the notice of the indictment, as provided in G.S. 15A-630.

The criminal summons or notice of indictment must be directed to the organization, and must be served by delivery to an officer, director, managing or general agent, cashier or assistant cashier of the organization, or to any other agent of the organization authorized by appointment or by law to receive service of process.

(b) At all stages of a criminal action, an organization may appear by counsel or agent having authority to transact the business of the organization.

(c) For purposes of this section, "organization" means corporation, unincorporated association, partnership, body politic, consortium, or other group, entity, or organization. (1973, c. 1286, s. 1; 1977, c. 557.)

ARTICLE 40.

§§ 15A-774 through 15A-786: Reserved for future codification purposes.

ARTICLE 41.

§§ 15A-787 through 15A-800: Reserved for future codification purposes.

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

OFFICIAL COMMENTARY

This Article provides generally for the bringing of witnesses or their testimony before the court. In addition to the provisions for subpoenas, material witness orders, and the like set out here, other sections of the Act (Section 9) will transfer the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings to a location in Article 43.

§ 15A-801. Subpoena for witness.

The presence of a person as a witness in a criminal proceeding may be obtained by subpoena, which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 15; 2003-276, s. 2.)

CASE NOTES

Right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

Cited in State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

§ 15A-802. Subpoena for the production of documentary evidence.

The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by subpoena which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 15; 2003-276, s. 3.)

CASE NOTES

Subpoenas are not available by statute until an action has been commenced. In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Person named in the subpoena duces tecum merely authenticates the records produced. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

Documents Relating to Offer of Reward. — This section governs motions to produce documents relating to the offer of a reward. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976).

Corporations have never possessed the kind of protection under U.S. Const., Amend. IV accorded to persons and their homes. Corporations' special status as creatures of the State exposes them to exhaustive State scrutiny in exchange for the privilege of State recognition. In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Cited in State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

§ 15A-803. Attendance of witnesses.

(a) Material Witness Order Authorized. — A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.

(b) When Order Issued. — A material witness order may be issued by a judge of superior court at any time after the initiation of criminal proceedings. A judge of district court may issue a material witness order only at the time that a defendant is bound over to superior court at a probable-cause hearing.

(c) How Long Effective. — A material witness order remains in effect during the period indicated in the order by the issuing judge unless it is sooner modified or vacated by a judge of superior court. In no event may a material witness order which provides for incarceration of the material witness be issued for a period longer than 20 days, but upon review a superior court judge in his discretion may renew an order one or more times for periods not to exceed five days each.

(d) Procedure. — A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance. The witness must be given reasonable notice, opportunity to be heard and present evidence, and the right of representation by counsel at a hearing on the motion. Counsel for a material witness may be appointed and compensated in the same manner as counsel for an indigent defendant. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. The order must be based on findings of fact supporting its issuance.

(e) Order. — If the court makes a material witness order:

(1) It may direct release of the witness in the same manner that a defendant may be released under G.S. 15A-534.

(2) It may direct the detention of the witness.

(f) Modification or Vacation. — A material witness order may be modified or vacated by a judge of superior court upon a showing of new or changed facts or circumstances by the witness, the State, or any defendant.

(g) Securing Attendance or Custody of Material Witness. — The witness may be required to attend the hearing by subpoena, or if the court considers it necessary, by order for arrest. An order for arrest also may be issued if it becomes necessary to take the witness into custody after issuance of a material witness order. (1973, c. 1286, s. 1; 2000-144, s. 29.)

OFFICIAL COMMENTARY

Former statutes provided for a witness to be placed under bond at a preliminary hearing (G.S. 15-97), and for him to be placed in jail if he failed to post bond (G.S. 15-127). This section specifies the grounds for the entry of a new "material witness order" under which a witness can be held in custody, and provides for bail.

Editor's Note. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

CASE NOTES

Discretion of Court. — The use of the term "may" suggests that the granting or denial of a motion for a material witness order is a matter committed largely to the discretion of the judge. Such discretion must, however, be exercised in a manner not inconsistent with guaranty under U.S. Const., Amend. VI that a criminal defendant be afforded "compulsory process for obtaining witnesses in his favor." State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

A trial judge may not exercise his discretion to issue an order to secure the attendance of a material witness in a manner inconsistent with the guarantee under U.S. Const., Amend. VI that an accused be afforded compulsory process for obtaining witnesses in his favor. State v. Coen, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

The trial court did not abuse its discretion and did not violate defendant's right to compulsory process in denying motion to issue an order under subsection (d) of this section, where defense counsel was dilatory in advising the court of any problem he was having with witness. State v. Coen, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

The court properly declined to subpoena certain witnesses where the pro se defendant was unable to provide any information to the court as to the anticipated testimony of 11 individuals on the witness list, including a district attorney, a judge, two other attorneys, and various law-enforcement officers. State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999).

Limitations on Authority to Compel Attendance. — There are well recognized limitations on the authority of a state court to compel the attendance of witnesses who are not residents of the state, not present therein and who lack any contact therewith. That such limitations are of constitutional stature may be inferred from the United States Supreme Court's opinions. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Court May Refrain from Issuing Ineffectual Process. — The trial judge's denial of the defendant's motion for material witness orders to compel the attendance of New York residents who had no contact with North Carolina did not infringe upon the defendant's right under U.S. Const., Amend. VI to compulsory process for obtaining witnesses in his favor. A state court need not engage in the futile issuance of ineffectual process in order to satisfy the requirements of U.S. Const., Amend. XIV. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Residents of Other States. — The General Assembly, in enacting this section, did not seek to confer upon judges of this State the novel and seemingly unconstitutional authority to issue material witness orders to compel the attendance of New York residents who have no contact with this jurisdiction. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Burden on Accused. — An accused may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

No Duty to Suggest Alternative Procedure to Defendant. — Where the trial court properly denied defendant's request under this section for a material witness order to compel attendance of witnesses from New York, the court was under no duty to search the statutes and suggest to defense counsel that G.S. 15A-813 might provide a procedure for obtaining the result which he sought, but could not obtain, under this section. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Effect of Failure to Request Material Witness Order on Appeal. — The defendant waived his right to raise on appeal the trial court's failure to ensure the presence of a defense witness, where after hearing the trial court's statements concerning the absence of the witness, the defense did not request a recess, move for a continuance, or request the issuance of a material witness order. State v. Smith, 130 N.C. App. 71, 502 S.E.2d 390 (1998).

Applied in State v. Poindexter, 69 N.C. App. 691, 318 S.E.2d 329 (1984).

Cited in State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978); State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979); State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995); State v. Jacobs, 128 N.C. App. 559, 495 S.E.2d 757 (1998).

§ 15A-804. Voluntary protective custody.

(a) Upon request of a witness, a judge of superior court may determine whether he is a material witness, and may order his protective custody. The order may provide for confinement, custody in other than a penal institution, release to the custody of a law-enforcement officer or other person, or other provisions appropriate to the circumstances.

(b) A person having custody of the witness may not release him without his consent unless directed to do so by a superior court judge, or unless the order so provides.

(c) The issuance of either a material witness order or an order for voluntary protective custody does not preclude the issuance of the other order.

(d) An order for voluntary protective custody may be modified or vacated as appropriate by a superior court judge upon the request of the witness or upon the court's own motion. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Although it may seem farfetched in North Carolina, the basis for this section sprang from the fear that members of organized crime might attempt to obtain the release of a witness who would prefer to remain in custody.

§ 15A-805. Securing attendance of witnesses confined in institutions within the State.

(a) Upon motion of the State or any defendant, the judge of a court in which a criminal proceeding is pending must, for good cause shown, enter an order requiring that any person confined in an institution in this State be produced and compelled to attend as a witness in the action or proceeding.

(b) If the witness is confined pursuant to another pending criminal proceeding, and the judge determines that the production of the witness would result in an unreasonable interference with the conduct of the prior proceeding, he may deny the order. If an order for production is issued, a judge or justice of the appellate division of the General Court of Justice may, upon application of a defendant or prosecutor in the other district for good cause shown, vacate the order for production.

(c) The costs of production of the witness are assessed as are other witness fees. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section replaces the old "habeas corpus ad testificandum" with a simple motion and order for the production of a prisoner (or other person confined in an institution). If a conflict arises between two cases, and it cannot be resolved at the trial level, provision is made for resort to the appellate division. The statutes in Article 8, Chapter 17 of the General Statutes are left untouched because of their preexisting applicability to other proceedings.

CASE NOTES

This section does not require that affidavits be submitted to show good cause; neither must a witness have testified in a previous trial in order to be subject to production as a witness for any other given trial. However, a trial judge has the duty to supervise and control the course and conduct of a trial, and in order to discharge that duty he is invested with broad discretionary powers. State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

Applied in State v. Jackson, 64 N.C. App. 715, 308 S.E.2d 360 (1983).

§§ 15A-806 through 15A-810: Reserved for future codification purposes.

Article 43.

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings.

OFFICIAL COMMENTARY

Transferred by section 9 of the act from its previous location in Article 9 of Chapter 8 of the General Statutes.

§ 15A-811. Definitions.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

"Witness" as used in this Article shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. (1937, c. 217, s. 1; 1973, c. 1286, s. 9.)

CASE NOTES

Constitutionality. — The Uniform Act to secure attendance of witnesses from without a state in criminal proceedings is constitutional. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Article is available to the defense as well as the prosecution. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

This Article gives the trial court the means to compel a nonresident witness to attend and testify at criminal proceedings in this State. State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983).

Under this Article, the officers and the court have a duty to see that defendant has an opportunity for securing material witnesses. They are placed under no burden to demand that he do so. State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983).

The North Carolina Supreme Court has identified three questions which are presented for review when a party attempts to invoke this Article's procedures: (1) whether the defendant has made an adequate showing that the prospective witness' testimony is material; (2) whether the defendant has adequately designated the witness' location; and (3) whether the trial judge's discretion to grant the motion was exercised in accord with the guarantee under U.S. Const., Amend. VI that the accused be afforded compulsory process for obtaining witnesses in his favor. State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983).

A trial judge must not issue a material witness order in a manner inconsistent with U.S. Const., Amend. VI. State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983).

Waiver. — While the right to compulsory process is a fundamental right and neither the statute nor the Constitution prescribes time limits within which to exercise that right, rights can be waived. State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983).

An accused may not be less than diligent in his own behalf in preparing for trial. He may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. But the officers and the court have a duty to see that he has opportunity for so doing. State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983).

Applied in State v. Locklear, 41 N.C. App. 292, 254 S.E.2d 653 (1979).

Cited in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 15A-812. Summoning witness in this State to testify in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies, under the seal of such court, that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents (10¢) a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars ($5.00) for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 2; 1973, c. 1286, s. 9.)

CASE NOTES

Evidence Insufficient to Show Witness Not a Material Witness. — Where the trial court failed to make findings of fact or conclusions of law, there was insufficient competent evidence to support the trial court's order finding that individual sought to be subpoenaed from out-of-state was not a material witness and that enforcement of the subpoena duces tecum would cause an undue hardship to her. In re McKinny, 462 S.E.2d 530 (1995).

Applied in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 15A-813. Witness from another state summoned to testify in this State.

If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court, stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this State he shall be compensated at the rate allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a) for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars ($5.00) for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees when traveling in the State. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 3; 1973, c. 1286, s. 9; 1998-212, s. 16.25(b).)

CASE NOTES

Defendant Has Burden of Procuring Attendance. — An accused may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Absence of Witness as Grounds for Continuance. — Ordinarily, the absence of a witness who could have been served with a subpoena does not constitute grounds for continuance. State v. Lee, 293 N.C. 570, 238 S.E.2d 299 (1977).

No Duty to Suggest Procedures to Defendant. — Where the trial court properly denied defendant's request under G.S. 15A-803 for a material witness order to compel attendance of witnesses from New York, the court was under no duty to search the statutes and suggest to defense counsel that this section might provide a procedure for obtaining the result which he sought, but could not obtain, under G.S. 15A-803. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Applied in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Cited in Jackson v. Garrison, 677 F.2d 371 (4th Cir. 1981); State v. Cyrus, 60 N.C. App. 774, 300 S.E.2d 58 (1983); State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995); State v. Nobles, 357 N.C. 433, 584 S.E.2d 765, 2003 N.C. LEXIS 830 (2003).

§ 15A-814. Exemption from arrest and service of process.

If a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

If a person passes through this State while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not while so passing through this State be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons. (1937, c. 217, s. 4; 1973, c. 1286, s. 9.)

CASE NOTES

Exemption from Service Is Personal Privilege. — The privilege of claiming an exemption from service of civil process granted by this section is personal. The service is not void. It is merely voidable, and, until the defendant elects to exercise his privilege by claiming his exemption and establishing his nonresidence, the service is binding. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957), decided under former law.

Nonresident defendant while in the State in compliance with conditions of a bail bond is not exempt from the service of process. Hare v. Hare, 228 N.C. 740, 46 S.E.2d 840 (1948), decided under former law.

Decisions That Nonresident Exempt from Process Held Res Judicata in Subsequent Proceeding. — In an action against the driver of a car upon whom service of summons was had while he was in the State in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the court's finding from the evidence that defendant was a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the State in obedience to the coroner's summons. In a subsequent action arising out of the same collision, brought in another county by the administrator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. It was held that the prior adjudication that defendant was a nonresident and was exempt from service under this section was in the nature of a judgment in rem and is res judicata as to the status and residence of the defendant, and is binding upon the administrator under the maxim res judicata pro veritate accipitur, and the holding of the court in the second action upon substantially the same evidence that defendant was a resident of this State and that the service of summons on him was valid must be reversed on appeal even though supported by evidence. Current v. Webb, 220 N.C. 425, 17 S.E.2d 614 (1941), decided under former law.

§ 15A-815. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1937, c. 217, s. 5; 1973, c. 1286, s. 9.)

§ 15A-816. Title of Article.

This Article may be cited as "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings." (1937, c. 217, s. 6; 1973, c. 1286, s. 9.)

§§ 15A-817 through 15A-820: Reserved for future codification purposes.

ARTICLE 44.

Securing Attendance of Prisoners as Witnesses.

OFFICIAL COMMENTARY

The three sections in this Article provide for exchange of prisoners as witnesses between North Carolina and other states and the federal authorities. The three sections are based on New York Criminal Procedure Law, §§ 650.10 and 650.30.

§ 15A-821. Securing attendance of prisoner in this State as witness in proceeding outside the State.

(a) If a judge of a court of general jurisdiction in any other state, which by its laws has made provision for commanding a prisoner within that state to attend and testify in this State, certifies under the seal of that court that there is a criminal prosecution pending in the court or that a grand jury investigation has commenced, and that a person confined in an institution under the control of the State Department of Correction of North Carolina, other than a person confined as criminally insane, is a material witness in the prosecution or investigation and that his presence is required for a specified number of days, upon presentment of the certificate to a superior court judge in the superior court district or set of districts as defined in G.S. 7A-41.1 where the person is confined, upon notice to the Attorney General, the judge must fix a time and place for a hearing and order the person having custody of the prisoner to produce him at the hearing.

(b) If at the hearing the judge determines that the prisoner is a material and necessary witness in the requesting state, the judge must order that the prisoner attend in the court where the prosecution or investigation is pending, upon such terms and conditions as the judge prescribes, including among other things, provision for the return of the prisoner at the conclusion of his testimony, proper safeguard for his custody, and proper financial reimbursement or other payment, including payment in advance, by the demanding jurisdiction for all expenses incurred in the production and return of the prisoner.

(c) The Attorney General may, as agent for the State of North Carolina, enter into such agreements with the demanding jurisdiction as necessary to ensure proper compliance with the order of the court. (1973, c. 1286, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 62.)

§ 15A-822. Securing attendance of prisoner outside the State as witness in proceeding in the State.

(a) When

(1) A criminal action or proceeding is pending in a court of this State, and

(2) There is reasonable cause to believe that a person confined in a correctional institution or prison of another state, other than a person confined as mentally ill, possesses information material to such criminal action or proceeding, and

(3) The attendance of the person as a witness in such proceeding is desired by a party thereto, and

(4) The state in which such person is confined possesses a statute equivalent to G.S. 15A-821, the court in which such proceeding is pending may issue a certificate under the seal of the court, certifying all such facts and certifying that the attendance of the person as a witness in such court is required for a specified number of days.

(b) The certificate may be issued upon application of either the State or a defendant setting forth the facts specified in subsection (a).

(c) Upon issuing such a certificate, the court may cause it to be delivered to a court of such other state which is authorized to initiate or undertake action for the delivery of such prisoners to this State as witnesses. (1973, c. 1286, s. 1.)

CASE NOTES

Cited in State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

§ 15A-823. Securing attendance of prisoner in federal institution as witness in proceeding in the State.

(a) When

(1) A criminal proceeding is pending in a court of this State; and

(2) There is reasonable cause to believe that a person confined in a federal prison or other federal custody, either within or outside this State, possesses information material to such criminal proceeding; and

(3) His attendance as a witness in such action or proceeding is desired by a party thereto, the court may issue a certificate, known as a writ of habeas corpus ad testificandum, addressed to the Attorney General of the United States certifying all such facts and requesting the Attorney General of the United States to cause the attendance of such person as a witness in such court for a specified number of days under custody of a federal public servant.

(b) The certificate may be issued upon application of either the State or a defendant, setting forth the facts specified in subsection (a).

(c) Upon issuing the certificate, the court may cause it to be delivered to the Attorney General of the United States or to his representative authorized to entertain the request. (1973, c. 1286, s. 1.)

CASE NOTES

Applied in State v. Poindexter, 69 N.C. App. 691, 318 S.E.2d 329 (1984).

SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.

Article 45.

Fair Treatment for Certain Victims and Witnesses.

§ 15A-824. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Crime" means a felony or serious misdemeanor as determined in the sole discretion of the district attorney, except those included in Article 46 of this Chapter, or any act committed by a juvenile that, if committed by a competent adult, would constitute a felony or serious misdemeanor.

(2) "Family member" means a spouse, child, parent or legal guardian, or the closest living relative.

(3) "Victim" means a person against whom there is probable cause to believe a crime has been committed.

(4) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action concerning a felony, or who by reason of having relevant information is subject to being called or is likely to be called as a witness for the prosecution in such an action, whether or not an action or proceeding has been commenced. (1985 (Reg. Sess., 1986), c. 998, s. 1; 1989, c. 596, s. 1; 1998-212, s. 19.4(a), (b).)

§ 15A-825. Treatment due victims and witnesses.

To the extent reasonably possible and subject to available resources, the employees of law-enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a reasonable effort to assure that each victim and witness within their jurisdiction:

(1) Is provided information regarding immediate medical assistance when needed and is not detained for an unreasonable length of time before having such assistance administered.

(2) Is provided information about available protection from harm and threats of harm arising out of cooperation with law-enforcement prosecution efforts, and receives such protection.

(2a) Is provided information that testimony as to one's home address is not relevant in every case, and that the victim or witness may request the district attorney to raise an objection should he/she deem it appropriate to this line of questioning in the case at hand.

(3) Has any stolen or other personal property expeditiously returned by law-enforcement agencies when it is no longer needed as evidence, and its return would not impede an investigation or prosecution of the case. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property whose ownership is disputed, should be photographed and returned to the owner within a reasonable period of time of being recovered by law-enforcement officials.

(4) Is provided appropriate employer intercession services to seek the employer's cooperation with the criminal justice system and minimize the employee's loss of pay and other benefits resulting from such cooperation whenever possible.

(5) Is provided, whenever practical, a secure waiting area during court proceedings that does not place the victim or witness in close proximity to defendants and families or friends of defendants.

(6) Is informed of the procedures to be followed to apply for and receive any appropriate witness fees or victim compensation.

(6a) Is informed of the right to be present throughout the entire trial of the defendant, subject to the right of the court to sequester witnesses.

(7) Is given the opportunity to be present during the final disposition of the case or is informed of the final disposition of the case, if he has requested to be present or be informed.

(8) Is notified, whenever possible, that a court proceeding to which he has been subpoenaed will not occur as scheduled.

(9) Has a victim impact statement prepared for consideration by the court.

(9a) Prior to trial, is provided information about plea bargaining procedures and is told that the district attorney may recommend a plea bargain to the court.

(10) Is informed that civil remedies may be available and that statutes of limitation apply in civil cases.

(11) Upon the victim's written request, is notified before a proceeding is held at which the release of the offender from custody is considered, if the crime for which the offender was placed in custody is a Class G or more serious felony.

(12) Upon the victim's written request, is notified if the offender escapes from custody or is released from custody, if the crime for which the offender was placed in custody is a Class G or more serious felony.

(13) Has family members of a homicide victim offered all the guarantees in this section, except those in subdivision (1).

Nothing in this section shall be construed to create a cause of action for failure to comply with its requirements. (1985 (Reg. Sess., 1986), c. 998, s. 1; 1989, c. 596, s. 2.)

Legal Periodicals. — For comment, "Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System," see 72 N.C.L. Rev. 1479 (1994).

CASE NOTES

In Camera Hearing with Victim. — The trial courts should exercise extreme caution in conducting in camera hearings and insure that all information received by the court relating to punishment is made known to the defendant and his counsel and that he be given the opportunity to explain or refute it. State v. Midyette, 87 N.C. App. 199, 360 S.E.2d 507 (1987), aff'd, 322 N.C. 108, 366 S.E.2d 440 (1988).

Sympathy for Victims, Not Bias. — The trial judge's comment that "the court system needs to become [victims'] friends, not their enemy" did not manifests a bias against defendant but rather illustrated an affinity for the use of victim impact statements, a procedure specifically endorsed by North Carolina's statutes. State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896, 2000 N.C. App. LEXIS 794 (2000).

Use of Victim Impact Statements at Sentencing Hearings. — Victim impact statements may be used at sentencing hearings, except in capital cases. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

Victim's or Witness' View of Evidence Has No Proper Place in Impact Statement. — What a victim or a witness thinks the evidence in a case shows or what the defendant's punishment should be is not an effect of crime, but advocacy, and such thoughts have no place in a proper impact statement, but holding that statements by victim's sisters on Victim Impact Statement forms as to the sentence which they believed defendant should receive were harmless under the circumstances. State v. Jackson, 91 N.C. App. 124, 370 S.E.2d 687 (1988).

Introduction of Victim Impact Statements Not Prejudicial. — Where court found no aggravating factor based on evidence adduced by victim impact statements introduced at defendant's sentencing hearing, defendant was shown the statements at the hearings and objected to their admission but did not move for a continuance to seek evidence in rebuttal or to issue subpoenas for the persons who made the statements, and the matters contained in the statements had been brought to the court's attention during the actual trial, defendant failed to show how he was prejudiced by introduction of the statements. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

The trial court properly admitted a victim impact statement into evidence at a sentencing hearing for second-degree murder, where the trial court found no aggravating factors based on the statement, and where defendant failed to show that the result of the hearing would have been materially more favorable to him had the statements not been admitted. State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998), cert. denied, 349 N.C. 374, 525 S.E.2d 189 (1998).

§ 15A-826. Assistants for administrative and victim and witness services.

In addition to providing administrative and legal support to the district attorney's office, assistants for administrative and victim and witness services are responsible for coordinating efforts within the law-enforcement and judicial systems to assure that each victim and witness is treated in accordance with this Article. (1985 (Reg. Sess., 1986), c. 998, s. 1; 1997-443, s. 18.7(e).)

§ 15A-827. Scope.

This Article does not create any civil or criminal liability on the part of the State of North Carolina or any criminal justice agency, employee, or volunteer. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§§ 15A-828, 15A-829: Reserved for future codification purposes.

OFFICIAL COMMENTARY

The General Assembly deleted proposed provisions relating to depositions and reserved this Article for future codification. The deletion leaves present deposition law unchanged.

ARTICLE 46.

Crime Victims' Rights Act.

§ 15A-830. Definitions.

(a) The following definitions apply in this Article:

(1) Accused. — A person who has been arrested and charged with committing a crime covered by this Article.

(2) Arresting law enforcement agency. — The law enforcement agency that makes the arrest of an accused.

(3) Custodial agency. — The agency that has legal custody of an accused or defendant arising from a charge or conviction of a crime covered by this Article including, but not limited to, local jails or detention facilities, regional jails or detention facilities, facilities designated under G.S. 122C-252 for the custody and treatment of involuntary clients, or the Department of Correction.

(4) Investigating law enforcement agency. — The law enforcement agency with primary responsibility for investigating the crime committed against the victim.

(5) Law enforcement agency. — An arresting law enforcement agency, a custodial agency, or an investigating law enforcement agency.

(6) Next of kin. — The victim's spouse, children, parents, siblings, or grandparents. The term does not include the accused unless the charges are dismissed or the person is found not guilty.

(7) Victim. — A person against whom there is probable cause to believe one of the following crimes was committed:

a. A Class A, B1, B2, C, D, or E felony.

b. A Class F felony if it is a violation of one of the following: G.S. 14-16.6(b); 14-16.6(c); 14-18; 14-32.1(e); 14-32.2(b)(3); 14-32.3(a); 14-32.4; 14-34.2; 14-34.6(c); 14-41; 14-43.3; 14-43.11; 14-190.17; 14-190.19; 14-202.1; 14-277.3A; 14-288.9; 20-138.5; or former G.S. 14-277.3.

c. A Class G felony if it is a violation of one of the following: G.S. 14-32.3(b); 14-51; 14-58; 14-87.1; or 20-141.4.

d. A Class H felony if it is a violation of one of the following: G.S. 14-32.3(a); 14-32.3(c); 14-33.2; 14-277.3A; or former G.S. 14-277.3.

e. A Class I felony if it is a violation of one of the following: G.S. 14-32.3(b); 14-34.6(b); or 14-190.17A.

f. An attempt of any of the felonies listed in this subdivision if the attempted felony is punishable as a felony.

g. Any of the following misdemeanor offenses when the offense is committed between persons who have a personal relationship as defined in G.S. 50B-1(b): G.S. 14-33(c)(1); 14-33(c)(2); 14-33(a); 14-34; 14-134.3; 14-277.3A; or former G.S. 14-277.3.

h. Any violation of a valid protective order under G.S. 50B-4.1.

(b) If the victim is deceased, then the next of kin, in the order set forth in the definition contained in this section, is entitled to the victim's rights under this Article. However, the right contained in G.S. 15A-834 may only be exercised by the personal representative of the victim's estate. An individual entitled to exercise the victim's rights as a member of the class of next of kin may designate anyone in the class to act on behalf of the class. (1998-212, s. 19.4(c); 2001-433, s. 1; 2001-487, s. 120; 2001-518, s. 2A; 2006-247, s. 20(e); 2007-116, s. 2; 2007-547, s. 2; 2009-58, s. 3.)

Editor's Note. — Session Laws 1998-212, s. 19.4(c), enacted this Article as Article 45A. It was recodified as Article 46 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-58, s. 3, effective June 5, 2009, in subdivision (a)(7)b., substituted "14-277.3A; 14-288.9; 20-138.5; or former G.S. 14-277.3" for "14-277.3; 14-288.9; or 20-138.5" at the end; in subdivision (a)(7)d., substituted "14-33.2; 14-277.3A; or former G.S. 14-277.3" for "14-33.2, or 14-277.3" at the end; and in subdivision (a)(7)g., substituted "14-277.3A; or former G.S. 14-277.3" for "or 14-277.3."

§ 15A-831. Responsibilities of law enforcement agency.

(a) As soon as practicable but within 72 hours after identifying a victim covered by this Article, the investigating law enforcement agency shall provide the victim with the following information:

(1) The availability of medical services, if needed.

(2) The availability of crime victims' compensation funds under Chapter 15B of the General Statutes and the address and telephone number of the agency responsible for dispensing the funds.

(3) The address and telephone number of the district attorney's office that will be responsible for prosecuting the victim's case.

(4) The name and telephone number of an investigating law enforcement agency employee whom the victim may contact if the victim has not been notified of an arrest in the victim's case within six months after the crime was reported to the law enforcement agency.

(5) Information about an accused's opportunity for pretrial release.

(6) The name and telephone number of an investigating law enforcement agency employee whom the victim may contact to find out whether the accused has been released from custody.

(7) The informational sheet described in G.S. 50B-3(c1), if there was a personal relationship, as defined in G.S. 50B-1(b), with the accused.

(b) As soon as practicable but within 72 hours after the arrest of a person believed to have committed a crime covered by this Article, the arresting law enforcement agency shall inform the investigating law enforcement agency of the arrest. As soon as practicable but within 72 hours of being notified of the arrest, the investigating law enforcement agency shall notify the victim of the arrest.

(c) As soon as practicable but within 72 hours after receiving notification from the arresting law enforcement agency that the accused has been arrested, the investigating law enforcement agency shall forward to the district attorney's office that will be responsible for prosecuting the case the defendant's name and the victim's name, address, date of birth, social security number, race, sex, and telephone number, unless the victim refuses to disclose any or all of the information, in which case, the investigating law enforcement agency shall so inform the district attorney's office.

(d) Upon receiving the information in subsection (a) of this section, the victim shall, on a form provided by the investigating law enforcement agency, indicate whether the victim wishes to receive any further notices from the investigating law enforcement agency on the status of the accused during the pretrial process. If the victim elects to receive further notices during the pretrial process, the victim shall be responsible for notifying the investigating law enforcement agency of any changes in the victim's name, address, and telephone number. (1998-212, s. 19.4(c); 2001-433, s. 2; 2001-487, s. 120; 2008-4, s. 1.)

Editor's Note. — Session Laws 2008-4, s. 2 provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence, the North Carolina Attorney General's Office, and the Governor's Crime Commission, shall study the adoption of a statewide automated victim notification system for persons who have received a protective order under Chapter 50B of the General Statutes. As part of its study of this issue, the Domestic Violence Commission shall review:

"(1) Automated notification systems used in other state jurisdictions to notify protective order holders of critical dates, e.g., the date the respondent, if incarcerated, will be released from custody.

"(2) Data, if any, on the effectiveness of other state systems.

"(3) The current statewide system which provides automated notice to crime victims (SAVAN), to determine if it could be enhanced to include the proposed system.

"(4) Sources of grant funding that are available to implement the system.

"(5) Methods utilized for registering into the system, and whether the information should be accessible to the general public, in addition to the person or persons protected by the order.

"(6) Methods to ensure that information relating to the respondent of an order is uploaded in a timely manner and to confirm that notification has been sent to registrants.

"The North Carolina Domestic Violence Commission shall report with the results of its study, and any recommendations, to the Joint Legislative Committee on Domestic Violence and the General Assembly on or before January 1, 2009."

Session Laws 2009-342, s. 6, provides: "The Joint Legislative Committee on Domestic Violence supports the adoption of an automated statewide domestic violence protective order notification system. In order to determine the financial and operational impact of developing the system, the Administrative Office of the Courts, in consultation with the Governor's Crime Commission and the North Carolina Attorney General's Office, shall (i) identify information in available databases relating to civil domestic violence protective orders, criminal no-contact order conditions, and postarrest conditions of release and (ii) determine the financial impact, including personnel costs, for implementing a domestic violence protective order notification system which interfaces with the North Carolina Statewide Automated Victim Assistance Notification System. The Administrative Office of the Courts and the Governor's Crime Commission shall jointly report the findings to the Joint Legislative Committee on Domestic Violence and the Fiscal Research Division by February 1, 2010."

Session Laws 2009-342, s. 7, provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence and the North Carolina Coalition Against Sexual Assault, shall study the issue of State oversight and coordination of services to victims of sexual violence and whether sexual violence should be included as a focus area of the Commission. The study shall include, but is not limited to, a review of the organization and membership of entities in other states that provide (i) information and recommendations to state legislatures on domestic and sexual violence and (ii) information and services to the public regarding these issues. The Commission shall report its findings and recommendations to the Joint Legislative Committee on Domestic Violence by February 1, 2010."

Effect of Amendments. — Session Laws 2008-4, s. 1, effective July 1, 2008, added subdivision (a)(7).

§ 15A-831.1. Polygraph examinations of victims of sexual assaults.

(a) A criminal or juvenile justice agency shall not require a person claiming to be a victim of sexual assault or claiming to be a witness regarding the sexual assault of another person to submit to a polygraph or similar examination as a precondition to the agency conducting an investigation into the matter.

(b) An agency wishing to perform a polygraph examination of a person claiming to be a victim or witness of sexual assault shall inform the person of the following:

(1) That taking the polygraph examination is voluntary.
(2) That the results of the examination are not admissible in court.
(3) That the person's decision to submit to or refuse a polygraph examination will not be the sole basis for a decision by the agency not to investigate the matter.

(c) An agency which declines to investigate an alleged case of sexual assault following a decision by a person claiming to be a victim not to submit to a polygraph examination shall provide to that person, in writing, the reasons why the agency did not pursue the investigation at the request of the person. (2007-294, s. 1.)

Editor's Note. — Session Laws 2007-294, s. 3, made this section effective December 1, 2007, and applicable to sexual assault offenses alleged to have been committed on or after December 1, 2007.

§ 15A-832. Responsibilities of the district attorney's office.

(a) Within 21 days after the arrest of the accused, but not less than 24 hours before the accused's first scheduled probable-cause hearing, the district attorney's office shall provide to the victim a pamphlet or other written material that explains in a clear and concise manner the following:

(1) The victim's rights under this Article, including the right to confer with the attorney prosecuting the case about the disposition of the case and the right to provide a victim impact statement.
(2) The responsibilities of the district attorney's office under this Article.
(3) The victim's eligibility for compensation under the Crime Victims Compensation Act and the deadlines by which the victim must file a claim for compensation.
(4) The steps generally taken by the district attorney's office when prosecuting a felony case.
(5) Suggestions on what the victim should do if threatened or intimidated by the accused or someone acting on the accused's behalf.
(6) The name and telephone number of a victim and witness assistant in the district attorney's office whom the victim may contact for further information.

(b) Upon receiving the information in subsection (a) of this section, the victim shall, on a form provided by the district attorney's office, indicate whether the victim wishes to receive notices of some, all, or none of the trial and posttrial proceedings involving the accused. If the victim elects to receive notices, the victim shall be responsible for notifying the district attorney's office or any other department or agency that has a responsibility under this Article of any changes in the victim's address and telephone number. The victim may alter the request for notification at any time by notifying the district attorney's office and completing the form provided by the district attorney's office.

(c) The district attorney's office shall notify a victim of the date, time, and place of all trial court proceedings of the type that the victim has elected to receive notice. All notices required to be given by the district attorney's office shall be given in a manner that is reasonably calculated to be received by the victim prior to the date of the court proceeding.

(d) Whenever practical, the district attorney's office shall provide a secure waiting area during court proceedings that does not place the victim in close proximity to the defendant or the defendant's family.

(e) When the victim is to be called as a witness in a court proceeding, the court shall make every effort to permit the fullest attendance possible by the victim in the proceedings. This subsection shall not be construed to interfere with the defendant's right to a fair trial.

(f) Prior to the disposition of the case, the district attorney's office shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of the case, including the victim's views about dismissal, plea or negotiations, sentencing, and any pretrial diversion programs.

(g) At the sentencing hearing, the prosecuting attorney shall submit to the court a copy of a form containing the identifying information set forth in G.S.

15A-831(c) about any victim's electing to receive further notices under this Article. The clerk of superior court shall include the form with the final judgment and commitment, or judgment suspending sentence, transmitted to the Department of Correction or other agency receiving custody of the defendant and shall be maintained by the custodial agency as a confidential file.

(h) When a person is a victim of a human trafficking offense and is entitled to benefits and services pursuant to G.S. 14-43.11(d), the district attorney's office shall so notify the Office of the Attorney General and Legal Aid of North Carolina, Inc., in addition to providing services under this Article. (1998-212, s. 19.4(c); 2001-433, s. 3; 2001-487, s. 120; 2007-547, s. 3.)

§ 15A-832.1. Responsibilities of judicial officials issuing arrest warrants.

(a) In issuing a warrant for the arrest of an offender for any of the misdemeanor offenses set forth in G.S. 15A-830(a)(7)g., based on testimony or evidence from a complaining witness rather than from a law enforcement officer, a judicial official shall record the defendant's name and the victim's name, address, and telephone number electronically or on a form separate from the warrant and developed by the Administrative Office of the Courts for the purpose of recording that information, unless the victim refuses to disclose any or all of the information, in which case the judicial official shall so indicate.

(b) A judicial official issuing a warrant for the arrest of an offender for any of the misdemeanor offenses set forth in G.S. 15A-830(a)(7)g. shall deliver the court's copy of the warrant and the victim-identifying information to the office of the clerk of superior court by the close of the next business day. As soon as practicable, but within 72 hours, the office of the clerk of superior court shall forward to the district attorney's office the victim-identifying information set forth in subsection (a) of this section. (2001-433, s. 4; 2001-487, s. 120.)

§ 15A-833. Evidence of victim impact.

(a) A victim has the right to offer admissible evidence of the impact of the crime, which shall be considered by the court or jury in sentencing the defendant. The evidence may include the following:

(1) A description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant.

(2) An explanation of any economic or property loss suffered by the victim as a result of the offense committed by the defendant.

(3) A request for restitution and an indication of whether the victim has applied for or received compensation under the Crime Victims Compensation Act.

(b) No victim shall be required to offer evidence of the impact of the crime. No inference or conclusion shall be drawn from a victim's decision not to offer evidence of the impact of the crime. At the victim's request and with the consent of the defendant, a representative of the district attorney's office or a law enforcement officer may proffer evidence of the impact of the crime to the court. (1998-212, s. 19.4(c); 2001-433, s. 5; 2001-487, s. 120.)

CASE NOTES

The court upheld the victim's brother's restrained testimony, which did no more than describe the emotional or psychological effect of his sister's death on him, as being well within the parameters of this section. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C.

LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Testimony of Victim's Wife and Brother. — At the sentencing hearing, testimony by the murder victim's wife and brother as to the murder victim's character and as to how the victim used to financially support his family was not so prejudicial that it made the trial fundamentally unfair. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Victim Impact Testimony Properly Allowed. — State properly used victim impact testimony to describe the specific harm caused by defendant's actions, including the psychological repercussions the murders had on family members and the community; the evidence was not so inflammatory as to render defendant's sentencing hearing fundamentally unfair, but instead reminded the sentencer that the victims were individuals whose deaths represented a unique loss to society and in particular to their families. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

With regard to defendant's convictions on two counts of first-degree murder, the trial court did not err in overruling his objection to the testimony of the sister of one of the victims concerning defendant's childhood, which related that the sister did not think that anything relating to defendant's childhood could have impacted his actions as the sister was unable to complete her thought and her incomplete sentence was not so prejudicial to have rendered the proceeding fundamentally unfair. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Victim Impact Testimony Not Reversible Error. — Though a trial court erred by allowing the State to make specific reference to the testimony of an assault victim's mother during closing argument by calling the mother a second victim of the crime, as victim impact evidence was only admissible during the guilt-innocence phase of the trial. However, because the State presented extensive evidence from two eyewitness who were well-acquainted with defendant and who positively identified him at trial, and evidence that defendant fled to another state shortly after hearing that the crime had been publicized, the appellate court was unable to say, as a matter of law, that absent the erroneous admission of the victim impact evidence, there was a reasonable possibility that the jury's verdict would have been different in light of the considerable evidence of defendant's guilt. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007), review denied, appeal dismissed, 362 N.C. 477, 666 S.E.2d 765 (2008).

Testimony Did Not Amount to Victim Impact Evidence. — Victim's testimony regarding the victim's mental condition, including the victim's dreams, after the alleged incident did not amount to victim impact evidence. State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008).

Cited in State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002); State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

§ 15A-834. Restitution.

A victim has the right to receive restitution as ordered by the court pursuant to Article 81C of Chapter 15A of the General Statutes. (1998-212, s. 19.4(c).)

CASE NOTES

Restitution Held Proper. — Where defendant raped a victim, an order of restitution to reimburse the victim for medical expenses resulting from the rape complied with the statutory requirements because the relatively modest amount of restitution, $2,301, and the terms of its payment were not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

§ 15A-835. Posttrial responsibilities.

(a) Within 30 days after the final trial court proceeding in the case, the district attorney's office shall notify the victim, in writing, of:

(1) The final disposition of the case.
(2) The crimes of which the defendant was convicted.
(3) The defendant's right to appeal, if any.
(4) The telephone number of offices to contact in the event of nonpayment of restitution by the defendant.

(b) Upon a defendant's giving notice of appeal to the Court of Appeals or the Supreme Court, the district attorney's office shall forward to the Attorney General's office the defendant's name and the victim's name, address, and telephone number. Upon receipt of this information, and thereafter as the circumstances require, the Attorney General's office shall provide the victim with the following:

(1) A clear and concise explanation of how the appellate process works, including information about possible actions that may be taken by the appellate court.

(2) Notice of the date, time, and place of any appellate proceedings involving the defendant. Notice shall be given in a manner that is reasonably calculated to be received by the victim prior to the date of the proceedings.

(3) The final disposition of an appeal.

(c) If the defendant has been released on bail pending the outcome of the appeal, the agency that has custody of the defendant shall notify the investigating law enforcement agency as soon as practicable, and within 72 hours of receipt of the notification the investigating law enforcement agency shall notify the victim that the defendant has been released.

(d) If the defendant's conviction is overturned, and the district attorney's office decides to retry the case or the case is remanded to superior court for a new trial, the victim shall be entitled to the same rights under this Article as if the first trial did not take place.

(e) Repealed by Session Laws 2001-302, s. 1, effective July 21, 2001. (1998-212, s. 19.4(c); 2001-302, s. 1; 2001-433, s. 6; 2001-487, s. 120.)

§ 15A-836. Responsibilities of agency with custody of defendant.

(a) When a form is included with the final judgment and commitment pursuant to G.S. 15A-832(g), or when the victim has otherwise filed a written request for notification with the custodial agency, the custodial agency shall notify the victim of:

(1) The projected date by which the defendant can be released from custody. The calculation of the release date shall be as exact as possible, including earned time and disciplinary credits if the sentence of imprisonment exceeds 90 days.

(2) An inmate's assignment to a minimum custody unit and the address of the unit. This notification shall include notice that the inmate's minimum custody status may lead to the inmate's participation in one or more community-based programs such as work release or supervised leaves in the community.

(3) The victim's right to submit any concerns to the agency with custody and the procedure for submitting such concerns.

(4) The defendant's escape from custody, within 72 hours, except that if a victim has notified the agency in writing that the defendant has issued a specific threat against the victim, the agency shall notify the victim as soon as possible and within 24 hours at the latest.

(5) The defendant's capture, within 24 hours.

(6) The date the defendant is scheduled to be released from the facility. Whenever practical, notice shall be given 60 days before release. In no event shall notice be given less than seven days before release.

(7) The defendant's death.

(b) Notifications required in this section shall be provided within 60 days of the date the custodial agency takes custody of the defendant or within 60 days of the event requiring notification, or as otherwise specified in subsection (a) of this section. (1998-212, s. 19.4(c); 2001-433, s. 7; 2001-487, s. 120.)

§ 15A-837. Responsibilities of Division of Community Corrections.

(a) The Division of Community Corrections shall notify the victim of:

(1) The defendant's regular conditions of probation or post-release supervision, special or added conditions, supervision requirements, and any subsequent changes.
(2) The date and location of any hearing to determine whether the defendant's supervision should be revoked, continued, modified, or terminated.
(3) The final disposition of any hearing referred to in subdivision (2) of this subsection.
(4) Any restitution modification.
(5) The defendant's movement into or out of any intermediate sanction as defined in G.S. 15A-1340.11(6).
(6) The defendant's absconding supervision, within 72 hours.
(7) The capture of a defendant described in subdivision (6) of this subsection, within 72 hours.
(8) The date when the defendant is terminated or discharged.
(9) The defendant's death.

(b) Notifications required in this section shall be provided within 30 days of the event requiring notification, or as otherwise specified in subsection (a) of this section. (1998-212, s. 19.4(c); 2001-433, s. 8; 2001-487, ss. 47(a), 120.)

CASE NOTES

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 15A-838. Notice of commuted sentence or pardon.

The Governor's Clemency Office shall notify a victim when it is considering commuting the defendant's sentence or pardoning the defendant. The Governor's Clemency Office shall also give notice that the victim has the right to present a written statement to be considered by the Office before the defendant's sentence is commuted or the defendant is pardoned. The Governor's Clemency Office shall notify the victim of its decision. Notice shall be given in a manner that is reasonably calculated to allow for a timely response to the commutation or pardon decision. (1998-212, s. 19.4(c).)

§ 15A-839. No money damages.

This Article, including the provision of a service pursuant to this Article through the Statewide Automated Victim Assistance and Notification System established by the Governor's Crime Commission, does not create a claim for damages against the State, a county, or a municipality, or any of its agencies, instrumentalities, officers, or employees. (1998-212, s. 19.4(c); 1999-169, s. 1.)

§ 15A-840. No ground for relief.

The failure or inability of any person to provide a right or service under this Article, including a service provided through the Statewide Automated Victim Assistance and Notification System established by the Governor's Crime Commission, may not be used by a defendant in a criminal case, by an inmate, by any other accused, or by any victim, as a ground for relief in any criminal or civil proceeding, except in suits for a writ of mandamus by the victim. (1998-212, s. 19.4(c); 1999-169, s. 2.)

§ 15A-841. Incompetent victim's rights exercised.

When a victim is mentally or physically incompetent or when the victim is a minor, the victim's rights under this Article, other than the rights provided by G.S. 15A-834, may be exercised by the victim's next of kin or legal guardian. (1998-212, s. 19.4(c).)

CASE NOTES

Victim's Presence at Trial. — Presence at trial of a non-testifying victim, who had been permanently disabled by gunshots and was unable to speak, was not improper under the Crime Victims' Rights Act; that the victim's mother may have exercised some of his rights during the process did not preclude him from attending the trial under the terms of the Act. State v. Kemp, 153 N.C. App. 231, 569 S.E.2d 717, 2002 N.C. App. LEXIS 1118 (2002), cert. denied, 356 N.C. 441, 573 S.E.2d 158 (2002), cert. denied, 537 U.S. 1129, 123 S. Ct. 864, 154 L. Ed. 2d 815 (2003).

§§ 15A-842 through 15A-849: Reserved for future codification purposes.

ARTICLE 47.

§§ 15A-850 through 15A-900: Reserved for future codification purposes.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

OFFICIAL COMMENTARY

The Commission recommended this Article dealing with reciprocal discovery in the belief that jury trials will be more orderly and that ultimately truth will more likely prevail if the parties are prepared to meet the case that the other side will present. Trial by ambush has been generally eliminated, with beneficial effects, in civil cases, and the Commission believed this philosophy should also extend to criminal cases. Another important benefit of liberal discovery is to enhance the likelihood of honorable and realistic plea negotiations, avoiding trial altogether.

Some persons have protested that discovery in criminal cases may lead defendants and unscrupulous counsel to fabricate defenses custom-tailored to the disclosed weaknesses of the State's case, but the Commission did not believe this risk was great enough to warrant avoidance of the benefits of discovery. There are other methods which may be utilized to prevent abuse of discovery by unscrupulous persons.

Until recently it was widely claimed that discovery of the defendant's case on the part of the State was a violation of the privilege against self-incrimination. These claims have been largely silenced by Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970), upholding a statute requiring the defendant to give notice of alibi. The Commission considered making the State's right to discovery independent of whether the defendant requested discovery, but finally settled upon a reciprocal right to the State on a category-by-category basis. The Commission decided this would be the wisest way to introduce discovery by the State into the law of North Carolina; there was no thought that the reciprocity feature was constitutionally necessary.

The Commission consulted a number of discovery provisions in formulating its proposals, including Article 240 of the New York Criminal Procedure Law and A.B.A. Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial (1970). The model used in drafting, however, was Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, Rule 16 (January 1970).

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-901. Application of Article.

This Article applies to cases within the original jurisdiction of the superior court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.

This Article, then, applies to felonies and misdemeanors in the original jurisdiction of the superior court. The statute concerning this jurisdiction is not in Chapter 15A. Section 7A-271, governing the superior court's criminal jurisdiction, is not affected by this Article.

CASE NOTES

Purpose of Rules of Discovery. — The rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, the defendants received a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State's mode of compliance. State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977).

The purpose of the discovery procedure authorized by this Article was not to protect a defendant from the consequences of perjury. It was intended only to protect him from the consequences of unfair surprise and to enable him to have available at the trial any evidence which he could legitimately offer in his defense. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

The purpose of the discovery procedures authorized by Art. 48, is to protect the defendant from unfair surprise. When the court is not informed of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose a sanction is an abuse of discretion. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

North Carolina discovery statutes in criminal cases apply only to cases within the original jurisdiction of the superior courts. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

Court's Power to Compel Disclosure Regarding Post-Trial Motion. — The judiciary must and does have the inherent power to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on such motion. State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

Criminal Investigatory Reports. — Plaintiff was precluded by this Article from obtaining copies of recordings which were unquestionably gathered by a city police department in the course of a criminal investigation and were part of the State's file in a pending criminal action. Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 434 S.E.2d 176 (1993).

Applied in State v. McMillian, 59 N.C. App. 396, 297 S.E.2d 164 (1982); McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Cited in State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988); State v. Mitchell, — N.C. App. —, 671 S.E.2d 340, 2009 N.C. App. LEXIS 10 (2009).

§ 15A-902. Discovery procedure.

(a) A party seeking discovery under this Article must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. A written request is not required if the parties agree in writing to voluntarily comply with the provisions of Article 48 of Chapter 15A of the General Statutes. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery under the provisions of this Article concerning any matter as to which voluntary discovery was not made pursuant to request.

(b) To the extent that discovery authorized in this Article is voluntarily made in response to a request or written agreement, the discovery is deemed to have been made under an order of the court for the purposes of this Article.

(c) A motion for discovery under this Article must be heard before a superior court judge.

(d) If a defendant is represented by counsel, the defendant may as a matter of right request voluntary discovery from the State under subsection (a) of this section not later than the tenth working day after either the probable-cause hearing or the date the defendant waives the hearing. If a defendant is not represented by counsel, or is indicted or consents to the filing of a bill of information before the defendant has been afforded or waived a probable-cause hearing, the defendant may as a matter of right request voluntary discovery from the State under subsection (a) of this section not later than the tenth working day after the later of:

(1) The defendant's consent to be tried upon a bill of information, or the service of notice upon the defendant that a true bill of indictment has been found by the grand jury, or

(2) The appointment of counsel.

For the purposes of this subsection a defendant is represented by counsel only if counsel was retained by or appointed for the defendant prior to or during a probable-cause hearing or prior to execution by the defendant of a waiver of a probable-cause hearing.

(e) The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

(f) A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate or if the judge for good cause shown determines that the motion should be allowed in whole or in part. (1973, c. 1286, s. 1; 2004-154, s. 3.)

OFFICIAL COMMENTARY

The Commission contemplated that after the parties become accustomed to discovery procedures they will be followed voluntarily without the necessity of motions before the judge. To facilitate this practice, the section requires that a party seeking discovery first request voluntary discovery. That the request be in writing is simply to make sure there is something tangible in the record if questions arise later. The written request need not be elaborate, but of course should be dated.

If the other party complies with a request for voluntary discovery, the request and the compliance will for the later procedural provisions of the Article be treated as if effected upon motion and order of the court.

The reference in subsection (c) is to trigger the special definition of superior court judge contained in G.S. 15A-101(10).

Because the request for voluntary discovery must precede any motion for discovery by at least seven days, subsections (d) and (e) in setting out the time limits for discovery speak of the period during which a party "may as a matter of right request voluntary discovery. . . ." If a defendant has counsel the period in which discovery can be requested as a matter of right is 10 working days following the holding, or waiver, of the probable-cause hearing. If he does not have counsel or is charged in the superior court before a probable-cause hearing is held or waived, the time is extended to a later period as noted in this section. In implementing this later time period, the complementary provisions of G.S. 15A-630 should be noted.

CASE NOTES

Subsection (d) Gives Right to Defendant, Not Defense Counsel. — In a criminal prosecution, there was no merit to the defendant's contention that the trial judge's denial of the opportunity to conduct discovery after counsel was appointed violated this section, since the section did not guarantee defense counsel at least 10 days after he was appointed in which to conduct discovery, but instead gave the defendant the right to seek discovery not later than the tenth day after appointment of counsel; the defendant did this during his vigorous representation of himself; and the defendant therefore could not argue that, since the State did not comply with the statutory discovery procedure, he had 10 more days to conduct discovery. State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269, cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1981).

Waiver of Discovery. — The failure to seek discovery pursuant to the terms of this section and G.S. 15A-903 constitutes a waiver of the right to discovery pursuant to those statutes. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Where defendant has made neither a written request nor a motion to compel discovery as required by subsection (a) of this section, the State has no duty to produce a defendant's statement or to notify defendant of its intention to use a defendant's oral statement at trial. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

Denial of oral request. — Defendant made an oral request to discover manuals the State's expert witness used to test substances police bought from him, and the trial court did not err when it denied the oral request. However, the appellate court found that the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures the analyst used, and it granted defendant's request for a new trial. State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).

Voluntary Disclosure Not Required. — Under the statutory discovery scheme neither the State nor the defendant is required to respond voluntarily to a request for discovery. The request for voluntary disclosure is merely a prerequisite to the filing of a motion for an order requiring disclosure. State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Thus, Motion for Order Is Remedy for Failure of Voluntary Disclosure. — Ordinarily one party in a criminal action may not complain of the other's failure to respond voluntarily to a request for disclosure. The remedy for such a failure is to move for a compulsory order. State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Duty of Party Offering Voluntary Disclosure. — Discovery statutes are designed to encourage voluntary disclosures of items which ultimately a party may be ordered to disclose. Thus if either party unequivocally advises the other that it will respond voluntarily to the other's request for disclosure, that party thereby assumes the duty fully to disclose all of those items which could be obtained by court order. State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Where the State undertook to make voluntary discovery when it responded to the request by one defendant for any statements made by his codefendant, the State's voluntary response was deemed under subsection (b) to have been made under an order of court. As a result, the trial court properly could have invoked the sanctions provided in G.S. 15A-910 for the State's failure to provide defendant with a copy of the pretrial statement of his codefendant in a timely manner. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Before filing a motion for discovery before a judge, a defendant must make a written request for voluntary discovery from the State of North Carolina pursuant to G.S. 15A-902(a). If the State voluntarily complies with the discovery request, the discovery is deemed to have been made under an order of the court, under G.S. 15A-902(b), and the State then has a continuing duty to disclose additional evidence or witnesses. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

State did not waive its right to receive a written request for defendant's oral statement by voluntarily producing defendant's written statement pursuant to an informal oral agreement between the prosecutor and defense counsel. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C.

508, 272 S.E.2d 123 (1980).

Contention That Prosecution Failed to Comply with Section Held Without Merit. — Where there was no showing in the record by the defendant that investigatory evidence of the prosecution not supplied to the defendant following a motion under this section was material or exculpatory, and the defendant was afforded the opportunity to cross-examine the witnesses regarding the evidence, the defendant's contention that the prosecution failed to comply with this section was without merit. State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288, reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977).

State Failed to Comply with Disclosure Requirements for Expert Witness. — SBI agent, who was better qualified than the jury to determine if the substance in defendant's shoe was marijuana, was erroneously allowed to testify as an expert where the State did not comply with discovery requirements in G.S. 15A-902(a)(2). State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Arraignment does not affect the time for discovery for a defendant represented by counsel. State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Imposition of Sanctions Not Mandated. — Neither G.S. 15A-902 to 15A-910 nor the case of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), requires the trial court to impose any sanctions for failure to comply with discovery. State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986).

Failure to Impose Sanctions Not Improper. — Where although the trial judge did not impose any sanctions for State's failure to comply with discovery, he expressed his displeasure with State's tactics with respect to discovery, and employed several of the curative actions suggested by G.S. 15A-910, and at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that State had failed to comply with the law, the court's failure to impose sanctions was not an abuse of discretion. State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986).

In prosecution for first-degree sexual offense and taking indecent liberties with children, the defendant was not prejudiced by the admission of the deputy's testimony that the defendant stated his birthdate during the booking procedure, where there was ample evidence aside from defendant's statement from which the jury could have found that defendant was at least 16 years of age at the time of the crimes; therefore, even assuming that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to G.S. 15A-910, the error was harmless. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Court's Choice of Sanction Found Appropriate. — Even if the State's failure to inform defendant about a second fingerprint in existence did not comply with the discovery article, the court's refusal to either suppress the evidence or continue the trial was not necessarily error, since the court did sanction the State in one of the ways authorized by the statute (by granting a recess and requiring the State's witness to confer with defense counsel and to be interrogated under oath before he testified) and that way was neither inappropriate nor beyond the court's discretion. State v. Hall, 93 N.C. App. 236, 377 S.E.2d 280, cert. denied, 324 N.C. 579, 381 S.E.2d 777 (1989).

Substantial Compliance with Statutory Requirements. — Where the record on appeal indicated that the State was unsure of the status or the probative value of a check due to its illegibility, the trial court also found the check to be illegible, and when a clear copy of the check was obtained by the State, defense counsel was present and was given the legible copy at that time, the State substantially complied with the requirements of the discovery statutes in regard to the check. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 324 N.C. 340, 391 S.E.2d 165 (1990).

Where the record indicated that the State did not intend to use a partnership breakdown initially but decided to use it after admission of other evidence was denied, the evidence did not appear to have been obtained directly from defendant or to belong to defendant, nor did it appear to have been material to the preparation of defendant's defense, and at the time the State decided to use the evidence it was made available to defendant for examination, the State substantially complied with the discovery statutes. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 324 N.C. 340, 391 S.E.2d 165 (1990).

Defendant Not Prejudiced. — Defendant did not preserve for review defendant's contention that the State provided discovery to defendant in short notice, as defendant only objected to the introduction of evidence regarding defendant's involvement in subsequent drug transactions. As to the objection defendant made, defendant did not show that a police report only made available to defendant at the start of the trial prejudiced the outcome of the trial. State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Applied in State v. Gillespie, 33 N.C. App.

684, 236 S.E.2d 190 (1977); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); State v. Powell, 61 N.C. App. 124, 300 S.E.2d 270 (1983); State v. Martin, 67 N.C. App. 265, 313 S.E.2d 15 (1984); State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006); State v. Herrera, — N.C. App. —, 672 S.E.2d 71, 2009 N.C. App. LEXIS 126 (2009).

Cited in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978); State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978); State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978); State v. McCormick, 36 N.C. App. 521, 244 S.E.2d 433 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Hodges, 51 N.C. App. 229, 275 S.E.2d 533 (1981); State v. Carter, 55 N.C. App. 192, 284 S.E.2d 733 (1981); State v. Jeffries, 55 N.C. App. 269, 285 S.E.2d 307 (1982); State v. Poplin, 56 N.C. App. 304, 289 S.E.2d 124 (1982); State v. Elam, 56 N.C. App. 590, 289 S.E.2d 857 (1982); State v. Pigot, 320 N.C. 96, 357 S.E.2d 631 (1987); State v. Browning, 321 N.C. 535, 364 S.E.2d 376 (1988); State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006); State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007); State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007); State v. Early, — N.C. App. —, 670 S.E.2d 594, 2009 N.C. App. LEXIS 49 (2009).

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

(a) Upon motion of the defendant, the court must order the State to:

(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. The term "prosecutorial agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant. Oral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

(3) Give the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the State certifies in writing and under seal to the court

that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(b) If the State voluntarily provides disclosure under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section.

(c) Upon request by the State, a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a). (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 759, ss. 1-3; 1983, Ex. Sess., c. 6, s. 1; 2001-282, s. 5; 2004-154, s. 4; 2007-183, s. 1; 2007-377, s. 1; 2007-393, s. 1.)

OFFICIAL COMMENTARY

Departing from the statutory breakdown, there are seven different categories of discovery of the State's case available to the defendant. They are:

(1) Written or recorded statements made by the defendant in the State's control. This type of statement is subject to discovery even if the State does not intend to offer it in evidence.

(2) Oral statements made by the defendant which the State intends to offer in evidence.

(3) Written, recorded, or oral statements of a codefendant which the State intends to offer at their joint trial.

(4) The prior criminal record of the defendant available to the solicitor. This criterion of availability is less stringent than the one used in several other subsections: "the existence of which is known or by the exercise of due diligence may become known to the solicitor." The subsection thus does not require the solicitor to take extreme pains to search out the criminal record of the defendant from all possible sources, but any sort of record that is normally or easily available to him must be produced. Several defense attorneys on the Commission commented that it is often difficult to find out from the defendant the full particulars of his criminal history, and a number of law-enforcement agencies will not provide criminal histories to defense counsel.

(5) Books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects in the control of the State and which are:

a. Material to the preparation of the defense; or

b. Intended for use by the State as evidence; or

c. Were obtained from or belong to the defendant.

(6) Results or reports of physical or mental examinations or of tests, measurements, or experiments made in connection with the case and in the control of the State.

(7) Physical evidence, or a sample of it, available to the solicitor if the State intends to offer the evidence as an exhibit or evidence in the case, or if the State intends to introduce at trial the results of tests or experiments made in connection with the physical evidence. This provision is similar to that in present G.S. 15-155.4 and G.S. 15-155.5, except that it does not go as far as those sections. Those sections, which are scheduled for deletion under this proposal, also allow the defendant to interview prospective expert witnesses of the State.

The discovery provisions as introduced in the General Assembly contained a requirement for discovery of the names and addresses of witnesses the State intended to call plus their criminal records. Because witnesses may easily be subject to harassment or intimidation, a special provision was inserted, in addition to the general one set out in G.S. 15A-908, to empower the judge to deny disclosure or take other appropriate protective measures. The whole proposal was controversial enough, though, that the General Assembly resolved the matter by deleting it.

The Commission followed the draft of the proposed amendment to Rule 16 and provided only for discovery of the State's case upon request of the defendant. The American Bar Association Standards would require the State to disclose virtually all of the information covered by this discovery Article automatically, whether requested or not. See A.B.A. Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial,

§ 2.1 (1970). In certain instances, of course, the State may be under an obligation to disclose information discoverable under this Article whether there is a request or not. See Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Commission grappled with the question whether to attempt to codify Giles and Brady and finally decided to leave this matter to case law development. Parenthetically, it should be noted that G.S. 15A-975 does require the State to disclose certain types of evidence if it wants to force a motion to suppress prior to trial, but there is no penalty attached to the failure to do so other than loss of this advantage.

Another issue concerned the extent to which the solicitor would be chargeable with knowledge of information in police files. The Commission finally decided not to go beyond the language copied from the proposed amendment to Rule 16, and leave further ramifications of the matter to case law. See Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).

Editor's Note. — Session Laws 2007-183, which added subsection (c), in s. 2, provides: "This act becomes effective December 1, 2007, and applies to cases where the trial date set pursuant to G.S. 7A-49.4 is on or after that date. Nothing in this act shall be construed to abrogate any judicial rulings or decisions prior to the effective date of this act that required a law enforcement agency to make available to the State a complete copy of the complete files related to the investigation of crimes committed or the prosecution of a defendant. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For article, "Evidentiary Problems in Multiple Defendant Cases: How to Plan for and Deal With Them," see 13 N.C. Cent. L.J. 62 (1981).

CASE NOTES

I. General Consideration.
II. Statement of Defendant.
III. Statement of Codefendant.
IV. Statements of Witnesses.
V. State Witnesses.
VI. Documents, Tangible Objects, and Reports.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the cases cited below were decided under former law.*

The purpose of discovery under the statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate. State v. Payne, 327 N.C. 194, 394 S.E.2d 158 (1990), cert. denied, 498 U.S. 1092, 111 S. Ct. 977, 112 L. Ed. 2d 1062 (1991).

A major purpose of the discovery procedures of Chapter 15A is to protect the defendant from unfair surprise. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

This section was patterned after F.R. Crim. P., Rule 16, which was initially adopted in 1946 and amended several times thereafter. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

But Is Viewed More Broadly. — Like Fed. R. Crim. P. 16(a)(1)(D), regarding a defendant's discovery of test results and procedures, G.S. 15A-903(e) must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also any tests performed or procedures utilized by chemists to reach such conclusions, but, unlike under Fed. R. Crim. P. 16(a)(1)(D), no requirement exists that such information be material to the preparation of the defense or intended for use by the State in its case in chief. State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

The categories of information discoverable from the State are contained in this section. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

This section and § 15A-904 must be construed jointly. State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983).

This Section Restricted by § 15A-904(a). — State did not have a duty to provide defendant with a complete copy of the police investigatory report pursuant to this section; this section is restricted by G.S. 15A-904(a), and therefore, defendant lacked the requisite statutory authority to request the production of the police investigatory report. State v. Lineberger, 100 N.C. App. 307, 395 S.E.2d 716 (1990).

This section, in conjunction with § 15A-904, limits the extent of disclosure of evidence by the State to the persons and things mentioned. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Subsection (e) of this section replaced former §§ 15-155.4 and 15-155.5, which although similar to the current statute, were more liberal in that they also allowed the defendant to interview prospective expert witnesses. State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251, cert. denied, 320 N.C. 173, 358 S.E.2d 61, cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987).

Applicability. — The "elects" language in this statute indicates that this section only applies to willful failures to produce evidence. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Counsel argued that the state did not disclose that a state's witness had "failed" a polygraph and that the results of a state witness's "failed" polygraph test would have been admissible in the penalty phase of the inmate's case; however, in both North Carolina and the Fourth Circuit there was a per se ban of polygraph evidence, and in North Carolina a polygraph did not fall within the category of physical or mental examinations contemplated under G.S. 15A-903(e). Call v. Polk, 454 F. Supp. 2d 475, 2006 U.S. Dist. LEXIS 68738 (W.D.N.C. 2006).

Where a statute expressly restricts pretrial discovery, as does subsection (a) of G.S. 15A-904, the trial court has no authority to order discovery. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Common law recognizes no right to discovery in criminal cases. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91, appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1976); State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

No right of discovery in criminal cases existed at common law. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Questions concerning discovery must be resolved by reference to statutes and due process principles, as no right to pretrial discovery existed at common law. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

No Violation Found. — Trial court did not err by denying defendants' motions to dismiss for discovery violations, as each time defense counsel requested discovery, copies of the documents requested were provided. State v. Castrejon, — N.C. App. —, 635 S.E.2d 520, 2006 N.C. App. LEXIS 2121 (2006), cert. denied, appeal dismissed, 361 N.C. 222, 642 S.E.2d 709 (2007).

No discovery statute requires the State "to investigate" matters sought by the defendant to be investigated. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Defendant is not entitled to the granting of his motion for a fishing expedition. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

Procedure Following Request for Disclosure. — When a specific request is made at trial for disclosure of evidence in the State's possession, the judge must at a minimum, order an in camera inspection and make appropriate findings of fact, and if the judge, after the examination, rules against the defendant, the judge should order the sealed statement placed in the record for appellate review. State v. Voncannon, 49 N.C. App. 637, 272 S.E.2d 153 (1980), rev'd on other grounds, 302 N.C. 619, 276 S.E.2d 370 (1981).

Justice requires the judge to order an in camera inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Internal Policies of District Attorney's Office. — This section does not entitle defendant to information on the internal policies of the district attorney's office. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, appeal dismissed, 297 N.C. 179, 254 S.E.2d 40 (1979).

Information on Prosecution of Repeat Offenders. — The prosecution was not required to provide the defendant with a full written description of a "career criminal" program pursued by a district attorney's office, consisting of a policy of vigorous prosecution of repeat offenders, since these documents were not material to the preparation of the defense, intended for use by the State as evidence, or obtained from the defendant. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied and appeal dismissed, 297 N.C. 179, 254 S.E.2d 40 (1979).

Work-Product Not Discoverable. — Subsection (d) of this section does not alter the general rule that the work product or investigative files of the district attorney, law-enforcement agencies, and others helping to prepare the case are not open to discovery. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

The statutory provisions set out in this section do not alter the general rule that the work product or investigative files of the district attorney, law enforcement agencies, and others assisting in the preparation of a case are not open to discovery. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Internal police reports and memoranda pertaining to a criminal case are not made discoverable by this section. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

To the extent that defendant's discovery motion seeking notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence to be presented by the State sought information beyond that which the State was required to disclose under disclose under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), it sought "work product" not subject to discovery. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Police Investigatory Work. — There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Blue, 20 N.C. App. 386, 201 S.E.2d 548 (1974).

Statements to Police Officers. — Standing alone, subsection (d) of this section would appear to require the State to disclose at least any written statements. Such provision is, however, restricted by subsection (a) of G.S. 15A-904. Therefore, any statements made to law-enforcement officers are expressly excluded from the discoverable evidence. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Notes of Investigating Officer. — The trial court did not err in refusing to afford defendant access to notes carried to the witness stand by the investigating officer, where the officer never referred to the notes during his testimony and in fact never read the notes at all, and where a witness on the stand does not use or attempt to use the writings sought to be produced, even though the writings are under his control, opposing counsel cannot compel their production. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Criminal records of witnesses other than the defendant are not made discoverable by this section. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Duty Not to Obstruct Interviews of Witnesses by Defense. — A prosecutor has an implicit duty not to obstruct defense attempts to conduct interviews with any witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

State Not Required to Introduce Writings in Precise Form Inspected by Defense. — While this section requires the State, upon proper motion, to divulge certain writings or documents, there is nothing that requires the State to offer the writings into evidence at trial in the precise form that they were in when inspected by defense counsel. State v. Williams, 29 N.C. App. 319, 224 S.E.2d 250 (1976).

Open File Policy. — While the prosecutor may, in his or her discretion, proceed under an open file policy, he or she may not be forced to do so. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Trial court did not err in denying defendant's motion for a bill of particulars, pursuant to G.S. 15A-925, because the State's legal theory of which type of murder it was proceeding on was not factual information within the meaning of G.S. 15A-925(b), defendant was not denied any information necessary for adequate preparation or conduct of his defense where the State had voluntarily provided defendant with open files pursuant to the mandates of G.S. 15A-903 and 15A-907, and defendant clearly had knowledge of some of the information regarding an underlying felony pursuant to G.S. 14-17. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Refusal to Comply with Discovery Orders. — A district attorney's refusal to comply with a discovery order under this section does not automatically require the exclusion of the undisclosed evidence. A variety of sanctions is authorized by G.S. 15A-910, and the choice of which to apply—if any—rests entirely within the discretion of the trial judge. His decision will not be reversed except for abuse of that discretion. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Sanction Within Trial Court's Discretion. — Because the trial court is not required to impose any sanctions for abuse of discovery orders, the question of what sanctions to impose, if any, is within the trial court's discretion, including whether to admit or exclude evidence not disclosed in accordance with a discovery order. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Sanctions for failure to comply with discovery procedures are permissive and are imposed in the sound discretion of the trial judge. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Exclusion Not Automatically Required. — The State's failure to comply with a discovery order pursuant to this section will not automatically require the exclusion of the undisclosed evidence. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Trial judge did not err by overruling defendant's objection to certain testimony on the ground of failure to comply with this section, where defendant was given timely notice of the substance of the statement, and those portions of the testimony as to which notice was not given related to an explanation of why the witness came forward with the evidence. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

When Refusal to Grant Discovery Is Reversible Error. — A refusal to grant a pretrial motion for discovery is not reversible error unless the movant shows that evidence favorable to him was suppressed. State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

Error in Failing to Examine Withheld Records to Determine If Material Evidence Withheld. — Where state failed to inform defendant about the existence of PEN register recording calls made by defendant despite defendant's discovery motion and subsequent court order enforcing that motion until well into the trial, the trial court erred in failing to examine the records in camera to determine if material and favorable evidence had been withheld or to seal them for the inspection of the appellate court. State v. Jones, 85 N.C. App. 86, 354 S.E.2d 251, cert. denied, 320 N.C. 173, 358 S.E.2d 61, cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987).

No Duty to Provide Discovery. — The State has no statutory duty to provide discovery absent a request from defendant. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Waiver of Discovery. — The failure to seek discovery pursuant to the terms of G.S. 15A-902 and this section constitutes a waiver of the right to discovery pursuant to those statutes. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Defendants waived their statutory right to have the trial court order the prosecutor to permit discovery where defendants did not argue or make any other showing in support of their discovery motion at the hearing before the trial judge, no objection was made upon his conclusion that the motion had been abandoned, and the judge never ruled on the motion. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Where defendant "slept on his rights" the trial court did not abuse its discretion in denying defendant's motion for a continuance. State v. Elam, 19 N.C. App. 451, 199 S.E.2d 45, cert. denied and appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

Defendant could not contend he was deprived of his right to test evidence where he made no attempt to do so during the many months preceding the trial. State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

Where defendant did not move for discovery, relying on what he considered to be an open file policy of the district attorney, he could not complain that he did not know in advance of trial of the statement of a certain witness which had not been reduced to writing. State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).

Preservation of Discovery Issue for Appeal. — While this section requires the trial judge on proper motion to order the prosecutor to permit certain kinds of discovery, the right must be asserted and the issue raised before the trial court. Further, the issue must be passed upon by the trial court in order for the right to be asserted in the appellate courts. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Compliance with Agreement Entered into in Other District. — The District Attorney in one district may not be compelled to comply with an agreement pertaining to discovery entered into by the District Attorney in another district once venue has been changed in the case. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

The "elects" language in the statute indicates that this section only applies to willful failures to produce evidence. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Applied in State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. McCormick, 36 N.C. App. 521, 244 S.E.2d 433 (1978); State v.

Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); State v. Powell, 61 N.C. App. 124, 300 S.E.2d 270 (1983); State v. Robinson, 310 N.C. 530, 313 S.E.2d 571 (1984); State v. Lefever, 67 N.C. App. 419, 313 S.E.2d 599 (1984); State v. Pridgen, 313 N.C. 80, 326 S.E.2d 618 (1985); State v. Callahan, 77 N.C. App. 164, 334 S.E.2d 424 (1985); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (1994); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995); State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996); State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (1997); State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. China, 150 N.C. App. 469, 564 S.E.2d 64, 2002 N.C. App. LEXIS 580 (2002); State v. Herrera, — N.C. App. —, 672 S.E.2d 71, 2009 N.C. App. LEXIS 126 (2009).

Cited in State v. Jeeter, 32 N.C. App. 131, 230 S.E.2d 783 (1977); State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977); State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Grady, 38 N.C. App. 152, 247 S.E.2d 624 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981); State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (1981); State v. Christmas, 305 N.C. 654, 290 S.E.2d 613 (1982); State v. Brackett, 55 N.C. App. 410, 285 S.E.2d 852 (1982); State v. Jeffries, 55 N.C. App. 269, 285 S.E.2d 307 (1982); State v. Poplin, 56 N.C. App. 304, 289 S.E.2d 124 (1982); State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984); State v. Beam, 70 N.C. App. 181, 319 S.E.2d 616 (1984); State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986); State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987); State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987); State v. Steele, 86 N.C. App. 476, 358 S.E.2d 98 (1987); State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Bridges, 325 N.C. 529, 385 S.E.2d 337 (1989); State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990); State v. Lopez, 101 N.C. App. 217, 398 S.E.2d 886 (1990); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (1993); State v. Tunstall, 334 N.C. 320, 432 S.E.2d 331 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (1994); State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996); State v. Braxton, 344 N.C. 702, 477 S.E.2d 172 (1996); State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997); State v. Creech, 128 N.C. App. 592, 495 S.E.2d 752 (1998); State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999); State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000); State v. Redd, 144 N.C. App. 248, 549 S.E.2d 875, 2001 N.C. App. LEXIS 422 (2001); State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001); State v. Gillespie, 180 N.C. App. 514, 638 S.E.2d 481, 2006 N.C. App. LEXIS 2512 (2006).

II. STATEMENT OF DEFENDANT.

Duty of State to Disclose. — Subdivision (a)(2) of this section requires the State to disclose to the defendant the substance of any relevant statement made by the defendant which is in the possession of the State and the existence of which is known to the prosecutor. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

Where the trial court allowed the defendant, accused of murdering her grandmother in a nursing home, to recall witnesses after the prosecutor used her undisclosed statement, the trial court did not abuse its discretion in not declaring a mistrial. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321, 1999 N.C. App. LEXIS 1239 (1999).

State fulfilled its duty to disclose defendant's statement, pursuant to G.S. 15A-903(a)(2), where both the testimony received at trial and the statement contained in the report that was given to defendant conveyed that defendant had told his daughter, the victim of his unlawful sexual conduct, not to tell anyone about the sexual assault. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

"Substance" Requirement of Subdivision (a)(2) Met. — Delivery of a synopsis of a defendant's oral statements in response to discovery requests complies with the "substance" requirement of subdivision (a)(2); because detective did not testify that defendant made a statement in response to the reading of his rights at the top of the juvenile rights and waiver of rights form, the State could not have provided a recorded statement by the defendant in response to the reading of these rights. State v. Johnson, 136 N.C. App. 683, 525 S.E.2d 830, 2000 N.C. App. LEXIS 164 (2000).

Nothing in this section requires the

prosecutor to disclose the name of the individual to whom the defendant has made a statement regarding a murder. State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997), cert. denied, 522 U.S. 1078, 118 S. Ct. 858, 139 L. Ed. 2d 757 (1998).

As used in subdivision (a)(2), "substance" means essence; the material or essential part of a thing, as distinguished from form; that which is essential. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Facts and Circumstances Surrounding Statement. — Nothing in this section entitles a defendant to have the trial court order the prosecutor to provide him with a description of the facts and circumstances surrounding his statements. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Where the State complied with subsection (a)(2) of this section by disclosing that portion of state's witness' statement which recited defendant's own words from a jailhouse conversation, defendant was not entitled to a description of the facts and circumstances surrounding these statements. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

When the State did not timely disclose defendant's statement to a jail administrator, under G.S. 15A-903(a)(2), its admission on rebuttal was not an abuse of the trial court's discretion, under G.S. 15A-910, because the trial court allowed a two-day continuance to allow counsel to discuss the statement with defendant and defendant's psychiatric expert, the statement was not actually introduced until 18 days after it was disclosed, the prosecutor disclosed the statement as soon as he became aware of it, and there was no evidence of the prosecutor's bad faith. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

In defendant's trial on a charge of conspiracy to traffic in cocaine by transportation, defendant was provided with the substance of a statement he made to a confidential informant (CI) before trial and knew before trial that the CI would testify, and the trial court did not err by denying defendant's motion to exclude the testimony of the CI because the State did not provide defendant with information about statements defendant made to the CI in time to comply with G.S. 15A-903(a)(2). State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003).

Subsection (b) of this section is limited to joint trials of codefendants. State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986).

Burden Is on Defendant to Request Discovery. — Subdivision (a)(2) of this section makes it clear that the burden is on defendant to request discovery in writing prior to a motion to compel discovery. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

A defendant has the burden of making a written request for voluntary discovery and making a motion to compel discovery where voluntary discovery does not occur, before the State's duty arises to produce oral statements made by defendant. State v. Keaton, 61 N.C. App. 279, 300 S.E.2d 471, cert. denied, 309 N.C. 463, 307 S.E.2d 369 (1983).

Defendant's Recorded Statement. — Defendant was not entitled, under this section, to review tape recorded interviews of himself; he had previously been provided with a written transcript of the tapes and that transcript was a "substantially verbatim" copy of the recording. State v. Ferguson, 140 N.C. App. 699, 538 S.E.2d 217, 2000 N.C. App. LEXIS 1261 (2000).

When defendant's statement is oral rather than recorded, the statute requires only that the substance of that statement be provided to a defendant. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Written and Oral Statements. — Disclosure by the State held sufficient where the State informed the defendant that his written statement was substantially similar to his oral statement, which was summarized, even though the former referred to the murder weapon as a "stick," and the latter referred to the weapon as a "board." State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

Inculpatory Statements. — Prosecutor complied with G.S. 15A-903 by revealing inculpatory statements made by defendant to the police as soon as the prosecutor knew of them, even though it was shortly before trial. State v. Parks, 148 N.C. App. 600, 560 S.E.2d 179, 2002 N.C. App. LEXIS 53 (2002).

Pretrial Statement. — The trial court acted within its discretion in refusing to impose sanctions against the State for introducing the defendant's pretrial statement, even though he was not provided with the tape recorded version of the statement, where the defendant was furnished the substance of the defendant's statement by way of a copy of the officer's written report months before trial the defense counsel became aware of the existence of the tape recording three days before the introduction of the written report, and on the same date, defense counsel was given an opportunity to listen to the tape, but she neither had the tape recording analyzed nor scheduled a future date upon which to have it analyzed, nor did the defense counsel call the officer, who was present throughout the interview, in an attempt to clarify any inaudible portions of the recording. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Use of Statement After Defendant Raised Matter. — In a trial for sexual abuse of a child, the trial court did not abuse its discretion by allowing the State to introduce defendant's statements to the Department of Social Services (DSS) about his prior acts of sexual abuse of a different child in an unrelated case where defendant "opened the door" to the matter by cross-examining the DSS witness about DSS files containing the statement. Although the State did not reveal the statement in response to defendant's motion under this section, neither did the State attempt to use the statement prior to defendant's questions of the DSS witness. State v. Moore, 103 N.C. App. 87, 404 S.E.2d 695 (1991).

Organization of Statements. — The prosecutor adequately provided the defendant's oral statements where the prosecutor provided the substance of both inculpatory and exculpatory statements, the names of the witnesses and whether each witness was with law enforcement, and the estimated time frame of each statement. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Alleged Erroneous Use of Statement Not Shown to be Prejudicial to Defendant. — Denial of motion in limine seeking exclusion of any mention before the jury of statements made by defendant but not disclosed to defendant or his counsel by a certain time did not mandate reversal where defendant failed to show that he was unduly prejudiced by the testimony; defendant's actions in removing the victim from one place to another, without her consent, for the purpose of terrorizing her, were sufficient to establish the elements of the charged offense. State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004).

State of North Carolina's failure to disclose defendant's second prior statement to the police did not constitute prejudicial error because there was no reasonable probability that timely providing such disclosure would have affected the outcome of defendant's trial. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

III. STATEMENT OF CODEFENDANT.

Separate Trials. — Where there is no joint trial, defendant has no right under subsection (b) of this section to discovery statements made by a codefendant. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980), overruled on other grounds, State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982).

Defendant Not Entitled to Statement of Accomplice Who Was State Witness. — Defendants were not entitled to receive a written copy of the oral statement made by a State witness, an admitted accomplice, to an S.B.I. agent or a list of the State's witnesses. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

IV. STATEMENTS OF WITNESSES.

The term "statement," as used in subdivision (f)(2) of this section, includes statements signed or otherwise adopted by the witness and substantially verbatim recitals or oral statements which are contemporaneously recorded. State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

Meaning of "Witness Statement." — Writing or recording evidencing a witness's assertions to a state prosecutor can qualify as a "witness statement" under G.S. 15A-903(a)(1); given the high stakes of criminal prosecutions and the special protections traditionally afforded criminal defendants, it is not untenable that the General Assembly intended that "witness statement" in the criminal context would not mean the same thing as it does under G.S. 1A-1-26(b)(3). State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Statements Before Grand Jury. — Defendant was not prejudiced by the actions of the trial judge in providing defendant with excerpts from grand jury testimony given by witnesses rather than with all of the witnesses' statements, as defendant had requested. State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993), cert. denied, 335 N.C. 561, 441 S.E.2d 123 (1994).

Disclosure of statements made in pretrial interviews required. — G.S. 15A-903(a)(1) requires prosecutors to disclose, in written or recorded form, statements made to them by witnesses during pretrial interviews; accordingly, where the trial court erred in denying defendant's motion to compel discovery of notes of pretrial interviews that the prosecutor had with a witness, and it could not be determined whether the error prejudiced the outcome of the case under G.S. 15A-1443(a), a motion for appropriate relief was remanded for an evidentiary hearing. State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Officer's field report, which contained only a narrative of the offense and did not attribute oral statements to any of the three witnesses mentioned therein, did not contain a witness' prior "statement" for purposes of this section. State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

Where State did not know of statements

of certain witnesses within time frame, there was no abuse of discretion in trial court's admitting the statements, since it could have determined that the State's disclosure of these statements was within a reasonable time. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Trial court did not overrule a discovery order entered under G.S. 15A-903(a)(1) by sanctioning the state for its failure to disclose a victim's statement as to what the victim told a friend, but refusing to sanction the state for failing to disclose under its continuing duty to disclose set forth in G.S. 15A-907 the friend's statement as the friend's statement was made after the discovery deadline, and the discovery order did not apply to the statement; further, the trial court properly refused to sanction the state for its failure to disclose statements made by another victim and the victims' aunt as they were also made after the discovery deadline. State v. James, — N.C. App. —, 643 S.E.2d 34, 2007 N.C. App. LEXIS 797 (2007).

No Violation of Defendant's Rights. — Where the trial court followed the requirements of subdivision (f)(1) in making the witnesses' statements available to the defense after the witnesses had testified on direct, and where the court afforded defense counsel sufficient time to examine and study the statements and to prepare for cross-examination, there was no constitutional violation of defendant's rights. State v. Batts, 93 N.C. App. 404, 378 S.E.2d 211 (1989).

In defendant's trial on charges of first-degree murder and robbery with a firearm, defendant did not have the right to receive written statements the prosecution's witnesses made until the witnesses testified, and the trial court properly denied defendant's motions to dismiss the charges and for a mistrial, based on a claim that the State failed to disclose exculpatory evidence. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Sanctions on Abuse of Discretion. — Court abused its discretion for dismissing murder case under G.S. 15A-910 where there was no evidence that witness made a statement as defined in this section. State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994).

Substance of Statement Sufficient. — Where the State divulged the "substance" of a defendant's oral statement, the defendant was not entitled to a description of the facts and circumstances surrounding the statements. State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996).

The State complied with the requirements of this section by providing defendant with the substance of witness' statement; nothing in the discovery statute or North Carolina Rules of Evidence Rule 404(b) obligated the State to provide defendant with witness' written statement prior to trial. State v. Ocasio, 344 N.C. 568, 476 S.E.2d 281 (1996).

Witnesses' Criminal Histories Undiscoverable. — Where defendant did not allege that any witness had a significant criminal record or that the State suppressed impeaching information concerning any witness, defendant did not have the right to discover criminal histories of witnesses in case of first and second degree murder against him, and State did not violate defendant's due process rights. State v. Kilpatrick, 343 N.C. 466, 471 S.E.2d 624 (1996).

Lost Statements. — The record did not establish that the State willfully "elected" not to comply with order in violation of subsection (f) where the State diligently and repeatedly attempted to locate witness' written statement in its files, but the statement was simply lost. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Testimony Properly Allowed. — Defendants contention that the trial court erred, by allowing testimony that defendant offered another prisoner $18,000 and a gold chain to plead guilty to the charges that defendant faced, was without merit. State v. Caporasso, 128 N.C. App. 236, 495 S.E.2d 157 (1998), appeal dismissed, 347 N.C. 674, 500 S.E.2d 91 (1998).

Where defense counsel had possession of witness' interview before the trial even commenced, and made effective use of the transcript at trial by extensively cross-examining the witness with the interview transcript, and where the State did not introduce detective's testimony regarding the interview until after defense counsel had already vigorously cross-examined the witness regarding the content of the interview, the trial court did not err in allowing the detective to read from the interview. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

There was no error in the admission of testimony by a witness not included on the State's witness list where neither defendant made a motion requesting the trial court to order that the State provide such a list and the trial court strictly limited the testimony to corroboration. State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

Trial court did not err by allowing an informant to testify at trial because defendant was provided with notice of the substance of the informant's statements, and defendant did not suffer prejudice or unfair surprise as a result of the admission of the informant's testimony in that the State of North Carolina provided defendant with all reports contained in the prosecution's file, which included reports from the dates of each offense, notations of the detective's meetings with the informant after each controlled buy from defendant as well as a summary of what the informant told the detective during each meeting. State v. Zamora-

Ramos, 190 N.C. App. 420, 660 S.E.2d 151, 2008 N.C. App. LEXIS 896 (2008).

Statements That Are Not Work Product Are Discoverable. — General Assembly expressly contemplated in G.S. 15A-904(a) that trial preparation interview notes might be discoverable except where they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff; accordingly, G.S. 15A-904(a) comports with G.S. 15A-903(a)(1)'s mandate that oral witness statements shall be in written or recorded form because every writing evidencing a witness's assertions to a prosecutor will not necessarily include opinions, theories, strategies, or conclusions that are protected as work product under G.S. 15A-904(a). State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Confidential Informants — No Disclosure Necessary. — Trial court did not err in denying defendant's pretrial motion to reveal the identity of a confidential informant, as defendant's guilt was established through other evidence and not through the informant, who did not testify at the trial; moreover, defendant was not surprised by the informant's identity when it was disclosed, as defendant had stated that he believed that the informant was one of two likely candidates. State v. Collins, 160 N.C. App. 310, 585 S.E.2d 481 (2003), aff'd, 358 N.C. 135, 591 S.E.2d 518 (2004).

Defendant was properly provided requested witness statements at trial after the witness testified on direct, pursuant to G.S. 15A-903(f)(1). State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

Where Witness Had Not Made a Specific Statement Prior to His Testimony. — During discovery, a victim testified that he had never revealed the contents of his telephone conversation with defendant to the State; defendant opened the door on cross-examination by asking the victim about later conversations between defendant and the victim. Defendant knew that the State had evidence that he had attempted to bribe a witness and should not have been surprised when the victim testified defendant had attempted to bribe him; defendant could not now reasonably complain that the victim's testimony amounted to unfair surprise. State v. Farmer, 177 N.C. App. 710, 630 S.E.2d 244, 2006 N.C. App. LEXIS 1201 (2006).

V. STATE WITNESSES.

No Right to List of State Witnesses. — Neither this section nor common law requires the State to furnish a defendant with the names and addresses of all the witnesses the State intends to call. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

No right to discover the names and addresses of State's witnesses exists by statute in this State. Neither former G.S. 15-155.4 nor this section requires the State to furnish the accused with a list of witnesses who are to testify against him. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980), overruled on other grounds, State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

Absent a statutory requirement, the defendant in a criminal case is not entitled to a list of witnesses who are to testify against him, and neither former G.S. 15-155.4 nor this section requires this. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

North Carolina law does not grant defendant the right to discover the criminal record of a State's witness. This right did not exist at common law and this section does not grant the defendant the right to discover the names, addresses, or criminal records of the State's witnesses. State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979).

This section affords an accused no right to discover the names and addresses of the State's witnesses and does not require the State to furnish the accused a list of the witnesses who will be called to testify against him. State v. Sledge, 297 N.C. 227, 254 S.E.2d 579 (1979); State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

A defendant is not entitled to a list of the State's witnesses. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

A provision requiring disclosure to a defendant of the names and addresses of witnesses to be called by the State was omitted from Art. 48 because the witnesses may be subject to harassment or intimidation. State v. Mills, 307 N.C. 504, 299 S.E.2d 203 (1983).

This section and G.S. 15A-904 do not require the State to disclose its witnesses' statements prior to trial. State v. Williams, 308 N.C. 339, 302 S.E.2d 441 (1983).

Defendant had no right to a list of the State's witnesses, and defendant did not show specific prejudice so as to constitute an abuse of discretion by the trial court in denying his request. State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

Trial court did not err in denying defendant's motion to dismiss as the prosecutor stated he knew of no prior identification of another individual until a witness testified in court. State v. Junious, 180 N.C. App. 656, 638 S.E.2d 497, 2006 N.C. App. LEXIS 2507 (2006).

Legislature Expressly Rejected Such Right. — The legislature has expressly rejected a proposal to require the State to disclose even the names and addresses of the witnesses it intends to call and also rejected a proposal to require the production of a proposed witness's criminal record. State v. Chappel, 36 N.C. App. 608, 244 S.E.2d 483, appeal dismissed, 295 N.C. 553, 248 S.E.2d 731 (1978).

The legislature has expressly refused to adopt a requirement that the State furnish the accused with the names of its witnesses. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

And Trial Judges Should Not Encourage It. — It was never the intention of the General Assembly when it enacted this Article to require the district attorney to furnish the names and addresses of witnesses the State intended to call. It follows that trial judges should not encourage, by court order, what the legislature specifically rejected during consideration of the legislation. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

State has no initial duty to disclose the names of witnesses. State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Manager of cellular telephone store was properly permitted to testify as a "surprise" witness where the state did disclose it would call the "Custodian of Nextel Phone Records" and provided the manager's name to defendant as listed in the detective's file. State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

Procedure Where State Calls Witness Not on List Furnished by Order of Court. — Where the State has substantially complied with the order of the court to furnish the names and addresses of the State's witnesses and where such a list has been furnished and the State subsequently seeks to call a witness not on that list, the court will look to see whether the district attorney acted in bad faith, and whether the defendant was prejudiced thereby. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Identity of Confidential Informant. — Generally the State has the privilege of withholding a confidential informant's identity from a defendant, but there are exceptions. State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

Trial court did not violate G.S. 15A-908(b) by not sealing a confidential informant's file for appellate review because G.S. 15A-908(b) governed the granting of protective orders; the state did not request a protective order because the discovery statutes, G.S. 15A-903 and G.S. 15A-904, did not require the state to disclose information about the confidential informant, whose identity was not known and who was not testifying at trial. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

Test for Disclosure of Informant's Identity. — Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), sets forth the test to be applied when the disclosure of an informant's identity is requested. The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

Refusal to Compel Disclosure of Informant's Identity Upheld. — Where defendant offered no defense on the merits, so there was no contradiction between his evidence and the State's evidence for informant's testimony to clarify, and no testimony by the informant was admitted at trial (as the testimony of three law-enforcement officers established defendant's guilt), and the State asserted that disclosure of the informant's identity would jeopardize pending investigations, it was not error to deny the defendant's motion to compel disclosure of the informant's identity. State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

Interviews of State Witnesses. — Nothing in the statutory discovery provisions would require the State to compel its witnesses to submit to any form of interview or questioning by the defense prior to trial; the State does not even have to afford the defense pretrial access to a list of its potential witnesses or copies of any statements they may have made. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Nothing in this Article compels State witnesses to subject themselves to questioning by the defense before trial. State v. Phillips, 328 N.C. 1, 399 S.E.2d 293, cert. denied, 501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).

Pursuant to G.S. 15A-903(a)(1), the detective was not required to submit to a pretrial interview with defense counsel against the detective's wishes. State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

State Special Agent's Testimony Must Comply With Section. — Trial court abused its discretion in allowing a State Bureau of Investigation special agent to testify without requiring the state to comply with the discovery requirements of G.S. 15A-903; although the state may not have known the specific witness it would be calling, the state did know it would be calling someone to testify concerning the process of manufacturing methamphetamine. State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006).

Request for Names of Persons Interviewed or Having Information. — Requests by defendant to have the prosecutor ordered to disclose the "names of all persons known by the State to have information regarding the above-captioned matter and/or all persons interviewed regarding the matter" amounted to a request for a list of the state's witnesses and others having knowledge of the cases against the defendant; such information simply is not discoverable. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Pathologist's Testimony. — Where defendant contended it was error to allow a pathologist to testify that a knife which had belonged to the defendant was consistent with the size and shape of the wounds inflicted on the victim and the pathologist did not do any particular tests on the knife, but simply opened it, looked at the blade, and measured it, this was not the type of test whose result must be given to the defendant pursuant to subsection (e). This testimony had some probative value and it was not error to admit it. State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 923, 130 L. Ed. 2d 802 (1995).

Properly Treated as Fact Witnesses. — In defendant's trial for common-law robbery, the trial court did not err by allowing a physician's assistant and a deputy to testify without complying with the discovery requirements for expert witnesses set forth in subdivision (a)(2) of G.S. 15A-903, as the assistant offered no opinion and brought no expertise to bear as to the subject at hand, and the deputy did not purport to compare defendant's fingerprints with the latent prints, made no attempt to express an opinion, and was asked no questions requiring him to do so, and thus the trial court properly considered the assistant and the deputy as fact witnesses. State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007).

Testimony Regarding Overheard Telephone Conversation Admissable. — Where the State immediately relayed the substance of detective's statement regarding overheard telephone conversation, wherein defendant admitted guilt to a third party, to the defense upon learning of it, there was no abuse of discretion by the trial court in refusing the requested sanctions and no error in the admission of the testimony; the trial court did grant the defendant a continuance from Thursday until Monday to allow the defense time to prepare for testimony concerning the telephone conversation. State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995).

Changes in police officers' report omitting racial phraseology and substituting acceptable terminology did not impermissibly violate this section. State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994).

Defendant was not entitled to pretrial discovery of victim's statements. State v. Alston, 81 N.C. App. 459, 344 S.E.2d 339 (1986).

Relevancy for impeachment purposes of a prior statement of a material State's witness is obvious. This State's discovery procedures, unlike the federal statute, do not automatically entitle the defendant to such statements at trial. Instead, since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, the judge is required to, at a minimum, order an in camera inspection and make appropriate findings of fact. As an additional measure, if the judge, after the in camera examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Impeachment value in the victim's statements goes to the weight of the victim's identification of the defendant rather than to its admissibility. State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984).

Pretrial Statement Which Would Have Revealed Perjury. — Where the prosecution failed to disclose to the defendants the corrected pretrial statement of the State's most crucial witness, whose credibility was the most basic issue in the case, the failure to disclose it constituted a violation of the defendants' due process rights and invalidated their convictions, since the amended statement would have revealed the witness' perjury and the production of the amended statement was requested at least six times in specific terms. Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980).

Where witness had not made a specific statement prior to his testimony, the State could not reasonably have been expected to relate the statement to defendant as it had no knowledge of such. State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

Examination by Witness Made for First Time at Trial. — While this section requires the State to allow defendant access to any results, reports of physical or mental examinations, tests, measurements or experiments made in connection with the case, detective called as expert on fingerprint analysis did not conduct any tests in preparation for this trial and did not testify regarding any test results or examinations specific to the case; he formulated his opinion as to the cellophane bag based on an examination made for the first time at trial and was therefore not subject to discovery requirements. State v. Lane, 119 N.C. App. 197, 458 S.E.2d 19 (1995).

Criminal Records of State Witnesses. — This section nowhere provides for discovery of the criminal records of the State's witnesses. Indeed, a provision authorizing the discovery of such material was included in the draft of the original bill and was subsequently deleted. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Copies of prior criminal records of any state witness or prospective witness, and any additional information which could reflect on the credibility of such witnesses, is not subject to discovery. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

This section does not grant the defendant the right to discover the names and addresses, let alone the criminal records, of the State's witnesses. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

Where no request was made for a copy of defendant's criminal record, failure to make such a request constitutes a waiver by defendant of his right to discovery of his record under subsection (c). State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Parole Record of State Witness. — Neither this statute nor the common law gives a defendant the right to discover the parole record of a witness for the state. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

No Authority to Order Disclosure of State Witnesses or Persons Interrogated. — The trial court does not have the authority to order the state to disclose to defendant either the names of the state's witnesses or the statements of all persons interrogated or interviewed during the investigation. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

No Requirement to Make Available State Investigation Files, Agents, or Criminal Records. — No statutory provision or constitutional principle requires the trial court to order the state to make available to a defendant all of its investigative files relating to his case or the names of all agents who participated in the investigation, or to disclose the criminal records of the state's witnesses. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Admission of Expert Testimony After State's Failure to Disclose Evidence Deemed Harmless Error. — Trial court erred in admitting testimony of an SBI agent in which the agent opined that the substance found in defendant's shoe was marijuana because the state did notify defendant that the agent would testify as an expert in this regard; the error was harmless, however, because two deputies provided lay tesitmony identifying the substance as marijuana and, thus, defendant should have anticipated the evidence and should not have been unfairly surprised. State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Failure to Grant Continuance to Defendant After State's Failure to Disclose Expert Witness Deemed Harmless Error. — Although the State of North Carolina violated G.S. 15A-903(a)(2) by failing to provide defendant with required expert discovery reasonably before trial and the trial court abused its discretion in failing to grant defendant a continuance of the trial for that reason, the trial court's denial of defendants' motion for a continuance was harmless error because defendant suffered no prejudice due to the additional evidence that was against defendant. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

VI. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Meaning of "Within the Possession, Custody, or Control of the State". — "Within the possession, custody, or control of the State" as used in subsections (d) and (e) of this section means within the possession, custody or control of the prosecutor or those working in conjunction with him and his office. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

There is no statute that grants a defendant in a criminal trial access as of right to any documents unless they are within the possession, custody or control of the State, which means within the prosecutor's possession, custody or control. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

When defendant, prior to her trial for larceny by employee, requested discovery of her employer's bank statements and accounting procedures, there was no evidence that the State had possession of these items or that the State intended to introduce them against defendant; thus the State's failure to provide this material to defendant did not violate G.S. 15A-903(d) or deny her due process or the effective assistance of her counsel, as she did not show how this rendered her attorney unable to provide effective assistance or otherwise prejudiced her. State v. Morris, 156 N.C. App. 335, 576 S.E.2d 391, 2003 N.C. App. LEXIS 113 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

Subpoena Duces Tecum. — Documents not subject to this section may still be subject to a subpoena duces tecum. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Denial of Discovery Held Harmless Error. — The trial court's denial of the defendant's request for information and data related to testing performed by the SBI and for copies of the State's photographs was harmless error where the defendant could point to nothing in the record to support his assertion that the State failed to comply with the statute vis-a-vis the photographs and where the evidence of defendant's guilt was overwhelming, including the evidence indicating the presence of gasoline in the victim's home. State v. McKeithan, 140 N.C. App. 422, 537 S.E.2d 526, 2000 N.C. App. LEXIS 1205 (2000).

While the trial court erred by denying defendant's motion under former G.S. 15A-903(e) (repealed by 2004 N.C. Sess. Laws 154 § 4, at 517-520) for the production of the laboratory protocols associated with DNA testing, the error was harmless because defendant's identity was not at issue during trial as the defense focused on defendant's mental state. Therefore, the State did not need the DNA evidence to link defendant to the crimes, including a rape. State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

Statute Did Not Compel DNA Test by State. — G.S. 15A-903(e) did not compel the state to perform a deoxyribonucleic acid test on a cap found at the scene of a crime. State v. Ryals, — N.C. App. —, 635 S.E.2d 470, 2006 N.C. App. LEXIS 2161 (2006).

Independent Chemical Analysis of Seized Substances. — Due process requires that defendants have the opportunity to have an independent chemical analysis performed upon seized substances. State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251, cert. denied, 320 N.C. 173, 358 S.E.2d 61, cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987), holding that the trial court's refusal to allow defendants further access to drugs did not violate that due process requirement.

A defendant enjoys a concomitant statutory right to inspect the crime scene and to independently analyze seized substances. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Prior Recorded Statement of State Witness. — Standing alone, subsection (d) of this section would allow discovery of a prior recorded statement of a State witness. On its face, subsection (d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the statutory scheme must be construed in its entirety. The very next section, G.S. 15A-904, limits this section and is dispositive of the issue of prosecution witnesses' statements. Section 15A-904(a) provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Due process requirements and the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), were satisfied where the State provided defendant with a transcript of a witness's statements to a detective before the trial and in time to make effective use of the evidence on cross-examination of the witness; defendant's argument that he was unable to make effective use of the evidence because the delay in disclosure deprived him of the opportunity to use the interview to investigate and possibly locate more witnesses was rejected as being both speculative and not required by law. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Applicability of Subsection (d) Where Documents Used Only in Cross-Examination. — The fact that the State did not offer the documents in question into evidence but merely used them on cross-examination does not mean that it was not error under subsection (d) of this section for the State to fail to disclose where disclosure of the documents in the possession of the State and which were intended to be used by the State in any manner was also essential to the preparation of defendant's defense. State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14, cert. denied, 300 N.C. 377, 267 S.E.2d 680 (1980).

Section does not require preservation of all physical evidence. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306

N.C. 559, 294 S.E.2d 372 (1982).

Destruction of Evidence for Lack of Storage Facilities. — In prosecution under G.S. 90-95, destruction of 2,700 pounds of marijuana by State for lack of storage facilities did not violate defendant's discovery rights under subsection (e) of this section where the State made random samples, photographs and a copy of the laboratory report of the State Bureau of Investigation available to defendants. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Destruction of Cartridge Casings Not Error Where Discovery Request Not Filed. — Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

"Tangible objects" does not include such objects as an apartment. As used in this statute, that term refers only to tangible, movable objects, and not to buildings or rooms. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Bill of Sale and Odometer Statement. — The court did not err in allowing the State to introduce a document to show that defendant owned car allegedly used in bank robbery, the contents of which had been suppressed by a prior order, where before the trial started the bill of sale and the odometer statement were not within the possession, custody, or control of the State, but when the car dealer arrived in court with the documents they were promptly made available to defendants. Since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, G.S. 15A-907 was not violated. State v. Alston, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

Trial judge would have discretionary power to permit second physical examination of alleged sexual-abuse victim if defendant showed court that examination would be probative, that it was necessary to defendant's preparation of his defense, and if the victim or the victim's guardian consented to examination. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Trial court did not abuse its discretion in failing to sanction the State for failure to disclose the results of footprint comparisons, where when the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Refusal to Have Children Examined by Second Expert Held Proper. — In child abuse case where defendant argued that children's bodies are physical evidence susceptible to objective tests and examinations like any other physical evidence which is to be used at trial, trial judge did not err in his refusal to grant defendant opportunity to have children examined by a second expert since defendant did not make credible showing to trial judge that additional examinations he requested would have been probative. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Identification Procedure Held Not Experiment. — In a prosecution for murder, a procedure in which a witness for the State identified defendant's van as being the vehicle which she had seen near the crime scene did not constitute an experiment; therefore, testimony concerning the van identification was not rendered inadmissible because of the State's failure to comply with established procedures governing the admission into evidence of experiments or because the prosecutor failed to inform defense counsel of the results of the identification procedure pursuant to subsection (e) of this section. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Letter Written by Defendant to Victim's Mother. — In prosecution for first degree rape, court properly permitted testimony regarding a letter from defendant to victim's mother, and the State did not violate subdivision (a)(1) of this section when it failed to produce this letter, since it was never in the State's possession and defendant failed to show that the original was destroyed in bad faith, as required by G.S. 8C-1, Rule 1004. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Photographs of Defendant Taken by Officer in Charge. — Despite prosecutor's personal ignorance of their existence, photographs of defendant showing scratches on his hands, arms and body, which had been taken at the direction of the officer in charge of the investigation a couple of days after defendant's arrest, were nevertheless in the State's "possession, custody or control" within the meaning of this section at the time of defendant's discovery request. State v. Pigot, 320 N.C. 96, 357 S.E.2d 631 (1987).

Subsection (d) of this section does not

require the State to furnish defendant copies of photographs. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Entitlement to Pretrial Discovery of Laboratory Tests. — Like F.R. Crim. P., Rule 16(a)(1)(D), subsection (e) of this section must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions. However, unlike the federal rule, no requirement exists under this section that such information be material to the preparation of the defense or intended for use by the State in its case in chief. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Discovery of Procedures Used to Conduct Laboratory Tests. — State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).

Tests and Procedures Used to Create Reports. — Under G.S. 15A-903(e), the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

Trial court did not err in admitting slides depicting the medical examination of victim, since State was unaware of existence of slides and defendant viewed them prior to conclusion of evidence. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Defendant was entitled to pretrial discovery of chemist's laboratory form indicating the various tests performed on the substance at issue, the results thereof, and the graph of the infrared scan, as the information sought by defendant was discoverable pursuant to subsection (e) of this section and the North Carolina Constitution. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Recess to Allow Inspection by Defendant Proper After Failure to Comply with Subsection (e). — Even if it is assumed that the State failed to comply with subsection (e) of this section in failing to notify defense counsel of tests performed upon the deceased's bedcovers and a bullet removed from her body until three days before trial, the trial court properly acted within its discretion in refusing to suppress evidence of the tests and in ordering a recess to permit defendant to examine the evidence and question the State's witnesses and offering to continue the recess to allow defendant to locate a ballistics expert, especially since the district attorney notified defendant of the tests as soon as he became aware of them. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Where photographs were not available to defendant before trial, even though defendant filed a pre-trial motion for discovery requesting a listing and description of any photographs within the State's possession which pertained to defendant's alleged crime, but the photographs were made available to defendant before they were introduced into evidence, and defendant did not request that the court allow her additional time to examine these photographs after she had obtained access to them and did not allege that the prosecuting attorney acted in bad faith, trial court did not err in admitting the photographs as evidence. State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989).

In defendant's prosecution for trafficking in cocaine by possession and carrying a concealed weapon, when the state allegedly violated G.S. 15A-903(a)(1) by not providing the defense with photographs taken of defendant's tattoos, which were allegedly evidence of defendant's gang affiliation, it was not an abuse of discretion under G.S. 15A-910(b) for the trial court to admit the photographs because the court was not required to exclude the evidence even had the court found that the state violated discovery requirements, as the court had to consider the totality of the circumstances, and given the overwhelming evidence of defendant's guilt, the court was within the court's rights to hold that these few photographs need not be excluded. State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

Currency, Serial Number List And Photocopy Used to Identify the Currency. — The State's failure to inform the defendant of the existence of, and its failure to provide him with, copies of the currency obtained from the defendant or the serial number list and photocopy used to identify the currency and to charge the defendant with the drug offenses was not condoned where the State had destroyed the photocopies and serial number list and recirculated the money for other drug buys. However, the defendant did not show substantial and irreparable prejudice to his case due to the overwhelming evidence on the charges stemming from one of the drug buys, including a recording of the drug buy obtained from the wire-tapped informant, testimony of the informant, surveillance of the area by officers, and seizure of defendant just after the transaction, when a substantial amount of cocaine was found on his person. State v. Manning, 139 N.C.

App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS 983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

And Were Erroneously Admitted. — The trial court's denial of defendant's motion for mistrial after the State erroneously admitted a prior arrest photograph which was not disclosed during discovery, despite a proper discovery request by defendant pursuant to this section, did not result in substantial or irreparable prejudice to defendant's case where no evidence suggested that the State's improper admission was intentional, or that it admitted the photograph in an attempt to improperly suggest that the defendant had been previously arrested, where the State's focus in admitting the photograph was the absence of scratches or bruises on defendant's body; and where the trial judge withdrew the evidence and provided a curative instruction for the jury to strike the photograph from their minds and give it no consideration. State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000), cert. denied, 353 N.C. 382, 547 S.E.2d 816 (2001).

Alcohol Screening Test. — The State violated discovery rules in failing to provide defendant with the results of his alcohol screening test, which the State sought to admit into evidence in the defendant's prosecution for driving while his license was revoked. State v. Bartlett, 130 N.C. App. 79, 502 S.E.2d 53 (1998).

A polygraph does not fall within the category of "physical or mental examinations" contemplated under subsection (e) of this section. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

No Blood Samples Available for Defendant. — Where all blood taken from automobile to be tested by the State was consumed in conducting the test so that there was no blood available to furnish to the defendant for testing, the court did not err in admitting the results of State's tests absent any evidence of bad faith on the part of the State. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993), cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

Denial of defendant's pretrial motion for discovery of victim police officer's personnel files did not violate this section. Although the defendant argued the files might have revealed prior acts of lethal force which might have impacted the jury on the issue of whether he had a reasonable belief that his brother was the victim of excessive force by the law enforcement officers, the list of discoverable items in the statute did not include victims' personnel files and the personnel files were not in the prosecutor's possession, custody, or control. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Parole Records Not In Prosecutor's Custody. — The court did not order the State to provide defendant's probation and parole records under subsection (d) of this section because these records were not in the "possession, custody or control" of the prosecutor or those working in conjunction with him or his office. State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (1997), cert. denied, 348 N.C. 285, 501 S.E.2d 913 (1998).

Written Report Prepared During Proceeding. — The trial court did not show partiality to the State when it required the state's expert witness to prepare a written report during the sentencing proceeding of a capital murder trial, although the report was already supposed to have been prepared, to provide the defendant with a copy of the report, and by postponing the witness' testimony one day so that defendant could prepare. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

Reference to Police Report Not Produced During Discovery. — Additional facts were needed regarding an alleged discovery violation after the State was allowed during cross-examination of a defense witness to reference a police report that had not been produced to defendant during discovery since no determination was made as to whether a law-enforcement agency or prosecuting agency was aware of a statement of the witness, former co-defendant, contained in the report, or through due diligence should have been aware of it, and whether while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose the statement as required by G.S. 15A-903(a)(1) and G.S. 15A-907. State v. Tuck, 191 N.C. App. 768, 664 S.E.2d 27, 2008 N.C. App. LEXIS 1495 (2008).

Disclosure of Retrograde Extrapolation Expert's Report. — Alleged error in denying defendant's motion to continue to allow defendant time to obtain a retrograde extrapolation expert after the state produced its expert's report on the Friday afternoon before the trial began could not be resolved, as it could not be determined whether defendant was prejudiced since it was unknown whether defendant or defense counsel knew that a second blood draw was taken or its results; the trial court was to determine: (1) whether the expert was listed as an expert witness in any witness list required to be disclosed to defendant under G.S. 15A-903(a)(2); (2) the date defense counsel received possession of any pre-trial order or other state's witness list; (3) whether the delivery of the expert's report to defendant's trial counsel on the eve of the trial occurred within a reasonable time prior to trial under G.S. 15A-903(a)(2); and (4) whether the state otherwise complied with G.S. 15A-903 and G.S. 15A-907. State v. Cook, 184 N.C. App. 401, 647 S.E.2d 433, 2007 N.C. App. LEXIS 1480 (2007), rev'd on other grounds, 362 N.C. 285, 661 S.E.2d 874 (2008).

Prosecutor's Notes. — While the prosecutor's notes of a conversation with a witness constituted a "statement" and were discoverable under G.S. 15A-903, the notes were not a witness statement for purposes of cross-examination or admissibility at trial. State v. Milligan, — N.C. App. —, 666 S.E.2d 183, 2008 N.C. App. LEXIS 1654 (2008).

Defendant did not preserve for review defendant's contention that the State provided discovery to defendant on short notice, as defendant only objected to the introduction of evidence regarding defendant's involvement in subsequent drug transactions. As to the objection defendant made, defendant did not show that a police report only made available to defendant at the start of the trial prejudiced the outcome of the trial. State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Trial court did not err by denying defendant's motion to continue after the State produced discovery notes on the morning of trial where the notes, which originated from the Department of Social Services (DSS), were not part of the prosecution file, and nothing suggested that DSS acted as a prosecutorial agency. State v. Pendleton, 175 N.C. App. 230, 622 S.E.2d 708, 2005 N.C. App. LEXIS 2743 (2005).

Review Not Possible Where Material Not Provided to Appellate Court. — Failure to include non-discoverable materials that the trial court placed under seal in the record on appeal precluded the appellate court from determining whether the trial court erred in classifying certain material as non-discoverable under G.S. 15A-904. State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007), review denied, appeal dismissed, 362 N.C. 366, 663 S.E.2d 431 (N.C. 2008).

OPINIONS OF ATTORNEY GENERAL

Scope of Subsection (a). — The requirement in subsection (a) of this section that the State furnish to the defense copies of statements of the defendant which the State intends to offer at trial does not extend to remarks or conversation by the defendant to or in the presence of witnesses who are subsequently interviewed by persons acting on behalf of the State. Opinion of Attorney General to Mr. Anthony Brannon, 45 N.C.A.G. 60 (1975), decided prior to 1983 amendment.

§ 15A-904. Disclosure by the State — Certain information not subject to disclosure.

(a) The State is not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.

(a1) The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.

(a2) The State is not required to provide any personal identifying information of a witness beyond that witness's name, address, date of birth, and published phone number, unless the court determines upon motion of the defendant that such additional information is necessary to accurately identify and locate the witness.

(b) Nothing in this section prohibits the State from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.

(c) This section shall have no effect on the State's duty to comply with federal or State constitutional disclosure requirements. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 2004-154, s. 5; 2007-377, s. 2.)

OFFICIAL COMMENTARY

This section is included to emphasize the general rule that the work product or investigative files of the solicitor, law-enforcement agencies, and others helping prepare the case are not open to discovery. Subsection (b) is added to indicate that a solicitor in his discretion may make fuller disclosure than is required if he believes this would assist in plea negotiations, otherwise speed the disposition of the case, or be in the interests of justice.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

I. General Consideration.
II. State Witnesses.
III. Attorney's Work Product.

I. GENERAL CONSIDERATION.

Construction with Federal Law. — Work product doctrine principles are embodied in Fed. R. Civ. P. 26(b)(3), and similar principles are codified in G.S. 15A-904 and G.S. 15A-906; although the work product doctrine was created in the context of civil litigation, it applies in criminal cases as well. State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

Section 15A-903 and this section must be construed jointly. State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983).

Section Limits § 15A-903. — Standing alone, subsection (d) of G.S. 15A-903 would appear to require the State to disclose at least any written statements. Such provision is, however, restricted by subsection (a) of this section. Therefore, any statements made to law-enforcement officers are expressly excluded from the discoverable evidence. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Section 15A-903 in conjunction with this section limits the extent of disclosure of evidence by the State to the persons and things mentioned. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Section 15A-903 and this section do not require the State to disclose its witnesses' statements prior to trial. State v. Williams, 308 N.C. 339, 302 S.E.2d 441 (1983).

State did not have a duty to provide defendant with a complete copy of the police investigatory report pursuant to G.S. 15A-903; the above-mentioned section is restricted by subsection (a), and therefore, defendant lacked the requisite statutory authority to request the production of the police investigatory report. State v. Lineberger, 100 N.C. App. 307, 395 S.E.2d 716 (1990).

Trial Court Has No Authority to Order Discovery Contrary to Section. — Where a statute expressly restricts pretrial discovery, as does subsection (a) of this section, the trial court has no authority to order discovery. This holding is in accordance with the federal courts' interpretation of their analogous provisions found in Fed. R. Crim. P. 16, and the Jencks Act, 18 U.S.C. § 3500. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Where a statute expressly restricts pretrial discovery, as does subsection (a) of this section, the trial court has no authority to order discovery. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Internal police reports and memoranda prepared by law-enforcement officers are not made discoverable by this section. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Investigative Files of Those Preparing State's Case. — The investigative files of the district attorney, law-enforcement agencies, and others helping to prepare the case were not open to discovery. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Trial court did not err when it denied defendant's request for the following: (1) police files dealing with any other murders or rapes having a common modus operandi with the crimes charged against defendant and the identification of all persons identified as suspects in those crimes; (2) evidence relating to another suspect in one victim's case; (3) evidence relating to another person as a suspect in the crimes charged against defendant; and (4) evidence relating to other murders and rapes in which defendant was a suspect. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

No discovery statute requires the State "to investigate" matters sought by the defendant to be investigated. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Laboratory Report Prepared During Investigation. — In a first-degree rape case, the trial court did not err in denying defendant's motion for mistrial based on the discovery by defendant, on the fourth day of trial, of a previously undisclosed laboratory report which revealed that an expert had found insufficient characteristics present in the photographs of shoeprints at the crime scene to enable the examiner to render an opinion as to whether defendant's shoes could have made the heel impressions shown in the photographs, where the existence of that report in no way affected the competency of the investigating officer's testimony concerning his personal observation of the shoeprints; where defendant did not take advantage of the trial court's offer to assist in locating the expert if defendant thought his testimony would be helpful and where, although defendant obtained possession of the report before the State rested its case, he made no effort to introduce the report into evidence; inasmuch as the report was prepared in connection with the investigation of the case, the report was not statutorily discoverable except by voluntary disclosure. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Evidence of State's Failure to Uncover Evidence of Defendant's Use of Public Transportation Held Not Discoverable. — The failure of the State to offer any evidence that the defendant used the public transportation system to return from Atlanta to Rocky Mount at or about the time the victim's body was found in Atlanta may have been a proper matter for jury argument, but evidence of the State's failure to develop such proof, was not subject to discovery. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Open File Policy. — While the prosecutor may, in his or her discretion, proceed under an open file policy, he or she may not be forced to do so. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Discovery Agreement from Other District. — The District Attorney in one district may not be compelled to comply with an agreement pertaining to discovery entered into by the District Attorney in another district once venue has been changed in the case. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Review Not Possible Where Material Not Provided to Appellate Court. — Failure to include non-discoverable materials that the trial court placed under seal in the record on appeal precluded the appellate court from determining whether the trial court erred in classifying certain material as non-discoverable under G.S. 15A-904. State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007), review denied, appeal dismissed, 362 N.C. 366, 663 S.E.2d 431 (N.C. 2008).

Applied in State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Lefever, 67 N.C. App. 419, 313 S.E.2d 599 (1984); State v. Williams, 71 N.C. App. 136, 321 S.E.2d 561 (1984); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Cited in State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981); State v. Brackett, 55 N.C. App. 410, 285 S.E.2d 852 (1982); State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983); State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988); State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

II. STATE WITNESSES.

Identity of State Witnesses Is Shielded Prior to Trial. — Subsection (a) of this section is consistent with the legislature's desire, elsewhere expressed, to have the identity of State's witnesses shielded prior to trial. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Trial court did not violate G.S. 15A-908(b) by not sealing a confidential informant's file for appellate review because G.S. 15A-908(b) governed the granting of protective orders; the state did not request a protective order because the discovery statutes, G.S. 15A-903 and G.S. 15A-904, did not require the state to disclose information about the confidential informant, whose identity was not known and who was not testifying at trial. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

Section Limits § 15A-903 as to State-

ments of Prosecution Witnesses. — Standing alone, G.S. 15A-903(d) would allow discovery of a prior recorded statement of a State witness. On its face, G.S. 15A-903(d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the statutory scheme must be construed in its entirety. This section limits G.S. 15A-903 and is dispositive of the issue of prosecution witnesses' statements. Subsection (a) of this section provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Subsection (a) is an express restriction on pretrial discovery of witnesses' statements that a trial judge has no authority to exceed in his discovery order. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Defendant was not entitled to pretrial discovery of victim's statements. State v. Alston, 81 N.C. App. 459, 344 S.E.2d 339 (1986).

State can properly resist discovery of its witness's statement under subsection (a). State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982).

No Authority to Order Disclosure of State Witnesses or Persons Interrogated. — Trial court does not have the authority to order the state to disclose to defendant either the names of the state's witnesses or the statements of all persons interrogated or interviewed during the investigation. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

State is not required to furnish defendant before trial any statement made by a witness of the State to anyone acting on behalf of the State. If the statement in question is material and favorable to the defendant, the State is required to disclose it to the defense at trial. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

But subsection (a) does not bar discovery of prosecution witnesses' statements at trial. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Miller, 37 N.C. App. 163, 245 S.E.2d 561, cert. denied, 295 N.C. 651, 248 S.E.2d 255 (1978).

Subsection (a) of this section shields oral statements by a defendant other than those made by him to persons acting on behalf of the State only from pretrial discovery. It does not bar the discovery of prosecution witnesses' statements at trial. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Under subsection (a) of this section, the State is not required to give to defendant before trial any statements made by witnesses of the State. If such evidence is material and favorable to the defendant, the State is required to disclose it to defense counsel at trial. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Statement by Accomplice to S.B.I. Agent. — Defendants in a prosecution for burglary and armed robbery were not entitled to receive a written copy of the oral statement made by an accomplice to an S.B.I. agent. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

Election to Use Person as Witness Waives Privilege. — By electing to use a person as a witness the State waived any privilege it might have had with respect to matters covered in his testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Impeachment value of victim's statements goes to the weight of the victim's identification of the defendant rather than to its admissibility. State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984).

Denial of Discovery of Witnesses' Statements at Trial Held Harmless. — The trial court in an armed robbery case erred in the denial of defendants' motions at trial for discovery of statements given by the State's witnesses to police regarding their descriptions of the robber; however, such error was harmless beyond a reasonable doubt where such statements were revealed to defendant during cross-examination of the police officers and were used by defendant in his cross-examination of the other State's witnesses. State v. Miller, 37 N.C. App. 163, 245 S.E.2d 561, cert. denied, 295 N.C. 651, 248 S.E.2d 255 (1978).

State Need Not Compel Witnesses to Submit to Interview or Questioning. — Nothing in the statutory discovery provisions would require the State to compel its witnesses to submit to any form of interview or questioning by the defense prior to trial; the State does not even have to afford the defense pretrial access to a list of its potential witnesses or copies of any statements they may have made. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Duty Not to Obstruct Interview of Wit-

nesses by Defense. — A prosecutor has an implicit duty not to obstruct defense attempts to conduct interviews with any witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Criminal records of witnesses other than the defendant are not compelled. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

III. ATTORNEY'S WORK PRODUCT.

Work Product Not Discoverable. — The statutory provisions set out in G.S. 15A-903 do not alter the general rule that the work product or investigative files of the district attorney, law-enforcement agencies, and others assisting in the preparation of a case are not open to discovery. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

To Anyone Acting on Behalf of the State. — G.S. 15A-904(a) does not require the production of reports, memoranda, or other internal documents made by a prosecutor or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State. State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

Work product doctrine applies in criminal as well as civil cases. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories and strategies are work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

General Assembly expressly contemplated in G.S. 15A-904(a) that trial preparation interview notes might be discoverable except where they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff; accordingly, G.S. 15A-904(a) comports with G.S. 15A-903(a)(1)'s mandate that oral witness statements shall be in written or recorded form because every writing evidencing a witness's assertions to a prosecutor will not necessarily include opinions, theories, strategies, or conclusions that are protected as work product under G.S. 15A-904(a). State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Defense Counsel Not Allowed to Review Investigative File. — The trial court did not err in not allowing defense counsel to review the entire investigative file compiled in the case since the investigative file requested by defendant consisted of internal documents made by law-enforcement officers, and none of it was subject to discovery by defendant. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

(a) Documents and Tangible Objects. — If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of Examinations and Tests. — If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of the State, the court must order the defendant to permit the State to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case.

(c) Notice of Defenses, Expert Witnesses, and Witness Lists. — If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.
   a. As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial. If disclosure is ordered, upon a showing of good cause, the court shall order the State to disclose any rebuttal alibi witnesses no later than one week before trial. If the parties agree, the court may specify different time periods for this exchange so long as the exchange occurs within a reasonable time prior to trial.
   b. As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, notice by the defendant shall contain specific information as to the nature and extent of the defense.

(2) Give notice to the State of any expert witnesses that the defendant reasonably expects to call as a witness at trial. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court.

(3) Give the State, at the beginning of jury selection, a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the defendant certifies in writing and under seal to the court that to do so may subject the witnesses or others to physical or

substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the defendant did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(d) If the defendant voluntarily provides discovery under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (c) of this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 2004-154, s. 6.)

OFFICIAL COMMENTARY

Based on the breakdown of categories in the commentary to G.S. 15A-903, there are three categories of discovery available to the State if the defense has sought discovery with respect to a similar category. The statute lumps two of these categories together, so the State may seek discovery as follows:

(1) If the defendant seeks discovery as to books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, or tangible objects, then the State may seek discovery as to any or all of these items which the defendant intends to introduce as evidence.

(2) If the defendant seeks discovery as to results or reports of the tests noted previously or seeks discovery as to physical evidence, then the State may seek discovery as to results or reports of physical or mental examinations or of tests, measurements, or experiments made in connection with the case, in the control of the defendant, and which:

a. The defendant intends to introduce into evidence; or

b. Were prepared by a witness whom the defendant intends to call.

(3) If the defendant seeks discovery as to results or reports of the tests noted previously or seeks discovery as to physical evidence, then the State may seek discovery as to any physical evidence, or a sample of it, available to the defendant if the defendant intends to offer it as an exhibit or evidence, or results or reports of tests or experiments made in connection with the evidence.

To balance the deletion of discovery of the names and addresses of State's witnesses, the General Assembly deleted from this section a proposal allowing the State to seek the names and addresses of defense witnesses.

CASE NOTES

Discovery statutes do not require a defendant to furnish the State with a list of proposed witnesses. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

But court did not abuse its discretion in requiring list of defense witnesses so that jurors, during voir dire, could look at the list and answer questions concerning their knowledge of and relationship to any of the witnesses who might be called to testify. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

The trial court properly denied the admission of defendant's mental examination reports and testimony thereof where the defense had failed to comply with the court's order to disclose said reports prepared by witnesses whom defendant planned to call to testify five working days in advance of testimony. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Defendant Not Required To Inform State Why Scientific Evidence Not Offered. — In a prosecution for discharging a firearm into an occupied building, since the defendant never intended to introduce his ballistics report or put the preparer of it on the stand, the judge had no authority to require that a copy of the report be sent to the district attorney, as the purpose of subsection (b) is not to inform the state why scientific evidence will not be offered by the defendant, but to acquaint it with scientific evidence that will be offered during the trial. State v. King, 75 N.C. App. 618, 331 S.E.2d 291, cert. denied, 314 N.C. 545, 335 S.E.2d 24, appeal dismissed, 314 N.C. 672, 335 S.E.2d 900 (1985).

Meaningful, Useful Report. — Within the meaning of this statute is the requirement that the State be provided in advance of the witness' testimony with a meaningful report which the State can use in preparation for trial. State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994), cert. denied, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994).

The State was entitled to inspect and copy incomplete personality test which provided expert witness with some "raw data," and to cross-examine expert witness on that subject. State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), cert denied, 517 U.S. 1110, 116 S. Ct. 1332, 134 L. Ed. 2d 482 (1996).

The trial court's reciprocal discovery order was upheld in light of clear statutory requirements, precedent upholding those requirements, and defendant's own request for a court order. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

No Time Limitation for Discovery. — Where the trial court ordered the prosecution to provide discovery to defendant and also ordered reciprocal discovery by defendant to the State within two weeks after the State met its deadline, as subsection (b) sets no time limitation by which a defendant must furnish the State with discovery, and defendant made no showing that the time set by the trial court was unreasonable, the trial court did not exceed its authority. State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

Probation and Parole Records. — The trial court did not violate subsection (a) of this section in ordering the Department of Corrections to provide the State with the defendant's probation and parole records. State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (1997), cert. denied, 348 N.C. 285, 501 S.E.2d 913 (1998).

Report of Expert's Examination. — By stating in its order that defense counsel must prepare a report if the expert's examination was to be used at trial, the trial court was ensuring fairness to both sides in the preparation of their case. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

Discovery of Report Not Used by Defendant. — The State was entitled to discover a copy of a psychiatrist's report on murder defendant's psychiatric condition, even though the defendant neither called the witness nor introduced the report into evidence, as the defendant had indicated his intent to call the witness. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Intent to Use Evidence. — The defendant is required to disclose evidence that he "intends" to use as of the time of the ordered disclosure; thus, the fact that he changes his mind and does not call that witness is not controlling. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Report of Psychological Examination. — The trial court acted properly in ordering production of results of an oral report of a psychological examination in the form of a written report to the State. State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997), cert. denied, 522 U.S. 918, 118 S. Ct. 306, 139 L. Ed. 2d 236 (1997).

Where defendant did not intend to introduce psychologist's report regarding the defendant at trial, the State did not have a right to discover the report. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

Once defendant admitted guilt and the capital sentencing proceeding was underway the trial court could compel defendant to disclose psychologist's report regarding the defendant to the State. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

Psychiatric Test Results and Notes. — A discovery order properly required a defense psychiatrist to produce "all of his notes," where the psychiatrist had relied on the requested materials at the defendant's competency hearing and at the sentencing hearing. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

In a death penalty case, it was not improper for the trial court to deny defendant's motion for a protective order to preclude the release to the prosecution of raw psychological data concerning defendant; the trial court merely applied G.S. 15A-905(b), which required the disclosure of raw psychological data to the State during discovery. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

The trial court's order that defendant's mental health expert prepare and disclose to the State a written report of his findings and a copy of his handwritten notes of interviews with defendant did not exceed the scope of reciprocal discovery requirements of this section nor violate defendant's attorney-client and Fifth Amendment privileges. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Reports Improperly Provided. — Although the court erred by ordering defendant's experts to provide to the State written reports of tests performed on the defendant, the error was not prejudicial to defendant's case. State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (1997), cert. denied, 348 N.C. 285, 501 S.E.2d 913 (1998).

Specific Information As to Diminished Capacity Not Required. — Trial court erred in entering a finding of fact and conclusion of law that defendant failed to provide specific information with respect to diminished capacity because no such requirement existed. State

v. Gillespie, 180 N.C. App. 514, 638 S.E.2d 481, 2006 N.C. App. LEXIS 2512 (2006), modified, aff'd, 362 N.C. 150, 655 S.E.2d 355 (2008).

Exclusion of Witness Was Not An Abuse of Discretion. — Trial court did not abuse its discretion in excluding the testimony of defendant's expert on confidential informants as notice was not given in accordance with G.S. 15A-905(c)(2), the issue could have been anticipated because defendant was aware of the use of a confidential informant, and the expert's testimony was not required by the interests of justice. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

Voir Dire in Lieu of Report. — Where defendant failed to comply with the court's order to produce a written mental health report, court properly allowed the State to conduct voir dire in lieu of the report, as it had forewarned that it would. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Section Not Violated. — Trial court did not overrule a discovery order entered under G.S. 15A-903(a)(1) by sanctioning the state for its failure to disclose a victim's statement as to what the victim told a friend, but refusing to sanction the state for failing to disclose under its continuing duty to disclose set forth in G.S. 15A-907 the friend's statement as the friend's statement was made after the discovery deadline, and the discovery order did not apply to the statement; further, the trial court properly refused to sanction the state for its failure to disclose statements made by another victim and the victims' aunt as they were also made after the discovery deadline. State v. James, — N.C. App. —, 643 S.E.2d 34, 2007 N.C. App. LEXIS 797 (2007).

Sanction for Failure to Give Notice of Defense. — Trial court's decision to allow defendant to use the defenses of accident and duress demonstrated that the court affirmatively exercised the court's discretion and precluded only those defenses that would have prejudiced the State of North Carolina from defendant's failure to timely give notice under G.S. 15A-905(c) of the defenses defendant intended to assert. Thus, the trial court's imposition of sanctions pursuant to G.S. 15A-910 by precluding defendant from asserting the defenses of voluntary intoxication and diminished capacity was not arbitrary and was not an abuse of discretion. State v. McDonald, 191 N.C. App. 782, 663 S.E.2d 462, 2008 N.C. App. LEXIS 1496 (2008).

Applied in State v. McMahon, 67 N.C. App. 181, 312 S.E.2d 526 (1984); State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

Cited in State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

§ 15A-906. Disclosure of evidence by the defendant — Certain evidence not subject to disclosure.

Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is substantially similar in its purpose to G.S. 15A-904.

CASE NOTES

Work product doctrine applies in criminal as well as civil cases. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. State v. Hardy, 293 N.C.

105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories and strategies are work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Court's Disclosure Order Held Overbroad. — By alleging in his amended motion for appropriate relief that his court-appointed attorney, the Public Defender, rendered ineffective assistance of counsel during the trial and direct appeal of his cases, defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel; therefore, as the order of the Superior Court directed the defendant to provide the state access to "all files relating to these cases" without limiting the ordered disclosure to matters relevant to issues raised by the defendant's allegations of ineffective assistance of counsel, the order of the Superior Court was overbroad and exceeded its authority. State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

Where defendant did not intend to introduce psychologist's report regarding the defendant at trial, the State did not have a right to discover the report. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

Once defendant admitted guilt and the capital sentencing proceeding was underway the trial court could compel defendant to disclose psychologist's report regarding the defendant to the State. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

Cited in State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

§ 15A-907. Continuing duty to disclose.

If a party, who is required to give or who voluntarily gives discovery pursuant to this Article, discovers prior to or during trial additional evidence or witnesses, or decides to use additional evidence or witnesses, and the evidence or witness is or may be subject to discovery or inspection under this Article, the party must promptly notify the attorney for the other party of the existence of the additional evidence or witnesses. (1973, c. 1286, s. 1; 1975, c. 166, s. 16; 2004-154, s. 7.)

OFFICIAL COMMENTARY

This important provision requires a party subject to a discovery request or order to disclose all additional information of the type requested or ordered that comes to his attention after first compliance with the discovery provisions of this Article.

The phrase "or the name of each additional witness" was left in this section inadvertently. It was not omitted when discovery of the names and addresses of witnesses was stripped from the bill.

CASE NOTES

State's affirmative duty of voluntary disclosure applies to evidence that is exculpatory from a constitutional standpoint. State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Relevant inquiry under a statutory disclosure duty is prejudice to the defendant resulting from either surprise on a material issue or where the nondisclosure hampers the preparation and presentation of the defendant's case. State v. Ginn, 59 N.C. App. 363, 296

S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Failure to Disclose Statement Which Would Have Revealed Perjury. — Where the prosecution failed to disclose to the defendants the corrected pretrial statement of the State's most crucial witness, whose credibility was the most basic issue in the case, the failure to disclose it constituted a violation of the defendants' due process rights and invalidated their convictions, since the amended statement would have revealed the witness' perjury and the production of the amended statement was requested at least six times in specific terms. Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980).

Failure to Disclose Past Conviction. — Where the State failed to disclose a 1972 conviction for credit card theft, this fact was actually known by defendant and the State's nondisclosure could not have hampered defendant's preparation or presentation of his defense. Additionally, defendant's testimony opened the door for the State's inquiry about that conviction, thereby negating any allegation of surprise. This violation did not rise to the level necessary to forbid the State's use of the evidence. State v. Blankenship, 89 N.C. App. 465, 366 S.E.2d 509 (1988).

Remedy for Failure to Comply Within Discretion of Court. — Although it appeared that the prosecution failed to comply with this section, it did not follow that the court was thereby required to prohibit the State from introducing the evidence which it had failed to disclose or that defendant was entitled to a new trial because the court permitted introduction of such evidence. Which of the several remedies available under G.S. 15A-910 should be applied in a particular case is a matter within the trial court's sound discretion. State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977).

Duty to Disclose Expert Witness. — Because the State of North Carolina voluntarily provided timely discovery, pursuant to G.S. 15A-902(a), following a request by defendant, the State was obligated to provide discovery as to its expert witness and the report by the expert witness under G.S. 15A-903. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

Disclosure of Retrograde Extrapolation Expert's Report. — Alleged error in denying defendant's motion to continue to allow defendant time to obtain a retrograde extrapolation expert after the state produced its expert's report on the Friday afternoon before the trial began could not be resolved, as it could not be determined whether defendant was prejudiced since it was unknown whether defendant or defense counsel knew that a second blood draw was taken or its results; the trial court was to determine: (1) whether the expert was listed as an expert witness in any witness list required to be disclosed to defendant under G.S. 15A-903(a)(2); (2) the date defense counsel received possession of any pre-trial order or other state's witness list; (3) whether the delivery of the expert's report to defendant's trial counsel on the eve of the trial occurred within a reasonable time prior to trial under G.S. 15A-903(a)(2); and (4) whether the state otherwise complied with G.S. 15A-903 and G.S. 15A-907. State v. Cook, 184 N.C. App. 401, 647 S.E.2d 433, 2007 N.C. App. LEXIS 1480 (2007), rev'd on other grounds, 362 N.C. 285, 661 S.E.2d 874 (2008).

Belated Disclosure of Hypnosis. — The State's failure to disclose that a witness was hypnotized was improper but was mitigated by the fact that disclosure came prior to identification testimony and comprehensive voir dire, and that the identification was not improperly tainted by the hypnosis. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

Section Not Violated. — The court did not err in allowing the State to introduce a document to show that defendant owned car allegedly used in bank robbery, the contents of which had been suppressed by a prior order, where before the trial started the bill of sale and the odometer statement were not within the possession, custody, or control of the State, but when the car dealer arrived in court with the documents they were promptly made available to defendants. Since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, this section was not violated. State v. Alston, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

Defendant was not prejudiced by the trial testimony which corrected newly discovered typographical error in the ballistic report. State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (1997).

Defendant did not preserve for review defendant's contention that the State provided discovery to defendant in short notice, as defendant only objected to the introduction of evidence regarding defendant's involvement in subsequent drug transactions. As to the objection defendant made, defendant did not show that a police report only made available to defendant at the start of the trial prejudiced the outcome of the trial. State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Additional facts were needed regarding an alleged discovery violation after the State was allowed during cross-examination of a defense witness to reference a police report that had not been produced to defendant during discovery since no determination was made as to whether a law-enforcement agency or prosecuting agency was aware of a statement of the witness, former co-defendant, contained in the report, or through due diligence should have been aware of it, and whether while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it as required by G.S. 15A-903(a)(1) and G.S. 15A-907. State v. Tuck, 191 N.C. App. 768, 664 S.E.2d 27, 2008 N.C. App. LEXIS 1495 (2008).

Applied in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Martin, 294 N.C. 702, 242 S.E.2d 762 (1978); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Williams, 71 N.C. App. 136, 321 S.E.2d 561 (1984); State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998); State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004); State v. Herrera, — N.C. App. —, 672 S.E.2d 71, 2009 N.C. App. LEXIS 126 (2009).

Cited in State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994); State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006).

§ 15A-908. Regulation of discovery — Protective orders.

(a) Upon written motion of a party and a finding of good cause, which may include, but is not limited to a finding that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders. A party may apply ex parte for a protective order and, if an ex parte order is granted, the opposing party shall receive notice that the order was entered, but without disclosure of the subject matter of the order.

(b) The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. If thereafter the court enters an order granting relief under subsection (a), the material submitted in camera must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal. (1973, c. 1286, s. 1; 1983, Ex. Sess., c. 6, s. 2; 2004-154, s. 8.)

OFFICIAL COMMENTARY

This section gives a superior court judge broad scope to deny, restrict, or defer discovery or to make other appropriate orders of a protective nature for good cause shown. Because sources for believing that harm may occur if full discovery is granted are often confidential, the section provides for submitting supporting affidavits or statements to the court for in camera inspection, and for sealing the material submitted.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Violation Not Found. — Trial court did not violate G.S. 15A-908(b) by not sealing a confidential informant's file for appellate review because G.S. 15A-908(b) governed the granting of protective orders; the state did not request a protective order because the discovery statutes, G.S. 15A-903 and G.S. 15A-904, did not require the state to disclose information about the confidential informant, whose identity was not known and who was not testifying at trial. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

Applied in State v. Beam, 70 N.C. App. 181, 319 S.E.2d 616 (1984).

Cited in State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

§ 15A-909. Regulation of discovery — Time, place, and manner of discovery and inspection.

An order of the court granting relief under this Article must specify the time, place, and manner of making the discovery and inspection permitted and may prescribe appropriate terms and conditions. (1973, c. 1286, s. 1.)

CASE NOTES

A defendant may petition the court to declare a specific time, place and manner for completing discovery. If the defendant pursues this available course of action, then, of course, the statutory time begins to run again upon the court ordered date of compliance. State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984).

Exclusion of discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier discovery, pursuant to this section. State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984).

§ 15A-910. Regulation of discovery — Failure to comply.

(a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or
(2) Grant a continuance or recess, or
(3) Prohibit the party from introducing evidence not disclosed, or
(3a) Declare a mistrial, or
(3b) Dismiss the charge, with or without prejudice, or
(4) Enter other appropriate orders.

(b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article. (1973, c. 1286, s. 1; 1975, c. 166, s. 17; 1983, Ex. Sess., c. 6, s. 3; 2004-154, s. 9.)

OFFICIAL COMMENTARY

Subsection (a) gives the judge broad and flexible powers to rectify the situation if a party fails to comply with discovery orders or provisions of the discovery Article.

Subsections (b) and (c) are meaningless, as the General Assembly elsewhere deleted the right of discovery of the names and addresses of witnesses.

CASE NOTES

Clarification was the purpose of the 1983 amendment to this section. It thus should not be construed to have changed the law so as to permit a previously prohibited sanction, but rather to have made explicit a previously implicit intent that the sanction of dismissal be among those which could be implemented by other appropriate orders. State v. Adams, 67 N.C. App. 116, 312 S.E.2d 498 (1984).

Particular Remedy Within Discretion of Trial Court. — Which of the several remedies available under this section should be applied in a particular case is a matter within the trial court's sound discretion. State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976), further review denied, 297 N.C. 178, 254 S.E.2d 37 (1979), overruled on other grounds, 312 N.C. 198, 321 S.E.2d 864 (1984); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); State v. McCoy, 303 N.C.

1, 277 S.E.2d 515 (1981); State v. Taylor, 311 N.C. 266, 316 S.E.2d 225 (1984); State v. Herring, 74 N.C. App. 326, 328 S.E.2d 23, aff'd, 316 N.C. 188, 340 S.E.2d 105 (1986).

The choice of sanction, if any, rests within the discretion of the trial court. State v. Carter, 55 N.C. App. 192, 284 S.E.2d 733 (1981); State v. Browning, 321 N.C. 535, 364 S.E.2d 376 (1988).

Imposition of the sanctions found in subdivisions (1) through (4) rests entirely within the discretion of the trial judge. State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977); State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Regulation of discovery and failure to comply determinations are within the sound discretion of the trial court. The court has broad and flexible powers to rectify the situation if a party fails to comply with discovery orders or provisions of the discovery article. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

Where a discovery order to supply defendant with certain information had been issued and the State had purported to comply with it, and no evidence of bad faith on the part of the State was shown, permitting witnesses whose names the State had failed to supply to defendant to testify and accepting photographs into evidence which also had not been supplied to defendant, were matters within the discretion of the trial judge, not reviewable on appeal in the absence of a showing of an abuse of discretion. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

It is important to note that while the statute sets out possible curative actions, it does not require the court to impose any sanction. Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court. The decision of the trial court will not be reversed absent a showing of abuse of that discretion. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Sanctions for failure to comply with the discovery procedures are permissive and are imposed in the sound discretion of the trial judge. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

The decision to employ remedies available under this section is a matter within the discretion of the trial judge and, absent abuse, is not reviewable on appeal. State v. Martin, 67 N.C. App. 265, 313 S.E.2d 15, cert. denied and appeal dismissed, 311 N.C. 405, 319 S.E.2d 278 (1984).

Because the trial court is not required to impose any sanctions for abuse of discovery orders, the question of what sanctions to impose, if any, is within the trial court's discretion, including whether to admit or exclude evidence not disclosed in accordance with a discovery order. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

The imposition of sanctions for failure to comply with discovery is entirely within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion. State v. Pigott, 320 N.C. 96, 357 S.E.2d 631 (1987).

The decision as to which sanctions to apply, or whether to apply any sanctions at all, rests with the discretion of the trial court. The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. State v. Carson, 320 N.C. 297, 357 S.E.2d 662 (1987).

The determination of what are appropriate sanctions for violation of a discovery order is within the sound discretion of the trial court. State v. Lopez, 101 N.C. App. 217, 398 S.E.2d 886 (1990).

Even if a prosecutor's actions constitute a discovery violation, a trial judge still retains broad discretion to determine if sanctions are appropriate; unless the trial judge abuses that discretion, the decision will not be reversed. State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001).

When the State tried to introduce lab reports in a drug case without prior disclosure to defendant, and the trial court offered defendant a recess to allow independent testing of the substance, as well as an opportunity to request a mistrial, and ordered the State to provide full discovery to defendant, who was then allowed time to review the reports and voir dire the lab agents, the trial court's refusal to exclude the reports was not an abuse of discretion. State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

When the State did not timely disclose defendant's statement to a jail administrator, under G.S. 15A-903(a)(2), its admission on rebuttal was not an abuse of the trial court's discretion, under G.S. 15A-910, because the trial court allowed a two-day continuance to allow counsel to discuss the statement with defendant and defendant's psychiatric expert, the statement was not actually introduced until 18 days after it was disclosed, the prosecutor disclosed the statement as soon as he became aware of it, and there was no evidence of the prosecutor's bad faith. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

In defendant's prosecution for trafficking in cocaine by possession and carrying a concealed weapon, when the state allegedly violated G.S. 15A-903(a)(1) by not providing the defense with photographs taken of defendant's tattoos, which were allegedly evidence of defendant's gang affiliation, it was not an abuse of discretion under G.S. 15A-910(b) for the trial court to admit the photographs because the court was not required to exclude the evidence even had the court found that the state violated discovery requirements, as the court had to consider the totality of the circumstances, and given the overwhelming evidence of defendant's guilt, the court was within the court's rights to hold that these few photographs need not be excluded. State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

And is not reviewable on appeal in the absence of a showing of abuse. State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976), further review denied, 297 N.C. 178, 254 S.E.2d 37 (1979), overruled on other grounds, 312 N.C. 198, 321 S.E.2d 864 (1984); State v. Thomas, 291 N.C. 687, 231 S.E.2d 585 (1977); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Carter, 55 N.C. App. 192, 284 S.E.2d 733 (1981); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982); State v. Taylor, 311 N.C. 266, 316 S.E.2d 225 (1984); State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

As this section is permissive and not mandatory and the remedy for failure to provide discovery rests within the trial court's discretion, its ruling is not reviewable on appeal absent an abuse of discretion. State v. Dukes, 305 N.C. 387, 289 S.E.2d 561 (1982).

The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Defendant's Duty to Inform Trial Court of Potential Unfair Surprise. — A major purpose of the discovery procedures of this chapter is to protect the defendant from unfair surprise. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

Exclusionary Sanction Is Permissive. — The exclusionary sanction imposed by the Criminal Procedure Act for failure to comply with discovery orders is permissive rather than mandatory. State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981).

By its express terms, this section authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it. This is left to the discretion of the trial court. State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977), overruled on other grounds, State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

The admission or exclusion of evidence not disclosed in accordance with a discovery order is left in the discretion of the trial court. State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978).

The exclusion of evidence for the reason that the party offering it has failed to comply with statutes granting the right of discovery, or with an order of the court issued pursuant thereto, rests in the discretion of the trial court. State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

While this section provides for several possible curative actions, the trial court is not required to impose any sanctions. State v. Taylor, 311 N.C. 266, 316 S.E.2d 225 (1984); State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

Sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Discretionary rulings of a trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the State in its noncompliance with the discovery requirements. State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001).

Trial Court's Sanction Authority Does Not Apply to Actions of Non-Parties. — Defendant, who was convicted of the first-degree murder of his girlfriend, was entitled to a new trial because the trial court exceeded its authority under G.S. 15A-910(a)(3), when it precluded defendant from introducing the testimony of two mental health experts as a sanction for the experts' failure to provide mental health reports to the State, given that the statute did not authorize the trial court to sanction defendant based on the actions of non-parties. State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355, 2008 N.C. LEXIS 29 (2008).

By its plain meaning, G.S. 15A-910(a)(3), ensures that in criminal proceedings the trial court has the authority to require both the State and defendants to comply with North Carolina's discovery statutes and any orders entered pursuant to those statutes. To this end, G.S. 15A-910 authorizes a trial court to impose sanctions on the parties in addition to exercising the court's inherent contempt powers; however, nothing in the language of the statute indicates that this authority extends so far as to punish either the State or a criminal defendant for the actions of non-parties. State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355, 2008 N.C. LEXIS 29 (2008).

Failure to Impose Sanctions Not Improper. — Where although the trial judge did not impose any sanctions for State's failure to comply with discovery, he expressed his displeasure with State's tactics with respect to discovery, and employed several of the curative actions suggested by this section, and at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that State had failed to comply with the law, the court's failure to impose sanctions was not an abuse of discretion. State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986).

In prosecution for first-degree sexual offense and taking indecent liberties with children, the defendant was not prejudiced by the admission of the deputy's testimony that the defendant stated his birthdate during the booking procedure, where there was ample evidence aside from defendant's statement from which the jury could have found that defendant was at least 16 years of age at the time of the crimes; therefore, even assuming that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to this section, the error was harmless. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Trial court did not err in allowing medical technician to testify concerning a matter not provided in discovery; this section gives the trial court broad discretionary powers, and since the court granted a recess in order to allow counsel time to meet the evidence, no abuse of discretion was committed by the trial court. State v. Fenn, 94 N.C. App. 127, 379 S.E.2d 715, cert. denied, 325 N.C. 548, 385 S.E.2d 504 (1989).

The courts are bound by the discretionary decision of a local board of education in selecting and determining the land necessary to construct a school, school building, school bus garage, a parking area, an access road suitable for school buses or "other school facilities" unless that decision is an arbitrary abuse of discretion or disregard of law. Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995), aff'd, 342 N.C. 648, 466 S.E.2d 717, rehearing denied, 343 N.C. 128, 468 S.E.2d 778 (1996), cert. denied, 519 U.S. 976, 117 S. Ct. 412, 136 L. Ed. 2d 325 (1996).

Where defendant could not use duress as a defense to the charge of first-degree murder and where he failed to produce sufficient evidence that he was coerced into participating in the kidnapping and robbery of the victim, the trial court correctly concluded that a diary which indicated that the accomplice was a violent person did not contain any exculpatory evidence which could aid defendant and, therefore, denied his motions to compel production and to sanction the State for failure to preserve and disclose exculpatory evidence pursuant to this section. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Trial court did not err by admitted photos first shown to defendant on the morning of trial, in violation of a discovery order, as defendant had been on notice of the existence of the photos and was not surprised by their introduction. State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Trial court was not required to impose sanctions for late discovery, but instead, it was a matter of discretion for the trial judge; the trial court was affirmed where no sanction was imposed for the State's late disclosure of several statements. State v. Love, 152 N.C. App. 608, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 66 (2003).

During discovery, a victim testified that he had never revealed the contents of his telephone conversation with defendant to the State; defendant opened the door on cross-examination by asking the victim about later conversations between defendant and the victim. Defendant knew that the State had evidence that he had attempted to bribe a witness and should not have been surprised when the victim testified defendant had attempted to bribe him; defendant could not now reasonably complain that the victim's testimony amounted to unfair surprise. State v. Farmer, 177 N.C. App. 710, 630 S.E.2d 244, 2006 N.C. App. LEXIS 1201 (2006).

Trial court did not abuse its discretion in allowing the testimony from witnesses disclosed by the State of North Carolina on the eve of trial when defendant did not request a recess or continuance to address the newly disclosed evidence. State v. Herrera, — N.C. App. —, 672 S.E.2d 71, 2009 N.C. App. LEXIS 126 (2009).

Trial court acted within its discretion in refusing to impose sanctions against the State for introducing the defendant's pretrial statement, even though he was not provided with the tape recorded version of the statement, where the defendant was furnished the substance of the defendant's statement by way of a copy of the officer's written report months before trial the defense counsel became aware of the existence of the tape recording three days before the introduction of the written report, and on the same date, defense counsel was given an opportunity to listen to the tape, but she neither had the tape recording analyzed nor scheduled a future date upon which to have it analyzed, nor did the defense counsel call the officer, who was present throughout the interview, in an attempt to clarify any inaudible portions of the recording. State v. Herring, 322 N.C. 753, 370 S.E.2d 363 (1988).

Trial court did not abuse its discretion in failing to sanction the State for failure to disclose the results of footprint comparisons, where when the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. State v. Herring, 322 N.C. 753, 370 S.E.2d 363 (1988).

Failure to Comply Held Harmless Error. — Any error in the failure of the State to comply with discovery in robbery case was harmless beyond a reasonable doubt. State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (1993).

Trial court's denial of defendant's motion for a continuance was an abuse of the court's discretion under G.S. 15A-910(a)(2) because the State of North Carolina violated G.S. 15A-903(a)(2) by failing to provide defendant with required discovery as to an expert witness reasonably before trial. However, the error was not prejudicial to defendant given the evidence against defendant. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

No Error Where Trial Court Cured Possible Prosecutor's Noncompliance by Imposition of Sanctions. — Assuming arguendo that agent's notes on his examination of defendant's pubic hairs in a rape case were discoverable and that the State should have produced them pursuant to defendant's discovery request, the trial court cured the prosecutor's failure to comply by its generous imposition of three statutory sanctions by ordering the prosecutor to allow inspection of agent's notes, granted defendant a recess and offered defendant an additional opportunity to cross-examine agent about the notes. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Court's Choice of Sanction Found Appropriate. — Even if the State's failure to inform defendant about the second fingerprint did not comply with the discovery article, the court's refusal to either suppress the evidence or continue the trial was not necessarily error, since the court did sanction the State in one of the ways authorized by the statute (by granting a recess and requiring the State's witness to confer with defense counsel and to be interrogated under oath before he testified) and that way was neither inappropriate nor beyond the court's discretion. State v. Hall, 93 N.C. App. 236, 377 S.E.2d 280, cert. denied, 324 N.C. 579, 381 S.E.2d 777 (1989).

The trial court acted appropriately under this section where, after considering the parties' assertions regarding their differing interpretations of the State's offer to disclose "everything" it had, the trial court allowed the previously undisclosed witness testimony but ordered a recess before cross-examination to allow defendant to prepare to question the witness. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Trial court's decision to allow defendant to use the defenses of accident and duress demonstrated that the court affirmatively exercised the court's discretion and precluded only those defenses that would have prejudiced the State of North Carolina from defendant's failure to timely give notice under G.S. 15A-905(c) of the defenses defendant intended to assert. Thus, the trial court's imposition of sanctions pursuant to G.S. 15A-910 by precluding defendant from asserting the defenses of voluntary intoxication and diminished capacity was not arbitrary and was not an abuse of discretion. State v. McDonald, 191 N.C. App. 782, 663 S.E.2d 462, 2008 N.C. App. LEXIS 1496 (2008).

Trial Judge Should Not Encourage by Court Order Requirement That State Furnish Witness List. — It was never the intention of the General Assembly when it enacted this Article to require the district attorney to furnish the names and addresses of witnesses the State intended to call. It follows that trial judges should not encourage, by court order, what the legislature specifically rejected during consideration of the legislation. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Where State undertook to make voluntary discovery when it responded to the request by one defendant for any statements made by his codefendant, the State's voluntary response was deemed under G.S. 15A-902(b) to have been made under an order of court. As a result, the trial court properly could have invoked the sanctions provided in this section for the State's failure to provide defendant with a copy of the pretrial statement of his codefendant in a timely manner. State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987).

Not Error to Allow Recess So Defense Counsel Could Question Witness. — Where it became evident at trial that the State had not complied with a discovery order by failing to advise defendant of tests performed on the alleged murder weapon, it was not error for the trial court to declare a recess and give defendant's attorney an opportunity to question the witness rather than to prohibit the State from introducing the evidence not disclosed. State v. Mayo, 40 N.C. App. 626, 253 S.E.2d 276 (1979).

Declaration of Mistrial Is in Court's Discretion. — It should be left to the discretion of the trial court as to whether a mistrial is an appropriate order within the meaning of subdivision (4) of this section for the State's failure to comply with a discovery order. State v. Sowden, 48 N.C. App. 570, 269 S.E.2d 274 (1980), decided prior to 1983 (Ex. Sess.) amendment.

Dismissal with Prejudice. — Where the prosecution refused to comply with disclosure order, the court did not err by dismissing with prejudice the charges against defendant. State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994).

Sanctions Held An Abuse of Discretion. — Court abused its discretion for dismissing murder case under this section, where there was no evidence that witness made a statement as defined in G.S. 15A-903; therefore the trial court was not authorized to impose sanctions for violating this section. State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994).

Trial court abused its discretion in prohibiting defendant's mental health defense as, inter alia, defendant was not required to provide specific information with respect to diminished capacity, defendant did not violate an order to produce reports where the order was only oral and never reduced to writing, and the state, which also did not comply with the deadline, was not prejudiced by the delay. State v. Gillespie, 180 N.C. App. 514, 638 S.E.2d 481, 2006 N.C. App. LEXIS 2512 (2006), modified, aff'd, 362 N.C. 150, 655 S.E.2d 355 (2008).

Refusal to Grant Mistrial or Continuance Not Abuse of Discretion. — Refusal of court to grant a mistrial or continuance based on failure of the State to disclose that a seized medicine bottle within its possession had been subjected to an unsuccessful fingerprint analysis held not an abuse of discretion. State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (1995).

Applied in State v. Cross, 293 N.C. 296, 237 S.E.2d 734 (1977); State v. Ruof, 296 N.C. 623, 252 S.E.2d 720 (1979); State v. Locklear, 41 N.C. App. 292, 254 S.E.2d 653 (1979); State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); State v. Jeffries, 55 N.C. App. 269, 285 S.E.2d 307 (1982); State v. Jarvis, 56 N.C. App. 678, 290 S.E.2d 228 (1982); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984); State v. Thibodeaux, 341 N.C. 53, 459 S.E.2d 501 (1995); State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321, 1999 N.C. App. LEXIS 1239 (1999); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000).

Cited in State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Lovette, 299 N.C. 642, 263 S.E.2d 751 (1980); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981); State v. Poplin, 56 N.C. App. 304, 289 S.E.2d 124 (1982); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989); State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991); State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991); State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (1994); State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994); State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995); State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995); State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998); State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006); State v. Mitchell, — N.C. App. —, 671 S.E.2d 340, 2009 N.C. App. LEXIS 10 (2009).

§§ 15A-911 through 15A-920: Reserved for future codification purposes.

ARTICLE 49.

Pleadings and Joinder.

OFFICIAL COMMENTARY

North Carolina has previously allowed just four "pleadings" for the prosecution of criminal cases: warrants and criminal summonses in misdemeanor cases and informations and indictments in felony cases. To this could be added the "citation" in traffic cases — actually just an unsworn warrant form. The term "pleadings" has been used infrequently in criminal cases.

The Commission makes no change in the two pleadings used in felony cases. It is in misdemeanor cases that it recommends some change in the pleadings used. A second look will reveal that the real change is substantially less than that suggested by a first glance.

The traditional warrant for arrest in North Carolina has contained an affidavit which in fact was not more than a conclusory charge of the crime — in effect a pleading. A review of North Carolina cases will reveal that questions of validity of the warrant have most frequently focused on this "sufficiency of the pleading" aspect of the warrant.

The case of Whiteley v. Warden of Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), made it clear that such a conclusory charge without more did not provide a magistrate with sufficient facts to support a finding of probable cause, and that there would have to be a showing of more facts. However, it should be noted that that additional showing of facts showing probable cause has no direct bearing on the "pleading" function of the warrant. We still need a "charge" of the crime, and for that reason the warrant format adopted in this statute contains both the traditional "charge" of the crime and provisions for the supplemental information necessary to satisfy Whiteley. See Article 17, Criminal Process.

The Commission followed the concept of trying to put together process from similar components, varying the forms of process only when appropriate. Thus the warrant for arrest contains the statement of the crime based upon a showing of probable cause and an order for arrest. G.S. 15A-304. The criminal summons contains the statement of the crime, showing of probable cause, and order to appear. G.S. 15A-303. When arrest is without a warrant, the magistrate, at the initial appearance, is directed to determine probable cause and if it is present to prepare a statement of the crime and enter an order of commitment or bail. G.S. 15A-511. If the crime is within the magistrate's jurisdiction for trial, he is directed to prepare a statement of the crime.

This "statement of the crime" is the same in each of these. It is essentially similar to the old warrant procedure and will serve as the "pleading" for the prosecution of misdemeanor cases — just as the indictment serves as the "pleading" in felony cases.

It should be noted that the citation (G.S. 15A-302) requires only that the crime be "identified," less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the Commission simply gives the defendant the right to object and require a more formal pleading. G.S. 15A-922(c).

The "statement of charges" is new. Being able to use the warrant as the pleading has worked well in this State, and saved much solicitorial manpower as compared to jurisdictions which require the drafting of a new misdemeanor pleading in each instance. It was felt that there is some loss in trying to "amend" the warrant, and sometimes issue a new warrant, when what is desired is a correct statement of the charges — a proper pleading. Since the warrant exists primarily as authority to arrest, there is some inconsistency of basic purpose and there is frequently a problem in getting all appropriate changes written in. Thus the "statement of charges" is created, as a new pleading, to be used when there is some problem with the original process as a pleading. As such it takes the place of amending the warrant (or amending other process which may also be used as the pleading). When filed prior to arraignment, it also may charge additional crimes. That simple idea requires some complexity for statement in statutory form, but that is the underlying idea in G.S. 15A-922. It should be relatively easy to prepare a statement of charges; a form should be sufficient in many cases.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-921. Pleadings in criminal cases.

Subject to the provisions of this Article, the following may serve as pleadings of the State in criminal cases:

(1) Citation.
(2) Criminal summons.
(3) Warrant for arrest.
(4) Magistrate's order pursuant to G.S. 15A-511 after arrest without warrant.
(5) Statement of charges.
(6) Information.
(7) Indictment. (1973, c. 1286, s. 1; 1975, c. 166, s. 18.)

CASE NOTES

Citation May Serve as an Indictment. — Citation may serve as the State's pleading in all criminal cases save those initiated in the superior court division. State v. Jones, 157 N.C. App. 472, 579 S.E.2d 408, 2003 N.C. App. LEXIS 751 (2003).

Cited in State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

§ 15A-922. Use of pleadings in misdemeanor cases generally.

(a) Process as Pleadings. — The citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation. When a statement of charges is filed it supersedes all previous pleadings of the State and constitutes the pleading of the State.

(b) Statement of Charges.

(1) A statement of charges is a criminal pleading which charges a misdemeanor. It must be signed by the prosecutor who files it.

(2) Upon appropriate motion, a defendant is entitled to a period of at least three working days for the preparation of his defense after a statement of charges is filed, or the time the defendant is first notified of the statement of charges, whichever is later, unless the judge finds that the statement of charges makes no material change in the pleadings and that no additional time is necessary.

(3) If the judge rules that the pleadings charging a misdemeanor are insufficient and a prosecutor is permitted to file a statement of charges pursuant to subsection (e), the order of the judge must allow the prosecutor three working days, unless the judge determines that a longer period is justified, in which to file the statement of charges, and must provide that the charges will be dismissed if the statement of charges is not filed within the period allowed.

(c) Objection to Trial on Citation. — A defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading. The prosecutor must then file a statement of charges unless it appears that a criminal summons or a warrant for arrest should be secured in order to insure the attendance of the defendant, and in addition serve as the new pleading.

(d) Statement of Charges upon Determination of Prosecutor. — The prosecutor may file a statement of charges upon his own determination at any time prior to arraignment in the district court. It may charge the same offenses as the citation, criminal summons, warrant for arrest, or magistrate's order or additional or different offenses.

(e) Objection to Sufficiency of Criminal Summons; Warrant for Arrest or Magistrate's Order as Pleading. — If the defendant by appropriate motion objects to the sufficiency of a criminal summons, warrant for arrest, or magistrate's order as a pleading, at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges, but a statement of charges filed pursuant to this authorization may not change the nature of the offense.

(f) Amendment of Pleadings prior to or after Final Judgment. — A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.

(g) Pleadings When Misdemeanor Prosecution Initiated in Superior Court. — When the prosecution of a misdemeanor is initiated in the superior court as permitted by G.S. 7A-271, the prosecution must be upon information or indictment.

(h) Allegations in Superior Court of Prior Convictions. — When charges in the district court involve allegations of prior convictions and there is an appeal to the superior court for trial de novo, a statement of charges must be filed in the superior court to charge the offense in the manner provided in G.S. 15A-928. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 770; 1985, c. 689, s. 6.)

CASE NOTES

Editor's Note. *— Some of the cases cited below were decided under former law.*

Prerequisites of Valid Warrant. — A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Effect of Defects in Warrant. — Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Lack of Jurisdiction. — Because misdemeanor charges were not included in an indictment, as required by G.S. 15A-922(g), a superior court did not have jurisdiction to try them under G.S. 7A-271. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Amendment of Warrant. — This section conforms to the long-held principle in this State that an amendment to a warrant under which a defendant is charged is permissible as long as the amended warrant does not charge the defendant with a different offense. State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

In a trial de novo in the superior court upon a warrant alleging death by vehicle, the trial court did not err in allowing the State to amend the warrant at the close of the State's evidence by striking an allegation of "following too closely" and adding an allegation of "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)," since the nature of the offense with which the defendant was charged, death by vehicle, was not changed by the amendment. State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

A fatally defective warrant cannot be amended; instead of issuing an amendment, the State should file a statement of charges to rectify the situation. State v. Madry, 140 N.C. App. 600, 537 S.E.2d 827, 2000 N.C. App. LEXIS 1240 (2000).

Statutory right to object to trial on citation applies only to the court of original jurisdiction. State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982).

Once jurisdiction had been established and defendant had been tried in district court, he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court. State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982).

While defendant was entitled to have the State file a statement of charges if he objected to being tried by citation, where defendant did not object to trial by citation in the court of original jurisdiction he was no longer entitled to assert that right. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Further Prosecution After Previous Judgment Vacated. — Where verdict and judgment were vacated because the warrant was fatally defective, this did not bar further prosecution of defendant if the solicitor (now prosecutor) deemed it advisable. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Warrants Held Insufficient to Be Treated as an Information. — See State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Error in Name of Person to Be Arrested. — Where, in the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell," the instrument did not meet the requirement that it be directed to a lawful officer commanding the arrest of the accused. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Failure to Name Person Assaulted. — An instrument setting forth the charge of assault by the use of the words "assault on an officer" to identify the person assaulted was not sufficient to charge the offense of assault. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Resisting Arrest. — A North Carolina uniform traffic ticket setting forth the charge of resisting arrest by using only the two words "resist arrest" was not sufficient to charge the offense. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Applied in State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980); State v. Killian, 61 N.C. App. 155, 300 S.E.2d 257 (1983); State v. Reeves, 62 N.C. App. 219, 302 S.E.2d 658 (1983); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

Cited in State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984); In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994); State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

(a) Prosecution on Information or Indictment. — The pleading in felony cases and misdemeanor cases initiated in the superior court division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. 15A-642. If there is a waiver, the pleading must be an information. A presentment by the grand jury may not serve as the pleading in a criminal case.

(b) Form of Information or Indictment. — An information and a bill of indictment charge the crime or crimes in the same manner. An information has entered upon it or attached to it the defendant's written waiver of a bill of indictment. The bill of indictment has entered upon it the finding of the grand jury that it is a true bill.

(c) Waiver of Indictment. — The defendant may waive a bill of indictment as provided in G.S. 15A-642.

(d) Amendment of Information. — An information may be amended only with the consent of the defendant.

(e) No Amendment of Indictment. — A bill of indictment may not be amended. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section provides for the use of informations and indictments in felony cases and in misdemeanor cases initiated in the superior court. The pleading provisions set out here must be read in conjunction with the provisions for the grand jury (Article 31) and the indictment (Article 32).

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former law.*

This statute has been construed to mean only that an indictment may not be amended in a way which would substantially alter the charge set forth in the indictment. Thus, for example, where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment. State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994).

An indictment may not be amended pursuant to subsection (e); however, this statute has been construed to mean that an indictment may not be amended in a way which would substantially alter the charge set forth in the indictment. State v. Sisk, 123 N.C. App. 361, 473 S.E.2d 348 (1996), aff'd in part and discretionary review improvidently allowed in part, 345 N.C. 749, 483 S.E.2d 440 (1997).

Because the indictment charging a first-degree sexual offense included the terms "feloniously" and "against the victim's will," the charge was sufficient to charge first-degree sexual offense and was not substantially altered by the addition of the term by force; thus, the trial court did not err in allowing the amendment pursuant to G.S. 15A-923(e). State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Adding an aggravating factor to a charge of operation of a motor vehicle to elude arrest, which resulted in a misdemeanor charge being elevated to a felony, substantially altered the charge in the original indictment, and the judgment was arrested where the trial court improperly allowed the State to so amend the indictment. State v. Moses, 154 N.C. App. 332, 572 S.E.2d 223, 2002 N.C. App. LEXIS 1452 (2002).

Change of Address on Indictment. — The trial court did not violate this section when it allowed the State's amendment to an indictment for keeping and maintaining a dwelling for the use of a controlled substance to correct the address from "919 Dollard Town Road" to "929 Dollard Town Road." State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000).

Trials upon presentments have been abolished, and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

The experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute. Since the adoption of the act of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

Misdemeanor Cannot Be Tried Initially in Superior Court Except upon Indictment. — Under the statute and N.C. Const., Art. I, § 22, a person charged with the commission of a misdemeanor cannot be tried initially in the superior court except upon an indictment found by a grand jury, unless he waives indictment in accordance with regulations prescribed by the legislature. State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953).

Trial in superior court upon the original warrant is a nullity where there has been no conviction by an inferior court having jurisdiction. State v. Evans, 262 N.C. 492, 137 S.E.2d 811 (1964).

Where the defendant pleads not guilty to a misdemeanor, the requirements for a waiver of indictment and for trial upon an information signed by the solicitor (now prosecutor) are the same as in noncapital felony cases. State v. Bethea, 272 N.C. 521, 158 S.E.2d 591 (1968); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972).

An indictment may not be amended. State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

Limited Amendment of Indictment Permitted. — Bill of indictment may not be amended in a manner which substantially altered the charge set forth, however, if the proof was in line with the indictment, an amendment would not substantially alter the charge within the meaning of G.S. 15A-923. State v. Parker, 146 N.C. App. 715, 555 S.E.2d 609, 2001 N.C. App. LEXIS 1080 (2001).

There could be no amendment to a bill of indictment if the change in the indictment would substantially alter the charge set forth in the indictment; a non-essential variance was not fatal to the charged offense. State v. Brady, 147 N.C. App. 755, 557 S.E.2d 148 (2001).

Term "amendment" in subsection (e) is defined as any change in the indictment which would substantially alter the charge set forth in the indictment. State v. Carrington, 35 N.C. App. 53, 240 S.E.2d 475, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978); State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982); State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986); State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990); State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990).

Amending Typographical Error. — Where defendant was charged in an arrest warrant and a bill of indictment for felonious assault, amending a mere typographical error in the bill of indictment involving the case number did not alter the charge in any way and was not violative of this section. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982).

Change in Allegation of Ownership. — Deletion by trial court of the words, "Mike Frost, president" from indictments charging defendant with embezzlement to change ownership from Mike Frost, an individual, to Petroleum World, Inc., a corporation, was a substantial alteration of the indictment prohibited by subsection (e) of this section. State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

Correction of Victim's Name. — Change to indictments which had stated victim's name as Pettress Cebron to correctly reflect the victim's name as Cebron Pettress was not an amendment within the meaning of subsection (e) of this section, and the trial court properly allowed this change. State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990).

Where a change in the name of the victim substantially altered the charge in the indictment, the trial court was without authority to allow the amendment. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

A change in defendant's name, adding one letter, was not a substantial alteration and did not impermissibly alter the charge in the original indictment. State v. Grigsby, 134 N.C. App. 315, 517 S.E.2d 195 (1999), rev'd on other grounds, 351 N.C. 454, 526 S.E.2d 460 (2000).

Amendment to an indictment which corrected the misspelling of a victim's name was permissible since it did not substantially alter the charge in the original indictment. State v. McNair, 146 N.C. App. 674, 554 S.E.2d 665, 2001 N.C. App. LEXIS 1061 (2001).

State was properly permitted to amend indictments to correct the name of the victim after the state had rested its case, as defendant suffered no confusion or surprise as to whom defendant was charged with having murdered. State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459, 2007 N.C. App. LEXIS 581 (2007).

Deleting One of Two Victims' Names Allowable. — G.S. 15A-923(e) prohibits indictment amendments which substantially alter the charge set forth in the indictment; the deletion of one of two victim's names from the indictment at trial did not change the degree or nature of the charged offense of armed robbery and did not prejudice defendant's theory of defense; thus, the trial court properly allowed the amendment. State v. Ingram, 160 N.C. App. 224, 585 S.E.2d 253, 2003 N.C. App. LEXIS 1731 (2003).

The failure to accurately state the date or time an offense is alleged to have occurred does not invalidate a bill of indictment, nor does it justify reversal of a conviction obtained thereon. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

The State may prove that an offense charged was committed on some date other than the time named in the indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984).

Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment, without the necessity of a motion to change the bill. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Changing the dates in the indictment in a statutory rape case to expand the time frame did not substantially alter the charge set forth in the indictment. State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Change in County on Indictment. — Where the defendant could not have been misled or surprised as to the nature of the charges against him, the substitution of Mitchell County for Watauga County did not amount to an impermissible amendment of the indictment under subsection (e) of this section, as it did not alter the charge in the indictment. State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990).

Change of Date on Indictment. — In prosecution for incest, where although the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which a certain individual visited the defendant's residence, the change on the indictment of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Trial court did not err in allowing State's oral motion to amend conspiracy indictments, where indictments initially charged that conspiracies occurred on or about May 6, 1987, through May 12, 1987, and amended indictments changed the time of the conspiracies to a period beginning on April 19, 1987, until May 12, 1987, as the conspiracy charges were not substantially altered by changing the dates recited in the indictments. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989).

It was the fact that another felony was committed, not its specific date, which was the essential question in habitual felon indictment; therefore, because date alleged in indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the state to change a date in the habitual felon indictment. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

Change of date in indictment was not an amendment proscribed by this section. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732, 1999 N.C. App. LEXIS 619 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 370 (1999).

Amendment of the date of the offense appearing on the indictment to accurately reflect the date of the offense rather than the date of the arrest did not amount to a substantial alteration of the indictment since time was not an essential element of the crime of obtaining property by false pretenses. State v. May, 159 N.C. App. 159, 583 S.E.2d 302, 2003 N.C. App. LEXIS 1430 (2003).

In a prosecution for obtaining property by false pretenses, in violation of G.S. 14-100, the trial court properly granted the State's motion to join two offenses, pursuant to G.S. 15A-926(a), because a transactional connection between the offenses was evidenced by a common modus operandi, the short time lapse between the criminal activity, and similar circumstances in victim, location, and motive; the trial court also properly granted the State's motion, pursuant to G.S. 15A-923(e), to amend the indictment to change the date of the charged offense, as the controlling precedent held that such a change was permissible, and properly denied defendant's motion to dismiss for insufficient evidence, pursuant to G.S. 15A-954, as the State produced sufficient evidence that a pawn shop owner was actually deceived by defendant's false representation that he owned stolen cameras. State v. Simpson, 159 N.C. App. 435, 583 S.E.2d 714, 2003 N.C. App. LEXIS 1531 (2003), aff'd, 357 N.C. 652, 588 S.E.2d 466 (2003).

State was properly permitted to amend the dates alleged on each indictment because time as not an essential element of the crimes of first-degree sex offense, attempted first-degree sex offense, and taking indecent liberties; therefore, defendant was not misled or surprised at the nature of the charges. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Trial court did not err in allowing the state's motion to amend the indictment by changing the alleged offense date because time was not a specific element of the offense charged, the state presented evidence of defendant's conduct during all the relevant periods, and the victim testified that all acts occurred while she was under the age of 15; thus, defendant was provided sufficient notice to present an alibi or reverse alibi defense. State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006), cert. denied, appeal dismissed, 361 N.C. 436, 649 S.E.2d 896 (2007).

Because the date of the offense was not an essential element of the offense of possession of a firearm by a felon in G.S. 14-415.1, the state was properly allowed to amend the indictment under G.S. 15A-923. State v. Coltrane, 188 N.C. App. 498, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008), review denied, 362 N.C. 476, 666 S.E.2d 760 (2008).

Trial court properly allowed the State to amend the indictments to change the date of each count because defendant did not present an alibi defense and time was not an element of the offense of third degree sexual exploitation of a minor under G.S. 14-190.17A. State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (2008).

Moving a Phrase. — Amendment to indictment which moved the phrase "a deadly weapon" was permissible because it did not substantially alter the charge in the original indictment and because the original indictment was sufficient to allege that the cell floor and bars were deadly weapons. State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994).

The change made in the indictment from "knife" to "firearm" did not alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury, and did not violate this section. State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991), cert. denied, 331 N.C. 120, 414 S.E.2d 764 (1992).

Change in Type of Drug Paraphernalia Possessed by Defendant. — Trial court erred in denying defendant's motion to dismiss that part of the indictment that charged his violation of the drug paraphernalia statute by possessing "drug paraphernalia, to wit: a can designed as a smoking device" as no evidence existed in the record or was shown at trial to support that assertion. As a result, the State's motion to amend the indictment to charge that the possession involved "drug paraphernalia, to wit: a brown paper container" was impermissible because it substantially altered the charge set forth in the indictment and was not the limited amendment of an indictment that was permitted. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

Change in Rape Indictment Permitted. — Where indictments alleged offense was committed against person of "Regina Lapish Foster" and indictment for rape used name "Regina Lapish," but at no time was defendant misled or surprised as to nature of charges against him, trial court did not err in allowing State to change rape indictment by substituting the name of "Regina Lapish Foster" for name of "Regina Lapish"; addition of alleged victim's last name to one of four indictments was not amendment as it did not substantially alter charge set forth in indictment. State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988), cert. denied, 328 N.C. 273, 400 S.E.2d 459 (1991).

Trial court did not err in amending the indictments for statutory rape and statutory sexual offense because the amendment of the indictments related to defendant's age, not the manner and means by which the crime was perpetrated. Defendant could not have been misled or surprised as to the nature of the charges and the respective punishment because defendant knew that he was at least 30 years old and was therefore, aware that G.S. 14-27.7A(b) did not apply to him. State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003).

Citation May Serve as an Indictment. — Citation may serve as the State's pleading in all criminal cases save those initiated in the superior court division. State v. Jones, 157 N.C. App. 472, 579 S.E.2d 408, 2003 N.C. App. LEXIS 751 (2003).

Amendment of Indictment Permitted. — Where defendant had previously stipulated to a prior conviction and did not argue a lack of notice of the hearing at trial, the state's requested corrections to the indictment, as to the date and county of the prior conviction, did not constitute an amendment and thus, the trial court did not err in denying defendant's motion to quash. State v. Lewis, 162 N.C. App. 277, 590 S.E.2d 318, 2004 N.C. App. LEXIS 130 (2004).

Because a showing of a taking is not a necessary element of the crime of robbery with a dangerous weapon, the amendment of the indictment against defendant from attempted robbery with a dangerous weapon to robbery with a dangerous weapon sufficiently apprised defendant of the charge against him with enough certainty to have enabled him to prepare his defense and was not in error; further, since the classifications and punishments of the crimes of attempted robbery with a dangerous weapon and robbery with a dangerous weapon are identical, the amendment to defendant's indictment did not deprive the trial court of knowledge as to the judgment to pronounce in the event of conviction since the amendment did not substantially alter the charge. State v. Van Trusell, 170 N.C. App. 33, 612 S.E.2d 195, 2005 N.C. App. LEXIS 886 (2005), cert. denied, — N.C. —, 620 S.E.2d 196 (2005).

Amendment of an indictment alleging robbery with a dangerous weapon to remove allegations concerning the amount of money taken during the robberies was permissible because the amendment did not constitute substantial alterations in that the value of the property taken was not an element of the offense but merely surplusage. State v. McCallum, 187 N.C. App. 628, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007).

In a case in which the defendant was prosecuted for stalking and for having previously been convicted of stalking, the State was properly allowed to amend the indictment to place the allegation of the prior offense in a count separate from that of the current offense because the amendment was not a substantial alteration of the charge, prohibited by G.S. 15A-923(e); the amendment merely placed the last two sentences of the single count in the original indictment into a separate count, to comply with G.S. 15A-928, and defendant had prior notice that the State alleged defendant's prior conviction and intended to prove that conviction, so defendant had the opportunity to prepare a defense. State v. Stephens, 188 N.C. App. 286, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008).

Amendment of Indictment Not Permitted. — This statute has been interpreted to mean that an indictment may not be amended in a way which would substantially alter the charge set forth in the indictment. It was error for a trial court to allow the prosecution to amend a fatally defective indictment for larceny that failed to state the name of the legal entity that purportedly owned the property that defendant took. State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408, 2004 N.C. App. LEXIS 128 (2004).

Trial court erred in allowing the State to amend the indictment because the allegations in the original felonious breaking and entering indictment did not encompass the elements of assault with a deadly weapon with the intent to kill or assault with a deadly weapon inflicting serious injury; therefore, the indictment did not provide defendant notice of assault allegations. State v. Silas, 168 N.C. App. 627, 609 S.E.2d 400, 2005 N.C. App. LEXIS 456 (2005), aff'd in part, modified in part, 360 N.C. 377, 627 S.E.2d 604 (2006).

When the prosecution amended an indictment for felonious breaking and entering in such a manner that the defendant could no longer rely upon its statement of the felony defendant allegedly intended, such an amendment was a substantial alteration and was prohibited by G.S. 15A-923(e), as to allow such practice would enable the state to thwart the very purpose of an indictment, which was to enable the accused to prepare for trial. State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006), rev'd in part, 361 N.C. 675, 651 S.E.2d 865 (2007), aff'd on remand, — N.C. —, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008).

While defendant abandoned error as to one of the six challenged indictments filed against him, each alleging charges of first-degree sexual offense, the trial court erred in failing to dismiss the remaining five upon defendant's motion as fatally defective, given that they erroneously charged two similar but distinct crimes and effectively charged neither; thus, the trial court also erred in allowing the state to amend those indictments. State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007), rev'd, 362 N.C. 169, 655 S.E.2d 831 (2008).

Instruction Did Not Constructively Amend Indictment. — Trial court did not constructively amend the bill of indictment by submitting aiding and abetting instructions to the jury where defendant was charged with obtaining property by false pretenses by acting in-concert with others. State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007), review denied, appeal dismissed, 362 N.C. 365, 661 S.E.2d 883 (2008).

Felonious Breaking or Entering Indictment. — There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony, and State v. Vick, 70 N.C. App. 338, 319 S.E.2d 327 (N.C. Ct. App. 1984), is overruled insofar as it is inconsistent with this; however, if an indictment does specifically allege the intended felony, G.S. 15A-923(e) mandates such allegations may not be amended. State v. Silas, 360 N.C. 377, 627 S.E.2d 604, 2006 N.C. LEXIS 26 (2006).

Jury Instruction at Variance with Indictment Benefitted Defendant and Was

Not Prejudicial Error. — Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

Applied in State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Cited in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980); State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980); State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995); State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000); State v. Holliman, 155 N.C. App. 120, 573 S.E.2d 682, 2002 N.C. App. LEXIS 1591 (2002); State v. Winslow, 169 N.C. App. 137, 609 S.E.2d 463, 2005 N.C. App. LEXIS 533 (2005).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

(a) A criminal pleading must contain:

(1) The name or other identification of the defendant but the name of the defendant need not be repeated in each count unless required for clarity.

(2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.

(3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.

(4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

(5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

(6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.

(7) A statement that the State intends to use one or more aggravating factors under G.S. 15A-1340.16(d)(20), with a plain and concise factual statement indicating the factor or factors it intends to use under the authority of that subdivision.

(b) If any count of an indictment or information charges more than one offense, the defendant may by timely filing of a motion require the State to elect and state a single offense alleged in the count upon which the State will proceed to trial. A count may be dismissed for duplicity if the State fails to make timely election.

(c) In trials in superior court, allegations of previous convictions are subject to the provisions of G.S. 15A-928.

(d) In alleging and proving a prior conviction, it is sufficient to state that the defendant was at a certain time and place convicted of the previous offense, without otherwise fully alleging all the elements. A duly certified transcript of the record of a prior conviction is, upon proof of the identity of the person of the defendant, sufficient evidence of a prior conviction. If the surname of a defendant charged is identical to the surname of a defendant previously convicted and there is identity with respect to one given name, or two initials, or two initials corresponding with the first letters of given names, between the two defendants, and there is no evidence that would indicate the two defendants are not one and the same, the identity of name is prima facie evidence that the two defendants are the same person.

(e) Upon motion of a defendant under G.S. 15A-952(b) the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.

(f) Upon motion of a defendant under G.S. 15A-952(b) the court may strike inflammatory or prejudicial surplusage from the pleading. (1973, c. 1286, s. 1; 1975, c. 642, s. 2; 1989, c. 290, s. 3; 2005-145, s. 3.)

OFFICIAL COMMENTARY

This section states the basic rules for pleading in criminal cases. Much here is familiar, but there are changes, including provisions permitting allegations in one count to be incorporated by reference in another. The pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with traditional ideas, see State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953), and provides a concise statutory statement. There are sections in Chapter 15 of the General Statutes providing what is sufficient to charge certain crimes, but it was thought better to leave those as they are at present. At such time as there is substantive revision, further simplification can be made in pleading.

Cross References. — As to alleging and proving prior convictions, see also G.S. 15A-928.

Editor's Note. — Session Laws 2005-145, s. 5, effective June 30, 2005, which added subdivision (a)(7), provides in part: "Prosecutions for offenses committed before June 30, 2005, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

I. General Consideration.
II. Identification of Defendant.
III. More Than One Offense in a Count.
IV. Allegation of Prior Convictions.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the cases cited below were decided under former law.*

Effect on § 15-144. — North Carolina Const., Art. I, § 23 and subdivision (a)(5) of this section did not specifically repeal G.S. 15-144, nor did they repeal it by implication. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), aff'd, 95 N.C. App. 572, 383 S.E.2d 224 (1989).

It is generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense. State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

Indictment Not Dispositive of Double Jeopardy Issue. — Indictments need only allege the ultimate facts constituting each element of the criminal offense; because a very detailed account is not necessary for legally sufficient indictments, examination of the indictments is not always dispositive on the issue of double jeopardy. State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (1995).

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

Indictment which avers facts constituting every element of an offense need not be couched in language of statute. State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

A criminal pleading does not have to state every element of the offense charged, but only facts supporting every element of the offense. State v. Jordan, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

The purpose behind requiring that the county in which the offense took place be alleged is to establish a basis for jurisdiction and venue. State v. Gardner, 84 N.C. App. 616, 353 S.E.2d 662, aff'd, 320 N.C. 789, 360 S.E.2d 695 (1987).

Where there was no error in the dates alleged, even if time were of the essence in defendants' case, the charges would not be subject to dismissal under subdivision (a)(4). State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 65 (1987).

Variance between allegation and proof as to time is not material where no statute of limitations is involved. State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Indictment Alleging Range of Dates Sufficient. — Indictment was sufficient because the indictment, by alleging a range of dates during which the offense occurred, was not so broad as to subject defendant to the possibility of being subjected to double jeopardy under the same facts. State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008).

Specifying Felony in Indictment. — An essential element of kidnapping under G.S. 14-39(a)(2) is that the confinement, restraint or removal be for the purpose of facilitating the commission of any felony or facilitating escape following the commission of a felony. The requirements of subdivision (a)(5) are met for the purposes of alleging this element by the allegation in the indictment that the confinement, restraint, or removal was carried out for the purpose of facilitating "a felony" or escape following "a felony". It is not required that the indictment specify the felony referred to in G.S. 14-39(a)(2). State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

Indictments which did not allege specific felonies nonetheless satisfied the requirements of this section. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Since a superseding indictment sufficiently described the false pretense incident as the defendant representing to the store employee that he was entitled to a cash refund for a watch band, when in truth and in fact, he knew that he had unlawfully taken the watch band and was not entitled to a refund, the indictment gave him proper notice and was properly not dismissed. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Since the indictment alleged the defendant sought to exchange the watch band that he had taken from the store for cash, the indictment did not have to allege the exact amount of cash that the defendant had tried to obtain by false pretenses. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Specifying Weapon in Assault with Deadly Weapon Charge. — Indictment charging assault with a deadly weapon was insufficient where it did not name the weapon, and each count of an indictment needed to be complete in itself. State v. Moses, 154 N.C. App. 332, 572 S.E.2d 223, 2002 N.C. App. LEXIS 1452 (2002).

Indictments listing the month and year of each alleged offense sufficiently comply with this section in a case involving sexual abuse of a child. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

An indictment alleging that the defendant kidnapped the victim "by unlawfully confining, restraining, or removing her from one place to another without her consent for the purpose of committing a felony . . ." charges the offense in the language of the statute and is sufficient. All of the elements of the crime of kidnapping are clearly alleged in the indictment. The additional "rape or robbery" language in the indictment, following "committing a felony," is mere harmless surplusage and may properly be disregarded in passing upon its validity. State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

Failure to name the party whom the defendant aided and abetted did not violate this section by failing to assert a fact supporting an element of the offense. State v. Poplin, 56 N.C. App. 304, 289 S.E.2d 124, cert. denied, 305 N.C. 763, 292 S.E.2d 579 (1982).

Short-form murder indictment which did not allege premeditation nor the elements of felony murder was held not defective. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

The State complied with the requirement of subdivision (a)(4) by stating the period of time during which the alleged offense occurred: the summer of 1986. State v. Reynolds, 93 N.C. App. 552, 378 S.E.2d 557 (1989).

The State Complied with Subdivision (a)(4). — Indictments sufficiently complied with subdivision (a)(4), where indictments charging sexual offenses with a minor alleged that they occurred between January 1 and September 12, 1994, and where the child testified at trial that the offenses occurred when she was seven years old and that some of those acts happened when it was cold outside and some when it was warm outside. State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998), cert. denied, 349 N.C. 531, 526 S.E.2d 470 (1998).

Date in Indictment Must Match Proof. — The dramatic variance between the date set forth in an indictment for first-degree sex offense against a child under the age of 13 and the evidence presented by the state prejudiced the defendant by depriving him of an opportunity to adequately present his defense where (1) the indictment listed the date of the offense as "7-01-1991 to 7-31-1991," and defendant prepared and presented alibi evidence in direct reliance on those dates, and (2) during trial, the state introduced evidence concerning sexual encounters between the victim and defendant over a two and one-half year period, but presented no evidence of a specific act occurring during July 1991. State v. Stewart, 353 N.C. 516, 546 S.E.2d 568, 2001 N.C. LEXIS 530 (2001).

Cases decided prior to the enactment of subdivision (a)(5) which held that an "indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony" are no longer controlling on this issue. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

As a general rule a warrant following substantially the words of subdivision (a)(5) of this section is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner. If, however, the statutory language fails to set forth the essentials of the offense, then the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged. State v. Barneycastle, 61 N.C. App. 694, 301 S.E.2d 711 (1983).

Together, subsection (e) of this section and G.S. 15A-954(a)(10) provide that on motion of the defendant the court must dismiss the charges stated in a criminal pleading if the pleading fails to charge the defendant with a crime in the manner required by subsection (a) of this section, unless the failure is with regard to a matter as to which an amendment is allowed. State v. Barneycastle, 61 N.C. App. 694, 301 S.E.2d 711 (1983).

Fatal Variance Between Juvenile Petition and Evidence. — There was a fatal variance between the juvenile petition and the evidence where the petition which charged a first-degree sexual offense based on the parties' ages was fatally defective as it did not allege the ages of the victim and the juvenile. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

In cases of sexual assaults on children, temporal specificity requisites diminish. Thus where child victim testified that defendant perpetrated rape and other sexual offenses against her on several occasions over a period of six years, and specifically recalled offenses occurring on September 27 and September 29, 1988, for both of which dates defendant presented an alibi, and where the difference between the testimony of the victim as to which offense occurred on which date did not prevent defendant from presenting his alibi, there was no error in letting the case go to the jury. State v. Young, 103 N.C. App. 415, 406 S.E.2d 3, cert. denied, 330 N.C. 201, 412 S.E.2d 65 (1991); State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Statutory rape conviction was affirmed as defendant's contention that the variance between the dates in the indictment and the evidence presented at trial was fatal and deprived him of a potential alibi defense had no merit. State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Indictments for taking indecent liberties held to clearly inform defendant of the conduct which was the subject of the accusations as required by subdivision (a)(5), and therefore sufficiently charged the offense, and did not need to specify the exact act which constituted the "immoral, improper and indecent liberty." State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

Indictments charging sexual offenses with a minor held sufficient under subdivision (a)(5), even though they did not describe the nature of the sex acts, where the indictments quoted the language of the relevant statutes. State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998), cert. denied, 349 N.C. 531, 526 S.E.2d 470 (1998).

Indictment charging defendant with crime against nature held sufficient under subdivision (a)(5) of this section. State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

Unlawful Private Use of Publicly Owned Vehicle. — A misdemeanor statement of charges which, when all surplusage was excluded from consideration, asserted that the defendant was a state employee, that she directed her subordinate to pick up a birthday cake and deliver it to her home, and that she did so with knowledge that her private purpose would be accomplished through the use of a state-owned motor vehicle, was sufficient to support a conviction of unlawful private use of a publicly owned vehicle. State v. Lilly, 75 N.C. App. 173, 330 S.E.2d 30 (1985).

In a prosecution for failing to stop at the scene of an accident resulting in property damage, the defendant's knowledge that a collision involving his car had occurred and that property damage had resulted was clearly inferable from the facts, duly alleged under subdivision (a)(4), that while the defendant operated the car it collided with and damaged another vehicle. State v. Jordan, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

Indictment Held Sufficient. — Indictment which alleged the element of possession of marijuana and further alleged that the amount of marijuana possessed exceeded one ounce set out the elements of possession of more than one ounce of marijuana with sufficient clarity to apprise defendant that he was charged with that offense. State v. Perry, 84 N.C. App. 309, 352 S.E.2d 259, appeal dismissed, 319 N.C. 676, 356 S.E.2d 791 (1987).

Indictment alleging that defendant entered into an agreement with two or more persons to commit, on December 20, 1985, the unlawful act of breaking and entering to commit larceny contained sufficient allegations to meet the requirements of subdivision (a)(5). State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

An indictment that alleged that larceny was committed "pursuant to a violation of G.S. 14-51" was in the language of G.S. 14-72(b) and was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to a burglary. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Indictment for first-degree burglary satisfied the requirements of subdivision (a)(5), even though it did not specify the felony the defendant intended to commit when he entered victim's apartment. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Indictment which alleged that defendant unlawfully and willfully did drive a vehicle on a street or highway while the driver's license issued to him had been permanently revoked was clearly sufficient to charge an offense in violation of G.S. 20-28(b). State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995).

Indictment charging that defendant attempted to obtain property with an intent to defraud met the requirements of G.S. 15A-924(a)(5) where it stated that defendant pretended to be someone else in order to cash a check without authorization, and that he obtained property by means of a false pretense which was calculated to deceive and did deceive. State v. Armstead, 149 N.C. App. 652, 560 S.E.2d 227, 2002 N.C. App. LEXIS 266 (2002).

Indictment charging defendant with larceny by employee clearly apprised defendant of the conduct that was the subject of the accusation, so it was sufficient under G.S. 15A-924(a)(5). State v. Morris, 156 N.C. App. 335, 576 S.E.2d 391, 2003 N.C. App. LEXIS 113 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

As the original language of the indictment tracked the language of G.S. 20-140(b), the indictment was sufficient to charge reckless driving. State v. Wade, 161 N.C. App. 686, 589 S.E.2d 379, 2003 N.C. App. LEXIS 2268 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 33 (2004).

While defendant claimed that the state's indictment was fatally defective in that it failed to properly identify the target of the robbery, the court found that where the indictment alleged that defendant committed the offense by threatening a store clerk with a knife and taking $20.00 worth of merchandise from the store, the evidence tendered by the state was consistent with the allegations contained in the indictment. State v. Matthews, 162 N.C. App. 339, 595 S.E.2d 446, 2004 N.C. App. LEXIS 122 (2004), cert. denied, 358 N.C. 379, 598 S.E.2d 140 (2004).

While an indictment must include a designated date or period of time within which it alleges the offense occurs, North Carolina courts have recognized the general rule that where time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal; failure to include specific date of the alleged act in the indictment was not fatal in a case where the defendant did not raise alibi as a defense or otherwise incorporate the dates as a part of a defense. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

State did not commit error by using a short-form indictment to charge defendants with first-degree murder. State v. Pope, 163 N.C. App. 486, 593 S.E.2d 813, 2004 N.C. App. LEXIS 423 (2004).

Where indictments stated that defendant possessed "10 pounds or more but less than 50 pounds" of marijuana, the over-inclusive drafting of the indictments did not invalidate them as "more than 10 pounds" was the same as "in excess of 10 pounds." State v. Trejo, 163 N.C. App. 512, 594 S.E.2d 125 (2004).

Indictments against defendant for first-degree murder and first-degree burglary complied with the statutory and caselaw requirements for charging those crimes; therefore, the State's use of the short-form indictments was proper as the indictments did not have to state each element of the offenses charged. State v. Byers, 175 N.C. App. 280, 623 S.E.2d 357, 2006 N.C. App. LEXIS 59 (2006), cert. denied, — N.C. —, 631 S.E.2d 135 (2006).

Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

Offense of fleeing to elude arrest was not dependent on the specific duty that the officer was performing at the time of the offense, and therefore it was not an essential element required to be set out in indictment. State v. Teel, 180 N.C. App. 446, 637 S.E.2d 288, 2006 N.C. App. LEXIS 2380 (2006).

Indictment was sufficient under G.S. 15A-924(a)(5) to charge defendant with felonious breaking and entering under G.S. 14-54(a) because the statement that defendant did break and enter a building used as a residence was surplusage as whether a building was a residence or not was not an essential element of the crime; the garage that defendant allegedly broke into was within the curtilage of the residence although it was an independent structure. State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008).

Indictment which was clearly couched in the language of the statute and alleged all of the essential elements was sufficient. State v. Canady, 191 N.C. App. 680, 664 S.E.2d 380, 2008 N.C. App. LEXIS 1498 (2008).

Indictment Held Insufficient. — Defendant was improperly convicted of first-degree arson, as the indictment only alleged elements of second-degree arson, and was not sufficient to put him on notice that he might be tried for first-degree arson and to allow him to prepare a defense. State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002), appeal dismissed, cert. denied, 356 N.C. 443, 573 S.E.2d 508 (2002).

Appellate court arrested the trial court's judgment convicting defendant on a charge of conspiracy to traffic in cocaine because the indictment charging defendant with committing that offense did not allege that he engaged in a conspiracy to facilitate the transfer of 28 grams or more of cocaine. State v. Outlaw, 159 N.C. App. 423, 583 S.E.2d 625, 2003 N.C. App. LEXIS 1510, cert. denied, 357 N.C. 510, 588 S.E.2d 380 (2003).

Sexual offense indictments were fatally defective because they cited one statute, but defendant was tried, convicted, and sentenced under another statute, and the averments were insufficient to satisfy all of the elements contained in either statute; while the indictments (1) alleged that each victim was a child under age 13, (2) named each child, and (3) averred that defendant "did engage in a sex act" with each, under the very narrow circumstances presented, the use of "short-form" language authorized under G.S. 15-144.2(b) was not sufficient to cure the fatal defects. State v. Miller, 159 N.C. App. 608, 583 S.E.2d 620, 2003 N.C. App. LEXIS 1538 (2003), aff'd, 358 N.C. 133, 591 S.E.2d 520 (2004).

Defendant was entitled to reversal of convictions for first degree kidnapping and entry of convictions for second degree kidnapping because the indictment only alleged that defendant did something "for the purpose of doing other serious bodily harm" and failed to allege actual serious injury. State v. Rodriguez, — N.C. App. —, 664 S.E.2d 654, 2008 N.C. App. LEXIS 1542 (2008).

Indictment for larceny fatally defective where it fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property; if a bill of indictment does not allege that an incorporated legal entity is a corporation or the name of the legal entity does not import that it is a corporation, the indictment is fatally defective. Thus, an indictment that alleged larceny, but failed to name the corporation that owned the property defendant supposedly stole was fatally defective and a conviction for larceny was reversed. State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408, 2004 N.C. App. LEXIS 128 (2004).

Felony larceny count in an indictment was not saved by any language in the second count under G.S. 15A-924(a)(2) because the larceny count, which failed to state that a store was a legal entity capable of owning the stolen cartons of cigarettes, did not incorporate by reference language of the second count, which was properly worded; thus, the indictment was fatally defective. State v. Brown, 184 N.C. App. 539, 646 S.E.2d 590, 2007 N.C. App. LEXIS 1469 (2007).

Amendment of Indictment Permissible. — State was properly permitted to amend the dates specified in indictment for rape and statutory sex offense because time was not of essence to state's case where the victim would have been 15 years old under the original dates and under the amended dates of the indictment. State v. Whitman, — N.C. App. —, 635 S.E.2d 906, 2006 N.C. App. LEXIS 2167 (2006).

Arrest Warrant Held Insufficient. — Because the arrest warrant failed to charge defendant with the commission of a simple assault under G.S. 14-33(a), the trial court erred in failing to dismiss the charge as stated in the criminal pleading and the appellate court vacated defendant's conviction for assault. State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

Motion to Dismiss Equivalent to Motion to Quash. — A motion to dismiss under G.S. 15A-954 for failure of the indictment to charge an offense as provided in this section is the functional equivalent of a motion to quash under prior practice. State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Dismissal on Unsworn Representations Held Erroneous. — The court erred in allowing motion to dismiss indictments which on their face sufficiently alleged the offense of embezzlement, where even assuming, arguendo, that the court could consider extraneous evidence in ruling on the motion, only the unsworn representations of defense counsel at the hearing on defendant's motion, to the effect that defendant was a partner in the victimized partnership, were before the court. State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Applied in State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978); State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980); State v. Everett, 328 N.C. 72, 399 S.E.2d 305 (1991); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003).

Cited in State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993); State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977); State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979); State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Rankin, 55 N.C. App. 478, 286 S.E.2d 119 (1982); State v. Ellers, 56 N.C. App. 683, 289 S.E.2d 924 (1982); State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982); State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604 (1982); State v. Malloy, 60 N.C. App. 218, 298 S.E.2d 735 (1983); State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983); State v. Willis, 67 N.C. App. 320, 313 S.E.2d 173 (1984); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760 (1986); State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986); State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Von Wilds, 88 N.C. App. 69, 362 S.E.2d 605 (1987); State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990); State v. Smith, 110 N.C. App. 119, 429 S.E.2d 425 (1993); State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993); State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Ellis, 130 N.C. App. 596, 504 S.E.2d 787 (1998); State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999); State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999); State v. Cockerham, 155 N.C. App. 729, 574 S.E.2d 694, 2003 N.C. App. LEXIS 18 (2003); State v. Winslow, 169 N.C. App. 137, 609 S.E.2d 463, 2005 N.C. App. LEXIS 533 (2005); In re S.R.S., 180 N.C. App. 151, 636 S.E.2d 277, 2006 N.C. App. LEXIS 2233 (2006); State v. Atkins, — N.C. App. —, 666 S.E.2d 809, 2008 N.C. App. LEXIS 1743 (2008).

II. IDENTIFICATION OF DEFENDANT.

Identification of Person Charged. — An indictment must clearly and positively identify the person charged with the commission of the offense; the name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

Failure to Identify Fatal. — The omission of defendant's name, or a sufficient description if his name is unknown, is a fatal and incurable defect. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

Allegation of Defendant's Residence Unnecessary. — The trial court properly denied defendant's motion to dismiss murder indictments against him on the ground they described him as being a resident of one county when in fact he resided in another county since defendant's residence was immaterial and the allegations as to his county of residence were at most surplusage. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

III. MORE THAN ONE OFFENSE IN A COUNT.

Joinder of Separate Offenses Arising from Same Act. — Neither the express language of G.S. 15A-926(a) nor this section will support the contention that the two statutes, when taken together, reflect a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Separate Offenses in Same Count. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Two Purposes for Kidnapping Not Two Crimes. — Contrary to defendant's assertion, two different crimes were not alleged; rather, the indictment set forth two different purposes for which the kidnapping took place, a technique which the North Carolina Supreme Court had explicitly approved. State v. McNeil, 155 N.C. App. 540, 574 S.E.2d 145, 2002 N.C. App. LEXIS 1598 (2002), cert. denied, appeal dismissed, 356 N.C. 688, 578 S.E.2d 323 (2003).

IV. ALLEGATION OF PRIOR CONVICTIONS.

No Presumption of Prior Conviction. — Where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. State v. Clark, 183 N.C. 733, 110 S.E. 641 (1922).

Time and place of conviction of prior offense must be alleged. State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965).

It is necessary also to allege in the indictment facts showing that at a certain time and place the defendant was convicted of the previous offense or offenses. State v. Bennett, 271 N.C. 423, 156 S.E.2d 725 (1967).

Standard of Proof of Prior Conviction. — A more formal proof is required to show a prior conviction than is required for merely showing lawful custody. State v. Chapman, 20 N.C. App. 456, 201 S.E.2d 579 (1974).

Record of Former Action as Proof. — The record itself in the former action, being in existence, is the only evidence admissible to prove its contents. Jones v. Jones, 241 N.C. 291, 85 S.E.2d 156 (1954); State v. Michaels, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Certified Transcript of Record as Evidence of Prior Conviction. — Where a person is charged in a bill of indictment with an offense which, on conviction thereof, is punishable with a greater penalty than on the first conviction and the indictment properly alleges a prior conviction, that a transcript of the record of the first conviction, duly certified, is, upon proof of the identity of the person of the offender, sufficient evidence of the first conviction. State v. Walls, 4 N.C. App. 661, 167 S.E.2d 547 (1969).

Admission of Secondary Evidence. — In order to admit secondary evidence of the contents of a court record, it is necessary that the foundation be laid by showing the original record has been destroyed or lost. Jones v. Jones, 241 N.C. 291, 85 S.E.2d 156 (1954); State v. Michaels, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Use of only the commitments issued as the result of prior convictions of escape for the purpose of establishing the prior conviction or convictions was error, since a transcript of the record of the prior conviction or convictions, i.e., a certified copy of the judgment or judgments, is required. State v. Chapman, 20 N.C. App. 456, 201 S.E.2d 579 (1974).

Admission of Division of Motor Vehicles records as evidence in a "second offense" case constituted prejudicial error. State v. Mabry, 18 N.C. App. 492, 197 S.E.2d 44 (1973).

Habitual Felons. — Because being a habitual felon is not a substantive criminal offense, but rather a status, each element of the offense need not be pleaded; all that is needed is that the defendant be given notice "that he is being prosecuted for some substantive felony as a recidivist." State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130, 1999 N.C. App. LEXIS 1245 (1999).

Indictment for Impaired Driving and Habitual Impaired Driving. — An indictment which alleges in one count the elements of impaired driving and alleges in a second count previous convictions which would elevate the impaired driving offense to habitual impaired driving is a valid indictment under this section and G.S. 15A-928. State v. Lobohe, 143 N.C. App. 555, 547 S.E.2d 107, 2001 N.C. App. LEXIS 311 (2001).

Admission of Authenticity of Record Is Not Admission That Defendant Was Person Convicted. — The admission of the authenticity of the record of an inferior court introduced by the solicitor (now prosecutor) is not an admission by the defendant that he had been theretofore convicted of a similar offense, even though the record shows a conviction of a similar offense, there being no admission by defendant that he was the person referred to in the record and an instruction assuming that defendant had made such admission must be held for error. State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961).

§ 15A-925. Bill of particulars.

(a) Upon motion of a defendant under G.S. 15A-952, the court in which a charge is pending may order the State to file a bill of particulars with the court and to serve a copy upon the defendant.

(b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(c) If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence.

(d) The bill of particulars must be filed with the court and must recite every item of information required in the order. A copy must be served upon the defendant, or his attorney. The proceedings are stayed pending the filing and service.

(e) A bill of particulars may not supply an omission or cure a defect in a criminal pleading. The evidence of the State, as to those matters within the scope of the motion, is limited to the items set out in the bill of particulars. The court may permit amendment of a bill of particulars at any time prior to trial. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section generally reflects former practice, but sets out more detail than did G.S. 15-143.

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under former law.

Bill of Particulars Originally Available in Civil Proceedings. — Provision as to a bill of particulars had prevailed previously as to civil proceedings, and was by statute made expressly applicable to criminal cases, to which the court had applied it in State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890); State v. Stephens, 170 N.C. 745, 87 S.E. 131 (1915).

Purpose of Section. — The statute intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. State v. Stephens, 170 N.C. 745, 87 S.E. 131 (1915).

When Applicable. — The statute applied only when further information, not required to be set out in the indictment, was desired. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Ingram, 271 N.C. 538, 157 S.E.2d 119 (1967).

A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Function of a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial, and (2) to limit the course of the evidence to the particular scope of inquiry. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Spence, 271 N.C. 23, 155 S.E.2d 802 (1967), vacated on other grounds, 392 U.S. 649, 88 S. Ct. 2290, 20 L. Ed. 2d 1350 (1968); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Martin, 21 N.C. App. 645, 205 S.E.2d 583 (1974); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

The whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements as to the particular charge or occurrence referred to that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. State v. Seaboard Air Line Ry., 149 N.C. 508, 62 S.E. 1088 (1908).

The purpose of a bill of particulars is to give an accused notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

What Bill Will Not Supply. — A bill of particulars will not supply any matter required to be charged in the indictment as an ingredient of the offense. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

A bill of particulars cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. State v. Cole, 202 N.C. 592, 163 S.E. 594 (1932). See also, State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941); State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

The function of a bill of particulars is to provide further information not required to be set out in the bill of indictment, but never to supply matter required to be charged as an essential ingredient of the offense. State v. Gibbs, 234 N.C. 259, 66 S.E.2d 883 (1951).

A fatal defect in an indictment is not cured by the statute which enables the defendant to call for a bill of particulars. The "particulars" authorized are not a part of the indictment. A bill of particulars will not supply any matter which the indictment must contain. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

A defect in a warrant is not cured by a bill of particulars. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

The statute did not cure a defect in the bill of indictment. State v. Ingram, 271 N.C. 538, 157 S.E.2d 119 (1967).

When Entitled to Particulars. — The court must order the State to respond to a request for a bill of particulars only when the defendant shows that the information requested is necessary to enable him to prepare an adequate defense. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Bill of particulars is not a part of the indictment, nor a substitute therefor, nor an amendment thereto. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

The "particulars" authorized are not a part of the indictment. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

Motion to Quash Not Remedy Where Indictment Is Less Definite Than Defendant Desires. — Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire, the defendant's remedy is by motion for a bill of particulars, and not by a motion to quash. State v. Everhardt, 203 N.C. 610, 166 S.E. 738 (1932); State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Nor Is Arrest of Judgment. — An indictment charging defendant disjunctively with murder committed with malice, premeditation, and deliberation and with murder committed in the perpetration of a robbery, is not void for uncertainty, since either charge constitutes murder in the first degree, and defendant's remedy, if he desires more specific information is by motion for a bill of particulars, and a motion in arrest of judgment after a verdict of guilty of murder in the first degree is properly denied. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Where the defendant thinks that an indictment fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894); State v. Corbin, 157 N.C. 619, 72 S.E. 1071 (1911).

Amendment of Bill. — A bill of particulars, being no part of the indictment, is not subject to demurrer, and may be amended at any time, with permission of the court, on such terms or under such conditions as are just. State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927).

A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court and the accused of specific occurrences for investigation. State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

Accused is not entitled to require the State to resolve discrepancies in its evidence in advance by a bill of particulars. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

An accused is not entitled to require the State to elect, by a bill of particulars, which witness's version of the events it will present. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Bill Need Not Recite Matters of Evidence. — An accused is not entitled to an order requiring the State to recite matters of evidence in a bill of particulars. State v. Johnson, 30 N.C. App. 376, 226 S.E.2d 876, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

State Confined to Particulars Stated. — The granting of a bill of particulars on an indictment for a criminal offense is primarily to inform the accused of the charges against him, and secondarily to inform the court; and while this is not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated. It is reversible error to the prejudice of the defendant's rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill to show the scienter or quo animo in relation to the particulars enumerated and coming within the scope of those generally charged in the indictment. State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927).

When a bill of particulars is furnished, it limits the evidence to the transactions or items therein stated. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Clarification of State's Theory. — Where the defendant seeks clarification of the State's theory for prosecution, the proper procedure is a motion for a bill of particulars. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

Election Between Legal Theories Not Required. — It is well settled that the State is not generally required to elect between legal theories in a murder prosecution prior to trial, and where the factual basis for the prosecution is sufficiently pleaded, defendant must be prepared to defend against any and all legal theories which these facts may support. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Defendant was not prejudiced in the preparation of his defense and preparation for trial because indictment did not inform him as to whether he was being prosecuted for first or second degree murder. It is well settled in North Carolina that the State is not generally required to elect its theory of prosecution in a murder case before trial. Where a factual basis for the prosecution is sufficiently pleaded, the defendant must be prepared to defend against any and all theories which the facts may support. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Trial court did not err in denying defendant's motion for a bill of particulars, pursuant to G.S. 15A-925, because the State's legal theory of which type of murder it was proceeding on was not factual information within the meaning of G.S. 15A-925(b), defendant was not denied any information necessary for adequate preparation or conduct of his defense where the State had voluntarily provided defendant with open files pursuant to the mandates of G.S. 15A-903 and 15A-907, and defendant clearly had knowledge of some of the information regarding an underlying felony pursuant to G.S. 14-17. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Aggravating Circumstances in Capital Case. — This section does not authorize a trial court to order the State to disclose its aggravating circumstances in a capital case prior to trial. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Time and Place. — Unless the exact time and place of the alleged occurrence are essential elements of the offense itself, a defendant may obtain further information in respect thereto by motion for a bill of particulars. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955).

Indictment Held Sufficiently Detailed. — The defendant was in effect furnished a bill of particulars where the warrant or indictment described the liquor as "nontaxpaid liquor," since the descriptive words identified the liquor. State v. Tillery, 243 N.C. 706, 92 S.E.2d 64 (1956).

Motion for Bill of Particulars Properly Denied. — The defendant was in no way prejudiced by the denial of his motion for a bill of particulars where his statements to the officers as to how, when, and under what circumstances he killed the deceased were in accord with the theory of the trial in the court below. State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Where defense counsel had been furnished copies of the officers' reports and the reports of the autopsies, had been permitted to interrogate the State's key witness, and was present when the defendant made admissions to investigating officers, and the State introduced nothing which should have been of surprise to the defendant, the court's refusal to order any additional bill of particulars was not error. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967).

Where defendant was given (1) the time of the alleged offense, (2) the specific location of the alleged offense, (3) the quantity of the controlled substance, and (4) the names of the prospective witnesses for the State, and counsel and his law partner were present at a preceding trial where the witnesses stated that their testimony against defendant would be substantially the same as their previous testimony, the information thus provided defendant was adequate, and there was no abuse of discretion in the denial of his motion for a bill of particulars. State v. Martin, 21 N.C. App. 645, 205 S.E.2d 583 (1974).

Short form indictments for first-degree rape and first-degree sexual offense satisfied the statutory requirements and provided defendant adequate notice of the alleged offenses; therefore, denial for bill of particulars was proper. State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992), discretionary review improvidently allowed, 333 N.C. 784, 429 S.E.2d 717 (1993).

Defendant was not harmed by the State's failure to notify him that it planned to use his conversation with co-defendant outside the car as evidence of a conspiracy to rape the victim; thus, there was no reversible error in the trial court's denial of defendant's motion for a bill of particulars on the conspiracy charge. State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Trial court did not err in denying defendant's motion for a bill of particulars because defendant failed to show that the information requested was necessary to enable defendant to adequately prepare or conduct a defense; thus, defendant did not prove palpable and gross abuse of discretion on the part of the trial court; furthermore, the prosecution provided defendant with open file discovery and defendant received copies of the victims' statements and copies of every police report that had been prepared in connection with the particular investigations so that all of the information that defendant requested was in these materials. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Denial of defendant's motion for a bill of particulars was not erroneous where defendant was provided with open-file discovery and failed to point to any factual information introduced at trial that was not provided in discovery and was necessary for defendant to prepare a defense. State v. Whitman, — N.C. App. —, 635 S.E.2d 906, 2006 N.C. App. LEXIS 2167 (2006).

Indictment for First-Degree Murder. — If a defendant is charged with murder in the first degree by bill of indictment drawn under G.S. 15-144, and desires to know whether the State relies on proof that the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a robbery, he should apply for a bill of particulars as provided in this section. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

Indictment for Perjury. — Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars. State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923).

Indictment for Malfeasance of Bank Officer. — It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of G.S. 14-254, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

Granting or Denial of Motion Is Within Trial Court's Discretion. — The granting of a bill of particulars lies largely within the trial judge's discretion. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

The granting or denial of motions for a bill of particulars is within the discretion of the court. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

A motion for a bill of particulars is addressed to the sound discretion of the trial court. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997); State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), rehearing denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398; 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

And is not subject to review except for palpable and gross abuse of discretion. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

Where the State introduced nothing at trial which could have come as a surprise to the defendant, and she had full knowledge of the specific occurrences to be investigated at trial, defendant failed to show that lack of access to information significantly impaired her preparation and conduct of the case. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

When Denial of Bill Held Error. — A denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Proctor, 58 N.C. App. 631, 294 S.E.2d 240 (1982); State v. Whitfield, 310 N.C. 608, 313 S.E.2d 790 (1984); State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984); State v. Freeman, 314 N.C. 432, 333

S.E.2d 743 (1985); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003).

Cited in State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976); State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976); State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. Rankin, 55 N.C. App. 478, 286 S.E.2d 119 (1982); State v. Creason, 68 N.C. App. 599, 315 S.E.2d 540 (1984); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988); State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999); In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200, 1999 N.C. App. LEXIS 744 (1999); State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

§ 15A-926. Joinder of offenses and defendants.

(a) Joinder of Offenses. — Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

(b) Separate Pleadings for Each Defendant and Joinder of Defendants for Trial.

(1) Each defendant must be charged in a separate pleading.

(2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

  a. When each of the defendants is charged with accountability for each offense; or

  b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

    1. Were part of a common scheme or plan; or
    2. Were part of the same act or transaction; or
    3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

(c) Failure to Join Related Offenses.

(1) When a defendant has been charged with two or more offenses joinable under subsection (a) his timely motion to join them for trial must be granted unless the court determines that because the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time or if, for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to make this motion constitutes a waiver of any right of joinder of offenses joinable under subsection (a) with which the defendant knew he was charged.

(2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial, and must be granted unless

  a. A motion for joinder of these offenses was previously denied, or

  b. The court finds that the right of joinder has been waived, or

  c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.

(3) The right to joinder under this subsection is not applicable when the defendant has pleaded guilty or no contest to the previous charge. (1973, c. 1286, s. 1; 1975, c. 166, ss. 19, 27.)

OFFICIAL COMMENTARY

Sections 15A-926 and 15A-927 are based generally upon the A.B.A. Standards Relating to Joinder and Severance. There are differences. The more familiar North Carolina statement with regard to transactions is retained, joinder for trial for defendants (not pleading joinder of defendants) is covered, and some changes are made in terminology.

Subsection (a) is similar to the former North Carolina statute in that it authorizes joinder on a transactional basis (G.S. 15-152) and adds the "common scheme or plan" statement from the Federal Rule 8(a). The Commission has eliminated provisions for joinder of offenses on the basis that they are of the same or similar character without any transactional connection. Such joinder contained in present statutes and the A.B.A. Standards would permit the joinder of entirely unrelated crimes in one charge and for trial.

Although some case law in North Carolina and the A.B.A. Standards would permit the joinder of defendants in pleadings, the Commission feels that the interests of the defendant and the ease of keeping court records will be served by requiring that each defendant be charged in a separate pleading, as has been the general custom. That is required by the last sentence of subsection (b). Thus "joinder of defendants for trial" refers to what frequently has been called "consolidation" for trial. The grounds for joinder of defendants for trial should be self-explanatory. The Commission felt it unnecessary to include provisions from the A.B.A. Standards which would have provided for joinder of defendants on the basis of conspiracy.

When there are several offenses arising out of the same transaction or scheme, as defined in the statute, a question is presented as to whether the offenses may be tried ad seriatim, or whether there is any compulsion for the State to proceed with all pending charges. The Supreme Court of the United States has touched on this problem with the doctrine of "collateral estoppel" in Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), and the North Carolina Supreme Court has applied jeopardy rules in State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972). Subject to these more basic requirements, subsection (c) provides that as a procedural matter offenses related in the somewhat more broad basis described in the statute must be tried together, absent some reason for separate trial.

Legal Periodicals. — For note as to general verdict rendered on indictment charging mutually exclusive crimes, see 36 N.C.L. Rev. 84 (1957).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

For article on evidentiary problems in multiple defendant cases, see 13 N.C. Cent. L.J. 62 (1981).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

CASE NOTES

I. General Consideration.
II. Joinder of Offenses.
  A. In General.
  B. Illustrative Cases.
III. Joinder of Defendants.
  A. In General.
  B. Illustrative Cases.
IV. Failure to Join Related Offenses.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided under former law.*

Public Policy Favors Consolidation. — Where two or more defendants are sought to be held accountable for the same crime or crimes, not only is joinder permissible under the statute, but public policy strongly compels consolidation as the rule rather than the exception. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Public policy strongly favors consolidation, because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. This last factor is especially compelling when the trials involve young children testifying about sexual abuse. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

Former § 15-152 Compared. — This section differs from its predecessor, former G.S. 15-152, in that it does not permit joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection, and in that it contains new language permitting joinder of offenses or crimes which are based on a series of acts or transactions "constituting parts of a single scheme or plan." State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978); State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

"Offense" may be construed to mean "indictment." State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Joinder Under This Section. — Subsection (a) of this section allows consolidation of separate offenses for trial when the offenses charged are "based on the same act or transaction or on a series of transactions connected together or constituting parts of a single scheme or plan." Subsection (b) similarly permits joinder of separate defendants for trial when the several offenses charged are transactionally related. This requirement is satisfied when the offenses in question all arose out of a single conspiracy. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, cert. denied, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Under this section there must be some sort of "transactional connection" between cases consolidated for trial. State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Berryman, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

In deciding whether two or more offenses should be joined for trial, the trial court must determine whether the offenses are so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant. Thus, there must be some type of "transactional connection" between the offenses before they may be consolidated for trial. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

This section requires a transactional occurrence between offenses sought to be joined for trial. State v. Smith, 70 N.C. App. 293, 319 S.E.2d 647 (1984).

Offenses are properly joined under subsection (a) only when there exists a transactional connection among the charges. State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23 (1985), aff'd, 316 N.C. 188, 340 S.E.2d 105 (1986).

For offenses to be joined, there must be a transactional connection common to all, and the trial court must determine that a defendant would not be prejudiced by hearing more than one charge at the same trial. State v. Williams, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

But mere finding of the transactional connection required by this section is not enough; in ruling on a motion to consolidate, trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial, and if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981); State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Subsection (a) of this section differs from its predecessor, in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is not transactional connection among the offenses. State v. Williams, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

In considering whether a "transactional connection" exists among offenses, the courts have taken into consideration such factors as the nature of the offenses charged, and the unique circumstances of each case. State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23, aff'd, 316 N.C. 188, 340 S.E.2d 105 (1986).

While factual similarities, and the nature of the offenses charged as being of the same class, was once all that was required for joinder, this is no longer the case. State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23, aff'd, 316 N.C. 188, 340 S.E.2d 105 (1986).

Indictments Joinable If Evidence as to One Is Competent as to Others. — The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. State v. Norton, 222 N.C. 418, 23 S.E.2d 301 (1942); State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Hamilton, 264 N.C. 277, 141 S.E.2d 506 (1965), cert. denied, 384 U.S. 1020, 86 S. Ct. 1936, 16 L. Ed. 2d 1044 (1966); State v. Parker, 271 N.C. 414, 156 S.E.2d 677 (1967); State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771, rev'd in part on other grounds, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Mourning, 4 N.C. App. 569, 167 S.E.2d 501 (1969); State v. Wright, 18 N.C. App. 76, 195 S.E.2d 801, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

Where defendants were charged in separate bills of indictment with identical crimes, and the offenses charged were of the same class, related to the same crime, and were so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other, the trial judge was authorized, in his discretion, to order their consolidation for trial. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

The trial judge may, in his discretion, order the consolidation for trial of two or more indictments in which the defendants are charged with crimes of the same class when the crimes are so connected in time or place that evidence at trial of one of the indictments will be competent and admissible at the trial of the others. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976), reconsideration denied, 293 N.C. 259, 243 S.E.2d 143 (1978); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979); State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

The trial judge may consolidate for trial two or more indictments in which the defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of the other. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The consolidation for trial of separate charges against two or more defendants was authorized when the offenses charged were of the same class and were so connected in time or place that most of the evidence at trial upon one of the charges would be admissible at a trial on the others. State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755, cert. denied, 283 N.C. 259, 195 S.E.2d 692 (1973).

Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. However, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

In the context of joinder, the term "offense" means "indictment," even though the term is often used more generally to refer to the act or acts done by defendant which constitute a crime. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Whether there is to be joinder of cases must depend upon circumstances of each case. State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982).

Mere Time Savings Not Alone Reason for Joinder. — Where a defendant is indicted in separate bills for two or more transactions of the same class of crimes or offenses, the court may in its discretion consolidate the indictments for trial. In exercising discretion the presiding judge should consider whether the offenses alleged are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. To save the time of the court is not, taken alone, sufficient predicate for consolidation. State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Mitchell, 17 N.C. App. 1, 193 S.E.2d 400 (1972).

Consolidation expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. However, no matter how appealing such public policy may be, it must not stand in the way of a fair determination of guilt or innocence. State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982).

Consolidation Is Within Discretion of Court. — An order consolidating cases for trial is discretionary. State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771, rev'd in part on other grounds, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Feimster, 21 N.C. App. 602, 205 S.E.2d 602, cert. denied, 285 N.C. 665, 207 S.E.2d 763 (1974); State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Foster, 33 N.C. App. 145, 234 S.E.2d 443, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977); State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978); State v. Hairston, 36 N.C. App. 641, 244 S.E.2d 448, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978); State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

When a defendant is charged with crimes of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court. State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

The question of consolidation of indictments against defendants charged with committing similar offenses at the same time and place is addressed to the sound discretion of the trial court. State v. Samuel, 27 N.C. App. 562, 219 S.E.2d 526 (1975); State v. Gonzalez, 62 N.C. App. 146, 302 S.E.2d 463 (1983), rev'd on other grounds, 311 N.C. 80, 316 S.E.2d 229 (1984).

A trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985), rev'd on other grounds, 323 N.C. 306, 372 S.E.2d 704 (1988).

The decision whether to try defendants separately or jointly is ordinarily within the sound discretion of the trial judge, and absent an abuse of that discretion, will not be overturned on appeal. State v. Jenkins, 83 N.C. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, 332 N.C. 669, 424 S.E.2d 411 (1992).

When joinder is permissible under the statute, whether to sever trials or deny joinder is a question lodged within the discretion of the trial judge, whose rulings will not be disturbed on appeal unless it is demonstrated that joinder deprived defendant of a fair trial. State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

The question of whether defendants should be tried jointly or separately is within the sound discretion of the trial judge, and will not be disturbed on appeal absent a showing that joinder has deprived a defendant of a fair trial. State v. Evans, 346 N.C. 221, 485 S.E.2d 271 (1997), cert. denied, 522 U.S. 1057, 118 S. Ct. 712, 139 L. Ed. 2d 653 (1998).

As Are Separate Trials. — The motion by the State to consolidate four cases for trial and the opposing motion by the defendants for separate trials were addressed to the sound discretion of the presiding judge. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Ruling on Consolidation Not Disturbed Absent Abuse of Discretion. — The motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980); State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981); State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982); State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982); State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); State v. Parrish, 73 N.C. App. 662, 327 S.E.2d 613 (1985); State v. Neal, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986); State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985); State v. Berryman, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Whether defendants jointly indicted will be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that a joint trial had deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976), reconsideration denied, 293 N.C. 259, 243 S.E.2d 143 (1978); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976), cert. denied, 429 U.S. 1050, 97 S. Ct. 761, 50 L. Ed. 2d 766, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Pierce, 36 N.C. App. 770, 245 S.E.2d 195 (1978); State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978); State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980); State v. Oxendine, 303 N.C. 235, 278 S.E.2d 200 (1981); State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981); State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885, cert. denied, 306 N.C. 748, 295 S.E.2d 484 (1982); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Separate offenses may be joined for trial when they arise from the same act or transaction, and the well-settled rule that the discretion of the trial court in joining cases for trial will not be disturbed absent a showing that the defendant has been deprived thereby of a fair trial, has not been abrogated by this Chapter and continues to apply. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

The question of consolidating offenses arising out of a single scheme or plan ordinarily is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied and appeal dismissed, 294 N.C. 187, 241 S.E.2d 522 (1978).

Whether defendants charged with committing identical offenses at the same time and place should be jointly or separately tried is within the sound discretion of the trial court, and in the absence of a showing that a joint trial deprived a defendant of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

The right or propriety of a severance rests on circumstances showing that a joint trial would be prejudicial and unfair, and in the absence of showing that defendant has been deprived of a fair trial, the exercise of the court's discretion will not be disturbed. State v. Foster, 33 N.C. App. 145, 234 S.E.2d 443, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977).

Ordinarily, motions to consolidate cases for trial are within the sound discretion of the trial court, and absent a showing that a joint trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983).

The question of consolidation of offenses for trial is a matter which lies within the sound discretion of the trial judge, and his ruling will not be disturbed absent a showing that joinder would hinder or deprive defendant of his ability to present his defense. State v. Newman, 308 N.C. 231, 302 S.E.2d 174 (1983).

Motions to join for trial offenses which have the necessary transactional connection under this section are addressed to the discretion of the trial court and, absent a showing of abuse of discretion, its ruling will not be disturbed on appeal. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

Although a motion to consolidate charges for trial is addressed to the sound discretion of the trial court, the determination of whether a group of offenses are transactionally related so that they may be joined for trial is a question of law fully reviewable on appeal. State v. Williams, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

The granting of a motion to consolidate is reviewable only for abuse of discretion. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

The question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. State v. Hardy, 67 N.C. App. 122, 312 S.E.2d 699 (1984).

Time for Making Order of Consolidation. — Where there are several charges against any person for the same act or for two or more transactions connected together, or for two or more transactions of the same class of offenses, which may be properly joined, the court will order them to be consolidated. This means, however, that the order of consolidation will be made in such cases when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might seriously be threatened by the consolidation. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

A motion for joinder of cases made orally after the present case was called for trial came too late. The motion should have been made at defendant's arraignment. Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pretrial stage of the proceedings. State v. Moore, 41 N.C. App. 131, 254 S.E.2d 191 (1979).

Consolidation After Jury Impaneled. — Where the record justifies the conclusion that after the jury had been impaneled and prosecution begun upon one bill of indictment other bills of indictment were consolidated for trial therewith, a new trial will be awarded even though the indictments might have been properly consolidated initially, since the defendant must be afforded opportunity to plead to the counts consolidated and to pass upon the impartiality of the jury upon such counts. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

Order of consolidation in capital cases will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation. State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943).

Correctness of Joinder Determined as of Time of Decision to Join. — Joinder is a decision which is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court's decision and not with the benefit of hindsight. State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

Partial Quashal of Consolidated Indictments. — Where the second count in each of two bills of indictment should be quashed for insufficiency, the judge entered should not be arrested where two sufficient counts were consolidated with the two insufficient counts for judgment; either one of the two sufficient counts, upon defendant's pleas of guilty, would support the judgment entered. State v. Horton, 15 N.C. App. 604, 190 S.E.2d 274 (1972).

Motion to Consolidate Is Not an Assent to a Mistrial. — A motion to consolidate three capital cases in medias res pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation. State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943).

Consolidation Proper Without Formal Written Motion. — Even in the absence of any formal written motion, the trial judge may direct that criminal cases be consolidated for trial where proper grounds for joinder exist and when to do so will promote the ends of justice and facilitate proper disposition of the cases on the docket before him. State v. Cottingham, 30 N.C. App. 67, 226 S.E.2d 387 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394, appeal dismissed, 290 N.C. 780, 229 S.E.2d 35 (1976).

Oral Motion to Consolidate Not Error. — Trial court did not err by allowing the State's oral motion for joinder of a juveniles' cases for trial when the motion was not written as required by G.S. 15A-926(b)(2) and the juvenile did not object to joinder at trial. Regardless, the trial court had discretion to allow the oral motion for joinder pursuant to G.S. 15A-926(b)(2), 15A-951(a), and 15A-952(b) and (f). In re R.D.L., 191 N.C. App. 526, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (2008).

Determination of Prejudice Resulting from Joinder. — In determining whether a defendant has been prejudiced by joinder pursuant to this section, the question which must generally be addressed is whether the offenses are so separate in time and place and so distinct in circumstances as to render joinder unjust and prejudicial to the defendant. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980); State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Avery, 302 N.C. 517, 276 S.E.2d 699 (1981); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Oxendine, 303 N.C. 235, 278 S.E.2d 200 (1981).

In determining whether an accused has been prejudiced by joinder, the question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Defendant's unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing the motion to consolidate. State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

Waiver of Right of Joinder. — Defendant waived any right of joinder of offenses involving possession and sale of contraband where defendant failed to move for joinder, and there was no merit to defendant's argument that, since the State made a motion for joinder, it was not necessary for defendant to make the identical motion, since it was defendant's duty to let the court know that he was relying on the State's motion, and defendant failed to do so. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

Function of Appellate Review. — Generally, joinder motions are properly decided in the sound discretion of the trial court. However, where there is a serious question of prejudice resulting from consolidation for trial of two or more offenses, the appropriate function of appellate review is to determine whether the case meets the statutory requirements. State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

While the court's ruling on a motion for joinder is reviewable only for abuse of the court's discretion, where there is a serious question of prejudice resulting from consolidation for trial of two or more offenses, the appropriate function of appellate review is to determine whether the case meets the statutory requirements. State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23 (1985), aff'd, 316 N.C. 188, 340 S.E.2d 105 (1986).

The test applied on appellate review of a motion for joinder is whether the offenses were so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant. State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988).

Applied in State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392 (1976); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980); State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980); State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981); State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982); State v. Sanderson, 60 N.C. App. 604, 300 S.E.2d 9 (1983); State v. Bellamy, 64 N.C. App. 454, 308 S.E.2d 88 (1983); State v. Godwin, 67 N.C. App. 731, 314 S.E.2d 265 (1984); State v. Poindexter, 68 N.C. App. 295, 314 S.E.2d 594 (1984); State v. Ford, 70 N.C. App. 244, 318 S.E.2d 914 (1984); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984); State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); State v. Pergerson, 73 N.C. App. 286, 326 S.E.2d 336 (1985); State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Evans, 99 N.C. App. 88, 392 S.E.2d 441 (1990); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993); State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Merrill, 138 N.C.

App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000); State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003); State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004); State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004).

Cited in State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976); State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Jarvis, 50 N.C. App. 679, 274 S.E.2d 852 (1981); State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981); State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819 (1983); State v. Toomer, 311 N.C. 183, 316 S.E.2d 66 (1984); State v. McGuire, 78 N.C. App. 620, 337 S.E.2d 620 (1985); State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987); State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987); State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711 (1988); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620 (1989); State v. Estes, 99 N.C. App. 312, 393 S.E.2d 158 (1990); United States v. Blackwood, 913 F.2d 139 (4th Cir. 1990); State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Howie, 116 N.C. App. 609, 448 S.E.2d 867 (1994); State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1995); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996); State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998); State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999); State v. McKeithan, 140 N.C. App. 422, 537 S.E.2d 526, 2000 N.C. App. LEXIS 1205 (2000); State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005); State v. Bowden, 177 N.C. App. 718, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006); State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006); State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007); State v. Walker, 188 N.C. App. 331, 654 S.E.2d 722, 2008 N.C. App. LEXIS 71 (2008).

II. JOINDER OF OFFENSES.

A. In General.

A trial court's ruling on joining cases for trial is discretionary and will not be disturbed absent a showing of abuse of discretion. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Whether joinder of offenses is permissible under this section is a question addressed to the discretion of the trial court which will only be disturbed if the defendant demonstrates that joinder deprived him of a fair trial. State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993).

Consolidation Is Rule Rather Than Exception. — Where each defendant is sought to be held accountable for the same crime or crimes, public policy strongly compels consolidation under subdivision (2)a of subsection (b) of this section as the rule rather than the exception. State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982).

Court Should Consider Whether Accused Will Be Fairly Tried. — In ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Cook, 301 N.C. 176, 270 S.E.2d 425 (1980); State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

In deciding whether to join offenses, the court must determine whether the accused can receive a fair hearing on more than one charge at the same trial. If joinder will impair the ability to present a defense, the motions should be denied. State v. Neal, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

Cases Should Not Be Joined If Defense Is Thereby Hindered. — If consolidation of charges hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982); State v. Parrish, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

In ruling upon a motion for joinder of offenses, the trial judge should consider whether the accused can be fairly tried if joinder is permitted. If joinder would hinder or deprive defendant of his ability to present his defense, the motion should be denied. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

In determining whether defendant has been prejudiced, the question posed is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to an accused. State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982); State v. Parrish, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

A defendant is not prejudiced by the joinder of two crimes unless the charges are so separate in time and place as to render the consolidation unjust and prejudicial to defendant. State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999).

This section does not require joinder based merely upon the fact that offenses are of the same class or crime or have common characteristics. State v. Smith, 70 N.C. App. 293, 319 S.E.2d 647 (1984).

Joinder Ruled Proper. — In a prosecution for obtaining property by false pretenses, in violation of G.S. 14-100, the trial court properly granted the State's motion to join two offenses, pursuant to G.S. 15A-926(a), because a transactional connection between the offenses was evidenced by a common modus operandi, the short time lapse between the criminal activity, and similar circumstances in victim, location, and motive. State v. Simpson, 159 N.C. App. 435, 583 S.E.2d 714, 2003 N.C. App. LEXIS 1531 (2003), aff'd, 357 N.C. 652, 588 S.E.2d 466 (2003).

Joinder under G.S. 15A-926(a) of the charges against defendant of assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon did not unjustly or prejudicially hinder defendant's ability to defend himself or to receive a fair hearing. In addition, the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses. State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

Consolidation of Calendared and Non-Calendared Charges. — When read together, former G.S. 7A-49.3(a) and subsection (a) of this section permit a judge in a criminal trial to consolidate calendared charges with non-calendared charges that are based either on the same act or transaction, or on a series of acts of transactions connected together or constituting parts of a single scheme or plan. State v. Thompson, 129 N.C. App. 13, 497 S.E.2d 126 (1998).

Nature of Offenses May Be Considered. — Although this section does not permit joinder of offenses solely on the basis that they are the same class, the nature of the offenses is a factor which may properly be considered in determining whether certain acts constitute parts of a single scheme or plan. State v. Street, 45 N.C. App. 1, 262 S.E.2d 365, cert. denied, 301 N.C. 104 (1980).

Although this section does not permit joinder of offenses solely on the basis that they are of the same class, the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in subsection (a) of this section. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Offenses of Same Class May Be Consolidated. — The trial judge is authorized to order consolidation for trial of two or more charges in which defendant is charged with crimes of the same class. State v. Franks, 20 N.C. App. 160, 200 S.E.2d 828 (1973), cert. denied, 284 N.C. 618, 202 S.E.2d 274 (1974).

And Prosecutor Is Not Required to Select Count on Which He Would Proceed. — An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions, does not require the solicitor (now prosecutor) to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. State v. Charles, 195 N.C. 868, 142 S.E. 486 (1928).

Commonality of Witness Not Required. — There is no requirement that there be a commonality of witnesses where two murder cases have been joined for trial. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Section does not allow joinder if the offenses are merely of the same class of crime. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Joinder Disallowed Where Acts Are of Same Class of Crime, Absent Transactional Connection. — This statute, which became effective in 1975, differs from its predecessor in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Transactional Connection Necessary for Joinder. — Subsection (a) provides for joinder of two or more offenses when they are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. It is not enough that a defendant is charged with acts of the same class of crime or offense; there must also be a transactional connection. State v. Neal, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

Where the second murder in the case was committed to avoid detection for the first murder, the transactional connection supported the consolidation of all the charges for trial pursuant to this section. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Where defendant was charged with murder

and failure to appear for his murder trial, this connection was insufficient to satisfy the transactional requirement of this section. The joinder of these two crimes constituted harmless error. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Discretion of Judge. — If the consolidated charges have a transactional connection, the decision to consolidate the charges is left to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999).

Consolidation Improper as Matter of Law Absent Transactional Connection. — If the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Continuing Transactions. — The charges were properly consolidated for trial where the acts constituting the offenses were connected as a continuing transaction. State v. Carson, 20 N.C. App. 211, 200 S.E.2d 831 (1973), cert. denied, 285 N.C. 87, 203 S.E.2d 59 (1974).

Joinder at trial of defendant's offenses of armed robberies of cash checking businesses, robberies at gunpoint of individuals, robbery at gunpoint of an individual's automobile, and larceny of a car in a parking lot resulting from a two-week crime spree upheld where the offenses were connected transactionally and the evidence was overlapping. State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

Two acts constituting essential parts of a single transaction may be charged together as a single offense, and defendant is not entitled to complain that only one offense was charged even though each act would have been ground for a separate charge. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Transactions Occurring at Same Time and in Close Proximity. — Where two warrants and an indictment were consolidated for trial, there was no denial of petitioner's constitutional rights, since all the charges grew out of transactions occurring on the same evening in close proximity to each other. Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

Joinder When Crimes Constitute "Fingerprint" of Perpetrator. — To be joined crimes must be transactionally related either as part of a single conspiracy, because they are closely related in time, or because similarities of the crime constitute a fingerprint of the perpetrator. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Consolidation of Minor Offense and Capital Charge. — Ordinarily, unless the evidence showing guilt of a minor offense fits into the proof on the capital charge, the minor offenses should not be included. State v. Old, 272 N.C. 42, 157 S.E.2d 651 (1967).

Separate Indictments Against Same Defendant Treated as Counts. — Where separate indictments against the same defendant are consolidated, the counts in the separate bills will be treated as separate counts in one bill. State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962).

Consolidated Offenses Need Not Have Been Counts of Same Pleading. — Neither the express language of subsection (a) of this section nor G.S. 15A-924 will support the contention that the two statutes, when taken together, reflect a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

General Verdict Covering Several Counts. — Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offenses. State v. Mills, 181 N.C. 530, 106 S.E. 677 (1921).

Ordinarily, where separate bills of indictment are returned and the bills are consolidated for trial, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count. State v. Braxton, 230 N.C. 312, 52 S.E.2d 895 (1949); State v. Austin, 241 N.C. 548, 85 S.E.2d 924 (1955).

Where there are several counts in a bill, and a general verdict of guilty is returned, if the verdict on any count is free from valid objection and has evidence tending to support it, the conviction and sentence for that offense will be upheld. State v. Austin, 241 N.C. 548, 85 S.E.2d 924 (1955).

Limits on Sentence Where Cases Consolidated. — Where cases are consolidated for trial and there is a conviction or plea of guilty on several counts, the court may enter a judgment on each count and have the judgments run concurrently or consecutively as it may direct; but the court is not authorized by law to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts upon which there has been a conviction or plea of guilty. State v. Austin, 241 N.C. 548, 85 S.E.2d 924 (1955).

Entering Different Judgment on Each Offense upon General Verdict of Guilty. — Where the trials of two separate criminal indictments are consolidated by the judge and tried together and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of them, with execution suspended, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered. State v. Harvell, 199 N.C. 599, 155 S.E. 257 (1930).

B. Illustrative Cases.

Where the evidence showed a common scheme whereby defendant and his accomplice broke and entered an occupied dwelling house at night, armed with a dangerous weapon, intending to steal property therein, and upon entering, used the weapon to threaten the occupant of the house for purposes of taking his personal property, it was clearly no abuse of discretion to hold that this series of acts constituted a single scheme or plan and that the requirements for joinder in subsection (a) of this section were satisfied. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Rape and Indecent Liberties with Minors. — Defendant did not show that the joinder of indecent liberties with minors charges with a statutory rape charge, which were transactionally connected, deprived him of a fair trial. State v. Beckham, 145 N.C. App. 119, 550 S.E.2d 231, 2001 N.C. App. LEXIS 559 (2001).

Similarities in Crime Held "Fingerprint" of Perpetrator. — Where defendant was charged with causing his step child to suffer separate injuries consisting of a facial burn and a burn to the buttocks, both injuries were sustained at the same place, the family residence, there was evidence that both injuries were inflicted while defendant was taking care of his wife's sons, and in neither instance did the defendant seek medical treatment for the victim, there was ample evidence of similarities of the crimes constituting a fingerprint of the perpetrator. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Evidence Was Sufficient for Transactional Connection. — There was sufficient evidence of transactional connection to support joinder of two murder charges where common thread connecting crimes was defendant's need for cash to pay for his rent and other bills, and this need for money motivated him to begin his search for victims and led to eventual robberies and murders of two victims two days apart. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court had discretion to consolidate charges of murder for trial, where the facts incident to the two murders revealed a common modus operandi and a temporal proximity sufficient to establish a transactional connection: both victims were young women with drug habits; defendant knew both and had smoked crack with each; one victim was nude when found, and the other was nude from the waist down; both victims suffered blunt-force injuries to their heads; one died as a result of strangulation, and the pathologist could not rule out the possibility that the other had also been strangled; the women were killed within two months of each other, and their bodies were found in the lowest part of vacant houses within two blocks of each other. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

The defendant's ten armed robberies were not so separate in time and place nor so distinct in circumstances as to render consolidation unjust and prejudicial, where the defendant consistently threatened his victims, usually female, with a gun or knife, all but two robberies occurred during daylight hours, and all took place in the same county during a seven-week period. State v. Breeze, 130 N.C. App. 344, 503 S.E.2d 141 (1998).

The defendant's two drug offenses were properly consolidated where they shared a transactional connection. The offenses for which defendant was being tried were identical, sale and delivery of cocaine, the facts involved in each offense were nearly identical, and finally, only three weeks elapsed between the commission of each offense. Joinder of the offenses did not impede defendant's ability to receive a fair trial and put on his defense. State v. Montford, 137 N.C. App. 495, 529 S.E.2d 247 (2000).

Joinder of criminal drug charges was appropriate because the charges of trafficking, conspiracy, and possession with the intent to manufacture, sell, or deliver all stemmed from a series of actions occurring over a short period of time that were part of one general transaction. State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

Joinder of offenses was proper in a case where the defendant was accused of sexually assaulting women and strangling to death two victims because transactional connection was established through numerous factors: (1) all of the victims were either prostitutes or had at some time exchanged sex for drugs or money, (2) the victims were all African-Americans and were drug addicts and/or drug users, (3) defendant's method of assaulting the victims was by strangulation that often left distinct scratches from defendant's long fingernails, (4) all of the surviving victims, except for one who could not identify the defendant, stated that the defendant was well-mannered prior to the assaults but that he would snap instantly and begin assaulting them, (5) defendant used a knife or box cutter at some point during the assaults, (6) the police were able to use DNA evidence to link defendant to three victims, (7) all of the offenses occurred within a one-square-mile area, (8) the incidents took place in a fifteen- to sixteen-month span, with the longest time between offenses being close to five months, and (9) the similarities in the cases were such that the essential evidence in one case would have been admissible in every other case to prove intent, plan, or design. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Joinder of a common law robbery charge with a first degree murder charge was upheld on appeal, despite the two offenses being separated in time by several days and involving different victims, because the offenses were based on a series of acts or transactions that commenced with the robbery of a cell phone from the murder victim's girlfriend and then the subsequent murder of the victim after an argument related to the robbery; the robbery events constituted a critical point in the ongoing dispute between the murder victim and defendant, which resulted in the argument and eventual shooting death of the victim, and therefore, a transactional connection existed between the two offenses. State v. Simmons, 167 N.C. App. 512, 606 S.E.2d 133, 2004 N.C. App. LEXIS 2333 (2004).

Defendant exhibited a similar modus operandi for G.S. 15A-926(a) purposes in the exploitation of a minor for the possession of computer files containing child pornography and exploitation of a minor for receiving those files under G.S. 14-190.17, and secret peeping under G.S. 14-202 crimes charged as defendant used the same personal computer to view pictures of young women; the two types of offenses shared a transactional connection, and the offenses were properly consolidated for trial as the secret peeping charge involved placing a camera in the room of defendant's stepdaughter and using the computer to view those images. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

Separate Charges of First-Degree Murder. — Defendant's unsupported contention that he was prejudiced by the consolidation for trial of separate charges of first-degree murder because without the consolidation he would have had the election of testifying in one case without being forced to testify in the other was not sufficient to show abuse of discretion by the trial judge where the charged crimes were continuing criminal acts which permit the admission in evidence of each in the trial of the other. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The following substantial similarities justified joinder of murder cases for trial: both were murders of young men whom defendant knew and with whom he was associated in the drug trade, both murders occurred after the victims had paged him, both victims were shot in the head with the same gun at a range of approximately two feet or less, both murders occurred in Winston-Salem, both murders occurred on the premises of the victims, and both murders occurred after defendant argued with the victims. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Evidence of a transactional connection was sufficient to support joinder of homicide charges against defendant for first-degree murder of his mother-in-law and son, where the evidence showed that defendant saw his problems as interrelated and developed a unified solution thereto, and further, where the two crimes were so closely related in time that they appeared to be parts of a continuous criminal episode. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Consolidation of two murder charges did not deny defendant a fair determination on the issue of his insanity at the time of the killing of his son or on the issue of his lack of premeditation and deliberation at the time of the killing of his mother-in-law by having to present conflicting defenses in a single trial. Contrary to defendant's assertion, the evidence showed that defendant did not present insanity as to the homicide of his son and lack of premeditation and deliberation as to the homicide of mother-in-law. Rather, defendant presented two defenses on each charge, the defense of insanity and the defense of lack of premeditation and deliberation, and the issues were fairly presented for the jury's consideration. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Two murders with which defendant was charged were properly joined for trial under G.S. 15A-926(a), due to the similarity of their modus operandi and their temporal proximity of four months, as well as their occurrence in the same county. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Murder and Conspiracy to Commit Murder. — On appeal from convictions of murder and conspiracy to commit murder, defendants failed to show either prejudice or that one defendant's defense was so antagonistic as to require separate trials pursuant to this section. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Murder and Solicitation to Commit Murder. — This section was not applicable in prosecutions for murder and solicitation of another to commit murder where at the time of the defendant's first trial for murder no indictments had yet been returned against him for solicitation, and where there was nothing in the record to indicate that the State held the solicitation charges in reserve pending the outcome of the murder trial. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Murder of One Person and Assault upon Another. — Upon the trial under an indictment charging the prisoner with murder of one person, it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon another, the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge. State v. Rice, 202 N.C. 411, 163 S.E. 112 (1932).

Murder of One Person and Kidnapping and Robbery of Another. — Where the State contended that the murder of one person, and the kidnapping and robbery of another person were all parts of a continuing program of action by the defendant covering a period of approximately three hours, evidence of the whole affair was pertinent to the several charges and there was no error in consolidating the charges for trial. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1976).

Second-Degree Murder and Misdemeanor Child Abuse. — In a prosecution for second-degree murder and misdemeanor child abuse the acts perpetrated by the defendant which led to the misdemeanor charge of child abuse were the same acts and transactions which also resulted in the death of the child. Therefore, the two offenses were properly joined under this section. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied and appeal dismissed, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

Kidnapping and Murder. — The trial court properly allowed the State to join for trial offenses of kidnapping one person and kidnapping and murdering another person where the State submitted a written motion to join prior to trial stating that it was made pursuant to this section, which provides for joinder when offenses are based on a series of acts or transactions connected together or constituting parts of a single scheme or plan, and where all of the matters out of which the joined cases grew occurred on the same afternoon of the same day and each was perpetrated according to a common modus operandi. State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

Kidnapping and Assault. — Where the kidnapping and assault charges arose out of the same transaction and elements of the assault charge were essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1972).

Felonious Entry, Kidnapping, and Forcible Taking of Automobile. — Where the felonious entry into a dwelling house, the kidnapping of one of the occupants of the house, and the forcible taking of an automobile in which the perpetrators attempted to make their getaway were so connected and tied together as to make the three offenses one continuous criminal episode, and the evidence of the whole affair was pertinent and necessary to establish the identity of the accused as one of the guilty parties, the three charges were properly consolidated and tried together. State v. Arsad, 269 N.C. 184, 152 S.E.2d 99 (1967).

Conspiracy. — It is permissible to join counts charging conspiracy and successive steps thereafter taken by the respective conspirators in executing the common design. State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935).

The fact that participants entered and exited conspiracy at various times between the years 1969-1978 did not convert one conspiracy into several. The conspiracy was originally based on a common scheme, and its continuation over several years did not sever that common scheme. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652 (1983).

The trial judge's joinder for trial of son's substantive trafficking offenses with mother's conspiracy offense did not deprive either of them of a fair trial. State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

Conspiracy to Rob and Murder in Per-

petration of Robbery. — It is not error for the trial court to refuse a separate trial on each two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. State v. Green, 207 N.C. 369, 177 S.E. 120 (1934).

The offenses of accessory after the fact of a felony and being an aider and abettor to that felony are joinable offenses for purposes of indictment and trial, even though a defendant cannot be convicted of both. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Robbery. — Three charges against defendant for common-law robbery were properly consolidated for trial on the ground that the offenses were based on a series of acts or transactions connected together or constituting parts of a single scheme or plan where all of the offenses occurred within 10 days on the same street in Wilmington; all occurred in the late afternoon; in each case, two black males physically assaulted the attendant of a small business and took petty cash from the person of the victim or the cash box of the business; the assaults were of a similar nature, and each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim; and in each case, the robbers escaped on foot. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Robbery of Motel Room Occupants. — Evidence that all three offenses took place within two months of each other at motels in Greensboro; all of the crimes occurred in the early morning hours; in each instance someone entered an occupied motel room by stealth while the occupants were asleep; in two cases, personal property was taken and the third was interrupted by the victim being awakened; and, in two cases, the victim identified the burglar as a young male wearing jogging pants and a baseball cap, who escaped on foot, was sufficient to establish a common scheme or plan to deprive motel occupants of their property while they were asleep. Thus, the trial court did not err in joining the three offenses for trial. State v. Cummings, 103 N.C. App. 138, 404 S.E.2d 496 (1991).

Robbery and the malicious throwing of acid were joinable offenses under subsection (a), which permits joinder of offenses based on the same act or transaction or on a series of acts or transactions connected together, and use of the fact that the acid was thrown after the robbery to aggravate sentence for the malicious throwing of acid was prohibited by G.S. 15A-1340.4(a)(1)(o). State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

Armed robbery and accessory after the fact of armed robbery are mutually exclusive offenses and not joinable for trial. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

The offenses of armed robbery and accessory after the fact to armed robbery were not joinable under this section where the defendant had not been charged with the offense of accessory after the fact at the time of his trial for armed robbery, and since armed robbery and accessory after the fact of armed robbery are mutually exclusive offenses and not joinable for trial. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

Embezzlement and Perjury. — The trial court did not err in allowing the state to join 3 counts of embezzling, and 3 counts of perjury against the defendant/attorney based on their being "part of a common scheme or plan." The defendant did not show that the offenses were so separate in time and place, or so distinct in circumstances as to render a consolidation unjust nor how the consolidation prejudiced his ability to present a defense and receive a fair trial. State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245, 2000 N.C. App. LEXIS 538 (2000).

Embezzlement and False Pretenses. — While a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction, the State may charge the defendant with both offenses. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Obtaining Money Under False Pretenses. — In prosecution for obtaining money under false pretenses, where contract with one couple was entered into on July 19, 1979, while contract with another individual was entered into on August 10, 1979, almost three weeks later, the offenses for which defendant was tried were separate and distinct, not part of "a single scheme or plan," and the necessary transactional connection was not present in these cases; hence joinder was improper as a matter of law. State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

Separate Acts of Taking Vehicles. — Similarity of modus operandi and similar circumstance in victims, location, time and motive was present, where the offenses involved two vehicles taken from the same location under similar circumstances four days apart. Viewing these facts as of the time of the order of consolidation, the court properly could find them indicative of a single scheme or plan to deprive members of the YMCA of their property while they used the "Y" facilities. State v. Neal, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

Separate Burglaries. — Where both burglaries and the confrontation with the police occurred within a two-hour time span, all the alleged offenses occurred in and around the same subdivision and the evidence indicated a common plan to burglarize homes of the neighborhood and escape by means of a stolen vehicle parked nearby, no showing has been made that a severance was necessary to insure a fair determination by the jury on each charge. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Burglary, Robbery and Murder. — In prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant failed to show that the trial court abused its discretion in permitting joinder or that he was deprived of a fair trial, where the defendant's argument was based entirely on a statement made by the co-defendant during his sentencing hearing, and there was no way for the Supreme Court to determine whether the co-defendant would have testified in the same way or would have testified at all if the defendants had been given separate trials, nor could it know whether any possible testimony by the co-defendant would have had any effect on the outcome of the defendant's trial. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Burglary and Rape. — A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the two offenses being of the same class, which may be joined in one indictment in separate counts, and it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial. State v. Smith, 201 N.C. 494, 160 S.E. 577 (1931).

In a prosecution for first-degree burglary and second-degree rape, where the crimes were committed on both occasions against the same victim in the same house at approximately the same time of evening, and on both occasions, entry was gained through a window and the victim was forced to engage in repeated acts of intercourse, and the perpetrator was not armed on either occasion, such evidence established the requisite transactional connection to permit consolidation of the offenses. State v. Berryman, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Burglary and Larceny. — An indictment which charged two offenses, (1) burglary in the first degree, and (2) larceny of money from the building allegedly feloniously broken into and entered, as alleged in the first count was not defective, since these two counts may be joined in one indictment in separate counts. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 227, 29 L. Ed. 2d 859 (1971).

Housebreaking and Larceny. — When not subject to legal objection, a motion by the solicitor (now prosecutor) to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. State v. Combs, 200 N.C. 671, 158 S.E. 252 (1931); State v. Spencer, 239 N.C. 604, 80 S.E.2d 670 (1954).

Larceny and receiving may be included in the same indictment, even though the charges are inconsistent and a defendant cannot be guilty of both. Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

When a defendant pleads guilty to the indictment, and a single judgment is pronounced thereon, it is regarded as immaterial whether the judgment is considered as relating to the larceny count or to the receiving count. It is only when there is some defect in either the larceny count or the receiving count that knowledge of which count the defendant is pleading guilty to is required. Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

Larceny, Rape and Kidnapping. — Consolidation of misdemeanor larceny with rape and kidnapping felonies is permissible where the three offenses were connected by time and circumstances and constitute a continuing criminal episode. State v. White, 22 N.C. App. 123, 205 S.E.2d 757, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974).

Separate Acts of Rape. — Where the evidence tended to show that defendant forced a girl to have sexual intercourse with him against her will, that on the same night, while defendant was still in company with the first girl, he met another girl in the company of two boys, and that after an altercation with the boys, they and the first girl left the second girl with defendant and that he forced her to have sexual intercourse with him against her will, the consolidation of the prosecutions for the purpose of trial was not error. State v. Chapman, 221 N.C. 157, 19 S.E.2d 250 (1942).

Rape and Carnal Knowledge of Female. — A charge of rape and that of carnally knowing a female person between the ages of 12 and 16 years, under former G.S. 14-26, were properly joined in separate counts in one indictment, since they are related in character and grow out of the same transaction. State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

Rape and Kidnapping. — The consolidation of indictments charging defendant with rape and kidnapping and based upon a single occurrence rests within the discretionary power of the trial court. State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966).

Rape and Armed Robbery. — An indictment charging defendants with rape and an indictment charging defendants with armed robbery may be consolidated for trial when it appears that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes are so connected in time and place that the evidence on the trial of the one is competent and admissible on the trial of the other. State v. Morrow, 262 N.C. 592, 138 S.E.2d 245 (1964), aff'd, 264 N.C. 77, 140 S.E.2d 767 (1965).

Assault with Intent to Rape of One Victim and Rape and Kidnapping of Another. — The consolidation for trial of charges of assault with intent to rape against one victim under former G.S. 14-22 and second-degree rape and kidnapping against another victim was within the sound discretion of the trial judge where the offenses for which defendant was tried occurred in a single afternoon within a three-hour period, with a time lapse of approximately one hour and 25 minutes between offenses, and the offenses were similar in nature and occurred within such a short time span that they could logically be considered all parts of a continuing program of action by the defendant. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Incest and Rape. — Defendant could properly be charged with incest and second-degree rape, though the two offenses arose out of the same transaction and were based on the same facts, where the two offenses were separate and distinct and involved different elements. State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980), appeal dismissed, 302 N.C. 399, 279 S.E.2d 353 (1981).

First-Degree Sexual Offense and Taking Indecent Liberties with a Child. — Consolidation of two counts of first-degree sexual offense and two counts of taking indecent liberties with a child, which allegedly occurred one week apart, did not constitute error. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Where defendant was charged with four sexual offense violations and all four charges involve acts of sexual abuse by defendant upon the same victim in the same location, and each of the alleged acts occurred when defendant was alone with the victim, the trial judge did not abuse his discretion in refusing to sever for separate trial an indecent liberties charge, even though it was based upon acts that allegedly occurred more than six months after the alleged acts underlying the remaining three charges. State v. Bruce, 90 N.C. App. 547, 369 S.E.2d 95, cert. denied, 323 N.C. 367, 373 S.E.2d 549 (1988).

Indictments for first-degree sexual offenses were properly joined under this section; all the crimes were committed while the children were in the exclusive care of defendant while he was transporting them from their homes to a day care [child care] center; and returning them home in the afternoon, therefore, the defendant's conduct manifested a common scheme or plan. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Assault, Attempted Murder, Statutory Rape, and Taking Indecent Liberties with Child. — Charges of assault with a deadly weapon and attempted murder were properly joined for trial with charges of first degree statutory rape and taking indecent liberties with a minor, where the assault and murder charges arose from the defendant's HIV infection when he sexually assaulted the victim, so that the cases were based on the same act, were connected together, and constituted part of the same plan. State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999).

Reckless Driving and Driving under the Influence. — A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, and separate judgments may be entered upon the jury's verdict of guilty of reckless driving and assault. State v. Fields, 221 N.C. 182, 19 S.E.2d 486 (1942).

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of G.S. 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of G.S. 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Unlawful Possession of Liquor and Reckless Driving and Speeding. — Where the evidence tended to show that defendant, the discovery of liquor on his premises being imminent, sped away in his car, leading the officers a chase at an illegal speed, the court properly consolidated for trial a bill of indictment charging unlawful possession of nontaxpaid liquor and unlawful possession of such liquor for the purpose of sale with an indictment charging reckless driving and speeding. State v. Brown, 250 N.C. 209, 108 S.E.2d 233 (1959).

Reckless Driving and Passing Standing School Bus. — Indictments charging defendant with reckless driving and with passing a standing school bus on the highway may be consolidated for trial. State v. Webb, 210 N.C. 350, 186 S.E. 241 (1936).

Obstructing Highway and Injury to Property. — It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. State v. Malpass, 189 N.C. 349, 127 S.E. 248 (1925).

Possession, Sale, and Delivery of Marijuana. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Cuthrell, 50 N.C. App. 195, 272 S.E.2d 616 (1980).

Two Trafficking Offenses. — Defendant did not show that he did not receive a fair trial as the result of the trial court's joining of his two cocaine trafficking charges. Joinder of the offenses pursuant to G.S. 15A-926(b)(2) was not error, as the charges arose from the same series of events on the same day, and the evidence indicated that defendant was involved in a common scheme to sell drugs. State v. Llamas-Hernandez, 189 N.C. App. 640, 659 S.E.2d 79, 2008 N.C. App. LEXIS 714 (2008), rev'd, 363 N.C. 8, 673 S.E.2d 658 (2009).

Joinder Held Prejudicial Error. — Joinder for trial of the defendant's possession of stolen property and financial card theft charges with the charges arising from certain home invasions was prejudicial error where the sole common denominator between the possession of stolen property charges and the charges arising out of the home invasions was that some of the evidence found in defendant's bedroom linked him to the armed robbery and the automobile break-ins, supporting the possession of stolen property and financial card theft charges, while other evidence found in the bedroom linked defendant to the home invasions and where, absent that evidence, the jury might well have reached a different verdict. State v. Perry, 142 N.C. App. 177, 541 S.E.2d 746, 2001 N.C. App. LEXIS 49 (2001).

Joinder of Charge of Possession of Heroin to Other Charges Not Prejudicial. — Defendant's argument that because a charge of possession of heroin carries a far greater "antisocial stigma," the defendant was prejudiced by joining it to a charge of possession of amphetamines was without merit. State v. Wooten, 20 N.C. App. 499, 201 S.E.2d 696 (1974).

Drug-Related Offenses. — Joinder of several drug-related offenses was not the product of arbitrary reasoning, since the transactions were closely related in time and nature under the circumstances. Additionally, defendant failed to point to any tangible evidence of prejudice which resulted from the joinder. State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993).

The trial court did not abuse its discretion and properly joined charges of knowingly keeping a dwelling for the purpose of keeping or selling controlled substances and possession of marijuana with intent to sell and deliver with the charge of selling marijuana to a minor. State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385, petition denied, 339 N.C. 620, 454 S.E.2d 265 (1995).

Arson and House Burning. — Where the grand jury has found two separate indictments, one charging arson and the other the lesser offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the lesser offense will be sustained on appeal. State v. Brown, 182 N.C. 761, 108 S.E. 349 (1921).

Solicitation to Commit Arson. — Where solicitation to commit arson charge and burning of the building charge both involved the same structure, the offenses constituted a transaction to burn the building. Therefore consolidation was proper. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Assault upon Law Officer and Assault with Deadly Weapon. — The trial court did not err in consolidating a charge of assault upon a law officer in the performance of his duty with three charges of assault with a deadly weapon with intent to kill inflicting serious injury where all of the alleged assaults occurred within a period of a few minutes at the same place. State v. Mitchell, 17 N.C. App. 1, 193 S.E.2d 400 (1972).

Assaults During Flight from Scene of Other Offenses. — The trial court did not err in consolidating for trial charges against defendant for assault with a deadly weapon on a law officer in the performance of his duties and assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries not resulting in death and charges against defendant for breaking and entering a restaurant, breaking and entering another building and larceny from the second building where the assaults occurred when the officer attempted to arrest defendant while defendant was fleeing from the scene of the other crimes, since all of the charges against defendant were based on the same series of acts or transactions connected together within the meaning of subsection (a) of this section. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C.

316, 281 S.E.2d 654 (1981).

Offenses During Escape from Jail. — In a criminal prosecution the "transactional connection" required by this section for joinder of offenses at trial existed and the State's motion for joinder was properly allowed where all the offenses involved related directly to defendant's escape from jail and his efforts to avoid recapture. State v. Avery, 302 N.C. 517, 276 S.E.2d 699 (1981).

Offenses Committed on Separate Dates. — In the absence of a conspiracy charge that serves as an umbrella, offenses that are committed on separate dates cannot be joined for trial, even when they are of like character, unless the circumstances of each offense are so distinctly similar that they serve almost as a fingerprint. State v. Williams, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

Subsection (a) of this section would not permit joinder of 13 counts of second-degree burglary, 11 counts of felonious larceny, two counts of conspiracy, and one count of attempted safecracking, which took place on a weekend in October 1982, and on a weekend in January 1983, as there was no single conspiracy charge that served as an umbrella covering the October and January offenses. State v. Williams, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

Where there existed an extended interval of as much as several years between sex offenses and the lack of a consistent pattern in defendant's molesting behavior, all of the charged acts perpetrated against three sisters did not constitute part of a single scheme or plan, as a matter of law, and the trial court erred in joining the cases under this section; however, since evidence of other molestations would have been admissible pursuant to G.S. 8C-1, Rule 404(b) to show "intent, plan or design," at the trial of any one offense, the error was harmless. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590, 1999 N.C. App. LEXIS 1145 (1999).

Where the record revealed that the crimes charged against defendant occurred over a period of 12 years, from 1984 to 1996, and involved three different victims, but, although all of the charges alleged sexual crimes against children, the evidence did not show that defendant went about committing them in any special way, or place, and where the defendant neither offered an argument to support his objection to the joinder nor suggested to the court that joinder would prejudice him and the evidence of the other crimes would have been admissible under G.S. 8C-1, Rule 404(b). State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000).

III. JOINDER OF DEFENDANTS.

A. In General.

Defendants Charged with Same Crimes May Be Tried Together. — Where there are two indictments in which both defendants are charged with the same crimes, then they may be consolidated for trial in the discretion of the court. State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976).

Charges against multiple defendants may be joined for trial, pursuant to subdivision (b)(2) of this section, when each defendant is charged with accountability for each offense, or when the several offenses were part of a common scheme or plan. State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Absent Showing of Irreparable Prejudice. — Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense. State v. Autry, 27 N.C. App. 639, 219 S.E.2d 795 (1975); State v. Johnson, 29 N.C. App. 534, 225 S.E.2d 113 (1976); State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977); State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23, aff'd, 316 N.C. 188, 340 S.E.2d 105 (1986).

Choice Is for State, Not Defendant. — A defendant could not independently assert his preference for joinder with a codefendant. Under the statutory joinder structure, the choice is for the State, not a defendant. State v. Adams, 103 N.C. App. 158, 404 S.E.2d 708 (1991).

The statute specifically provides only for joinder of charges against two or more defendants, as distinguished from joinder of two or more charges against the same defendant, upon motion of the State. Thus, the statute provided no basis for a motion by defendant to compel joinder of his case for trial with that of his brother, even though both he and his brother were charged with the rape and kidnapping of the victim and their defenses were not antagonistic. State v. Jeune, 332 N.C. 424, 420 S.E.2d 406 (1992).

Trial Court's Ruling Will Not Be Disturbed Unless Defendant Is Deprived of Fair Trial. — Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

The question of whether to allow a motion to join defendants for trial ordinarily is addressed to the sound discretion of the trial court; absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's discretionary ruling on the question will not be disturbed. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Timing and Form of Motions. — A written motion for joinder of defendants may be made at any time prior to trial; the motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Result Necessary to Show Prejudice. — Unless joinder of codefendants results in the admission of evidence harmful to the defendant which would not have been admissible in a severed trial, the defendant is not prejudiced by the joinder. State v. Lowry, 318 N.C. 54, 347 S.E.2d 729 (1986); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Prejudice arises most often where defendants offer antagonistic defenses. State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

Or where one defendant has made a confession inadmissible against the other. State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

Antagonistic defenses do not necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980).

Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Mere inconsistencies in defenses do not necessarily amount to such antagonism between defendants joined for trial as to deprive one or the other of a fair trial. Rather, the defenses must be so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty or so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants, resulting in a spectacle where the State simply stands by and witnesses a combat in which the defendants attempt to destroy each other. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

That one defendant chose to testify and the others did not does not amount to antagonistic defenses. State v. Wilhite, 58 N.C. App. 654, 294 S.E.2d 396 (1982), rev'd on other grounds, 308 N.C. 798, 303 S.E.2d 788 (1983).

Where each defendant was charged with accountability for the same offenses, joinder was permissible. State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

Common Scheme or Plan. — In light of the fact that the charges against each defendant arose out of a common scheme or plan entered into by the defendants and the evidence against each would be almost identical, the trial judge did not abuse his discretion by joining the defendants' cases for trial. State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985).

Continuous Criminal Episode. — Where two defendants are charged in separate bills of indictment with identical crimes, and the offenses charged are so connected and tied together in time, place, and circumstances as to make one continuous criminal episode, in such cases there is statutory authority for a consolidation. State v. Walker, 6 N.C. App. 447, 170 S.E.2d 627 (1969); State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (1971).

When two or more defendants are charged in separate bills of indictment with identical crimes and the offense charged against each is so connected in time and place as to constitute one continuous criminal offense, the trial court may order the cases consolidated for trial and his decision will not be disturbed in the absence of a showing of abuse of discretion. State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2, cert. denied, 282 N.C. 427, 192 S.E.2d 837 (1972).

Joinder Permitted. — Defendant's contention that joinder of defendants for trial was improper because some of the evidence was inadmissible against him was without merit. State v. Weaver, 123 N.C. App. 276, 473 S.E.2d 362 (1996).

When Joinder Not Permitted. — Joinder of defendants may not be permitted where such joinder would not promote a fair determination of the guilt or innocence of one or more of the defendants. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

The trial court may in its discretion order a joinder of defendants for trial as provided in subsection (b) of this section, unless there is a showing that a joint trial would be prejudicial and unfair, i.e., the existence of antagonistic defenses, or the admission of evidence which would be excluded on a separate trial, or the exclusion of evidence which would be admitted. State v. Foster, 33 N.C. App. 145, 234 S.E.2d 443, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977).

Subdivision (b)(2) of this section permits joinder where the state seeks to hold each defendant accountable for the same crimes. Under G.S. 15A-927(c)(2) joinder is not permitted, however, if severance is necessary for a fair determination of guilt or innocence. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Severance should be granted to avoid an evidentiary contest between defendants where the state simply stands by and witnesses a combat in which defendants attempt to destroy each other. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

When Written Motion Required. — The district attorney's motion under subsection (b) of this section, made at the beginning of trial, comes within the purview of G.S. 15A-951(a) and is not required to be in writing. The language in subsection (b) of this section, which states, "Upon written motion of the district attorney," applies only in those instances in which joinder of defendants is requested prior to trial. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

For discussion of whether codefendants who are tried jointly should receive joint or separate sentencing trial, see State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

B. Illustrative Cases.

Armed Robbery. — Trial court did not err in granting the State's motion to join defendant's case with that of a codefendant for trial, where both defendants were charged with accountability for the same armed robbery; and there was no merit to defendant's contention that, had the parties been tried separately, witness's testimony that he saw a man not fitting defendant's description leave getaway vehicle and run into the woods would not have been admissible against him, since the witness's testimony would have been admissible against defendant in any event as the witness's personal observation of one of the events taking place during the incident, and the testimony would be more favorable to defendant than prejudicial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Murder Charges. — Defendant failed to show that the trial judge abused his discretion in permitting joinder of murder charges against himself and his girlfriend or that he was deprived of a fair trial. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

The consolidation of defendants' charges for trial did not result in any unfair prejudice to defendant, where neither defendant put on a defense, and where there was nothing in the record to suggest that this course of action was forced on either defendant as a result of the other defendant's position or strategy. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

Consolidation of Indictments Charging Defendants with Murder of Same Person. — Indictment was returned against one defendant charging him with murder in the first degree of a named person and another indictment was returned against two other defendants charging them with murder in the first degree of the same person and on the same date. Since the State was relying upon the same set of facts at the same place and time as against each of the defendants, the trial court had authority to consolidate the indictments for trial. State v. Spencer, 239 N.C. 604, 80 S.E.2d 670 (1954).

In a prosecution of defendants for felony murder, the trial court did not err in granting the State's motion to consolidate defendants' cases for trial where each defendant was charged with having committed the same offense at the same time, neither defendant acted at trial in such a way as to incriminate the other and their defenses were not antagonistic, and while the State on occasion presented evidence that was competent against only one defendant, the trial court proceeded at those times to instruct the jury that such evidence was competent against only a particular defendant. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Armed Robbery and Murder. — In a prosecution of defendant for armed robbery and murder, the trial court did not err in consolidating defendant's case for trial with that of a codefendant where defendants were charged in separate indictments for the same crimes; they were tried upon the theory that the murder with which they were charged was committed in connection with a robbery committed by them jointly; their defenses were not antagonistic; and neither attempted to incriminate the other in the presentation of an alibi. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Where the three defendants were charged with and tried for a single, identical crime, the murder of the trooper, the theory of the prosecution in each case was that the three defendants, jointly, and pursuant to a common plan, robbed the bank, and, while fleeing from the scene of the robbery with its proceeds, shot and killed the trooper, and nothing whatever in the record indicated the slightest prejudice to the right of any of the defendants to a fair trial by reason of the consolidation of the cases per se, there was no error in consolidating the three cases for trial under subsection (b)(2) of this section. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

There was no error in the denial of the motion of codefendants for a separate trial where the two defendants were duly charged in separate indictments with the same crime, the State proceeded upon the theory that the murder, with which they were charged, was committed in the course of a robbery committed by them jointly, their defenses were not antagonistic, each testified in support of their joint alibi and neither, in his testimony or other evidence, attempted to incriminate the other defendant. State v. Madden, 292 N.C. 114, 232 S.E.2d 656 (1977).

The trial court neither committed error nor denied the defendant due process of law when it denied his pretrial motion to sever his case from that of his brother co-defendant and overruled his objections to improper joinder where both were charged with two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count each of assault with a deadly weapon with intent to kill, discharging a firearm into occupied property, and possession of a stolen vehicle, and where the offenses arose out of a common scheme and were part of the same transaction. Furthermore, the State did not stand by and rely on the brother's statement to prove its case but, instead, rebutted the brother's claim that while he was debilitated by pepper spray, he heard gunshots. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Receiving of Stolen Goods Separately by Defendants at Different Times and Places. — Where two persons are charged in separate bills of indictment with receiving stolen goods knowing them to have been stolen, and there is no evidence tending to show there was a conspiracy between them, or between them and other parties, but the indictments relate to the receiving of goods separately by each defendant at different times and places, the consolidation of indictments for trial over objection of appealing defendant is prejudicial error. State v. Dyer, 239 N.C. 713, 80 S.E.2d 769 (1954).

Rape. — Where all of the offenses of rape were parts of a common scheme or plan and each of the defendants was present, aiding and abetting in each offense, the granting of the motion for consolidation for trial was in the sound discretion of the trial judge, and in the absence of a showing that the joint trial deprived the defendant of a fair trial, the judge's exercise of that discretion by consolidating the cases for trial would not be disturbed on appeal even though each of the successive rapes of the prosecutrix was a separate criminal offense. State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978).

Multiple charges of trafficking in cocaine through possession, manufacturing, and transportation, as well as conspiracy, are within the purview of this statute. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

Possession with Intent to Sell Cocaine. — Where defendants were charged with identical crimes emanating from the same instance of wrongdoing, where the offenses charged were so connected in time and place that the evidence presented at trial was competent and admissible to both defendants, where the trial court instructed the jury that each defendant's case should be considered separate and apart from the other defendant's case, and where defendants had shown absolutely no prejudice resulting from the court's failure to sever their trials, there was no abuse of discretion by the trial court in refusing to separate the trial of defendants for possession with intent to sell more than 28 grams of cocaine. State v. Kite, 93 N.C. App. 561, 378 S.E.2d 588, appeal dismissed, 324 N.C. 579, 381 S.E.2d 778 (1989).

Possession of Heroin. — Two defendants, charged with identical offenses that were connected and tied together in time, place and circumstances, may be given a consolidated trial of cases charging them with possession of heroin. State v. Keitt, 19 N.C. App. 414, 199 S.E.2d 23, cert. denied, 284 N.C. 257, 200 S.E.2d 657 (1973), 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974).

Conspiracy. — Where both defendants were convicted of conspiracy to commit the same instance of breaking or entering and larceny, joinder was proper under this section and did not deprive defendant of a fair trial. State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248 (1986), rev'd on other grounds, 320 N.C. 626, 359 S.E.2d 774 (1987).

False Pretenses. — Joinder of four charges against defendant of obtaining property by false pretenses for trial and consolidation of his cases with those of codefendant upheld. State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Sexual Abuse of Children. — Trial judge did not abuse his discretion in joining the cases of defendant husband and wife, involving sexual abuse upon four young children for whom wife had been baby-sitting, where she was present at all times, including both times that husband committed his offenses, as under these facts the trial judge could have made a reasoned decision that there was a common scheme or plan, namely a scheme on the part of the defendants to gratify their sexual desires on the children whom they took in to baby-sit, and the defendants' defenses were not antagonistic. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

Defendant wife who married codefendant husband four days before their joint trial did not prevail in contention that trial should have been severed due to the couple's marriage and antagonistic defenses, where neither her brief nor the record revealed any such conflict. State v. Agubata, 94 N.C. App. 710, 381 S.E.2d 191 (1989).

Joinder of Married Defendants Upheld. — Where both of the defendants were charged with trafficking in heroin based on controlled substances found in the home they shared, joinder originally was consented to by both defendants through their prior counsel, joinder was made prior to the defendants' marriage to each other, and although defendant argued that he would tend to incriminate his wife by offering a defense that would implicate her as the owner of the controlled substances found by the police, defendant offered no such defense at trial, there was no error in trial court's decision to allow joinder. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Joinder Was Upheld where the defendant and the co-defendant were charged with the same offenses, but on different theories and where the several offenses for which they were charged were clearly part of a common scheme or plan to murder the victims, defendant's mother and nephew, and to disguise their murders by burning the victim' house. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

Defendant waived his right to severance by failing to renew his pre-trial motion to sever his trial from his co-defendant at the close of all of the evidence, as required by G.S. 15A-927(a)(2); the trial court did not err in ordering joinder of trials of two defendants charged with offenses arising out of a single attempt to escape from prison. State v. McDonald, 163 N.C. App. 458, 593 S.E.2d 793, 2004 N.C. App. LEXIS 510 (2004), cert. denied, 358 N.C. 548, 599 S.E.2d 910 (2004).

Defendant and codefendant were each charged with accountability for first-degree murder, first-degree kidnapping, and burning of personal property arising from the same series of events involving the same victim and witnesses, and the evidence tended to indicate a common scheme; there was ample reason for the trial court to decide to join the cases for trial under G.S. 15A-926(b)(2) even though (1) one defendant's semen was found (and not the other's), and (2) one defendant wanted a juror that the other struck by use of a peremptory challenge. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Denial of defendants' motions to sever was proper because very minimal conflict in defendants' respective positions at trial existed in as much as neither was claiming that the other was the guilty party with regard to the armed robbery of a fast food restaurant. State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005), review denied, appeal dismissed, 360 N.C. 290, 628 S.E.2d 384 (2006).

Trial court did not abuse its discretion in joining defendants' cases for trial because the State of North Carolina sought to hold defendants accountable for the same crimes that arose at the same time, and the State's evidence was sufficient to show that defendants were involved in a common scheme to distribute marijuana. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

No Prejudice Shown. — Joint trial of defendants was not in error because the defendants were not prejudiced by the admission of a redacted confession by one of the defendants; furthermore, one defendant was not prejudiced by his co-defendant's decision to support the disqualification during the trial of a juror who the court learned was being criminally investigated. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Witness for One Defendant Serving as Attorney for the Other. — There was no irreparable prejudice in the consolidation for trial of the charges against two defendants where one of the witnesses for one of the defendants was the attorney representing the other defendant. State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Denial of Severance of Sentencing Proceedings Not Plain Error. — The court did not commit plain error in refusing to sever the defendant's sentencing proceeding from that of his brother co-defendant where he produced no evidence that his mother would have testified favorably if the cases had been severed and there was no indication that she would not have testified truthfully if she had been subpoenaed and where the trial court repeatedly instructed the jury to consider each defendant separately. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

IV. FAILURE TO JOIN RELATED OFFENSES.

Purpose of Subsection (c). — Subsection (c) of this section was designed to provide a means by which a defendant may protect himself from multiple trials on charges of related offenses when the charges later brought up for trial were not known to the defendant at the time of the first trial but, if the severed charges were pending at the time of the first trial, the defendant waives any right to joinder by failing to move for joinder. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

Subdivision (c)(2) applies after a trial on another charge and the motion to dismiss is permitted unless the motion for joinder was previously decided against the defendant or unless the defendant has waived his right to object by his earlier failure to request joinder of related offenses. State v. Jones, 50 N.C. App.

263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

(a) Timeliness of Motion; Waiver; Double Jeopardy.

(1) A defendant's motion for severance of offenses must be made before trial as provided in G.S. 15A-952, except as provided in G.S. 15A-953, and except that a motion for severance may be made before or at the close of the State's evidence if based upon a ground not previously known. Any right to severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion.

(3) Unless consented to by the defendant, a motion by the prosecutor for severance of offenses may be granted only prior to trial.

(4) If a motion for severance of offenses is granted during the trial, a motion by the defendant for a mistrial must be granted.

(b) Severance of Offenses. — The court, on motion of the prosecutor or on motion of the defendant, must grant a severance of offenses whenever:

(1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or

(2) If during trial, upon motion of the defendant or motion of the prosecutor with the consent of the defendant, it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

(c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant.

(2) The court, on motion of the prosecutor, or on motion of the defendant other than under subdivision (1) above must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or

b. If during trial, upon motion of the defendant whose trial is to be severed, or motion of the prosecutor with the consent of the defendant whose trial is to be severed, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

(3) The court may order the prosecutor to disclose, out of the presence of the jurors, any statements made by the defendants which he intends to introduce in evidence at the trial when that information would assist the court in ruling on an objection to joinder of defendants for trial or a motion for severance of defendants.

(d) Failure to Prove Grounds for Joinder of Defendants for Trial. — If a defendant moves for severance at the conclusion of the State's case or of all the evidence, and there is not sufficient evidence to support the allegation upon which the moving defendant was joined for trial with the other defendant or defendants, the court must grant a severance if, in view of this lack of evidence, severance is found necessary to achieve a fair determination of that defendant's guilt or innocence.

(e) Severance on Motion of Court. — The court may order a severance of offenses before trial or deny the joinder of defendants for trial if a severance or denial of joinder could be obtained on motion of a defendant or the prosecutor. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Subject to the exceptions set out here, the making of a motion for severance is subject to the requirements of Article 52, Motions Practice.

Obviously if a defendant seeks severance of charges, the granting of that motion should not bar trial on the severed offenses. If the presence of the severed charges has already worked to the prejudice of the defendant, he should not have to go forward at that time, and provisions for mistrial have been added to the A.B.A. Standards.

Subsection (b) sets out the obvious grounds for severance. Of course severance during trial would require the consent of the defendant if there is to be further trial on those charges.

Subdivision (1) of subsection (c) contains provisions which meet the requirements of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). This and other provisions of subsection (c) are from the A.B.A. Standards, with appropriate modification to reflect the concept of joinder for trial rather than pleading joinder. Prior to trial the defendant may object to joinder. Once the trial is begun it is more appropriate to speak in terms of "severance."

Legal Periodicals. — For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For article on evidentiary problems in multiple defendant cases, see 13 N.C. Cent. L.J. 62 (1981).

CASE NOTES

I. General Consideration.
II. Procedure.
III. Codefendant's Statements, etc.

I. GENERAL CONSIDERATION.

History of Section. — State v. Gonzalez, 62 N.C. App. 146, 302 S.E.2d 463 (1983), rev'd on other grounds, 311 N.C. 80, 316 S.E.2d 229 (1984).

Legislative Intent. — It must be assumed that the legislature in enacting the former Speedy Trial Act was aware of the preexisting subdivision (c)(2) of this section. It must also be assumed that the legislature did not intend to do a vain act. Therefore, the provision "right to a speedy trial" found in this section refers to the defendant's constitutional right to a speedy trial, not his statutory right. This interpretation allows a harmonious existence between these statutes, and returns discretion to trial courts. State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984).

Public Policy Favors Consolidation. — Where two or more defendants are sought to be held accountable for the same crime or crimes, not only is joinder permissible under the statute, but public policy strongly compels consolidation as the rule rather than the exception. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

There is a strong policy favoring the consolidated trials of defendants accused of collective criminal behavior. State v. Roope, 130 N.C. App. 356, 503 S.E.2d 118 (1998), cert., 349 N.C. 374, 525 S.E.2d 189 (1998).

Applied in State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Hairston, 36 N.C. App. 641, 244 S.E.2d 448 (1978); State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Liddell, 39 N.C. App. 373, 250 S.E.2d 77 (1979); State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982); State v. McGee, 60 N.C. App. 658, 299 S.E.2d 796 (1983); State v. Marlow, 61 N.C. App. 300, 300 S.E.2d 567 (1983); State v. Williams, 308 N.C. 339, 302 S.E.2d 441 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984); State v. Johnson, 71 N.C. App. 90, 321 S.E.2d 510 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Winslow, 97 N.C. App. 551, 389 S.E.2d 436 (1990); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); Newell v. Nationwide Mut. Ins. Co., 334 N.C. 391, 432 S.E.2d 284 (1993); State v. Floyd, 115 N.C. App. 412, 445 S.E.2d 54 (1994); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996); State v. Galloway, 145 N.C. App. 555, 551 S.E.2d 525, 2001 N.C. App. LEXIS 744 (2001); State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003).

Cited in State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385; State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649 (1977); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981); State v. Hammond, 307 N.C. 662, 300 S.E.2d 361 (1983); State v. Williams, 308 N.C. 339, 302 S.E.2d 441 (1983); State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Weaver, 123 N.C. App. 276, 473 S.E.2d 362 (1996); State v. Lemons, 352 N.C. 87, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

II. PROCEDURE.

Discretion of Trial Judge. — Ordinarily, motions for separate trial lie within the sound discretion of the trial judge. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

A trial court's ruling on questions of joinder or severance is discretionary and will not be disturbed absent a showing of abuse of discretion. State v. Carson, 320 N.C. 297, 357 S.E.2d 662 (1987).

Whether defendants should be tried jointly or separately is in the sound discretion of the trial court. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979), cert. denied, 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980); State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 592 (1980); State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980); State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

The question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. State v. Hardy, 67 N.C. App. 122, 312 S.E.2d 699 (1984).

A trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985).

The question of whether defendants should be tried jointly or separately is within the sound discretion of the trial judge, and will not be disturbed on appeal absent a showing that joinder has deprived a defendant of a fair trial. State v. Evans, 346 N.C. 221, 485 S.E.2d 271 (1997), cert. denied, 522 U.S. 1057, 118 S. Ct. 712, 139 L. Ed. 2d 653 (1998).

Public policy favored a single prosecution of two defendants who were charged with robbing a video store, and the trial court did not abuse its discretion when it discounted uncorroborated testimony presented by one defendant's wife, claiming that the other defendant told her he would testify that her husband was not present during the robbery if they were tried separately, and denied the wife's husband's motion for a separate trial. State v. Distance, 163 N.C. App. 711, 594 S.E.2d 221, 2004 N.C. App. LEXIS 576 (2004).

The trial court has three choices when a defendant objects to joinder due to the existence of an extrajudicial statement by a codefendant that makes reference to the objecting defendant but is not admissible as to the objecting defendant: 1) a joint trial at which the statement is not admitted; 2) a joint trial at which the statement is admitted in a sanitized form; or 3) a separate trial for the objecting defendant. State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992).

Review of Exercise of Discretion. — In the absence of a showing that a joint trial has deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979), cert. denied, 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980); State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 592 (1980); State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

Decision to join the charges against two or more defendants for trial is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981); State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986); State v. Giles, 83 N.C. App. 487, 350 S.E.2d 868 (1986), cert. denied, 319 N.C. 460, 356 S.E.2d 8 (1987); State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

The trial court's exercise of authority to consolidate cases for trial is discretionary and will not be disturbed on appeal absent a showing that a joint trial deprived a defendant of a fair trial. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied, 307 N.C. 580, 299 S.E.2d 652 (1983); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

The question of whether to allow a motion to join defendants for trial ordinarily is addressed to the sound discretion of the trial court; absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's discretionary ruling on the question will not be disturbed. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Under this section, restrictions are placed on the use of a codefendant's statement only where a joint trial occurs; therefore, this statute did not apply to statements made by co-defendant and read in court by prosecution witness, since co-defendant was not jointly tried with defendant. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Under this section, restrictions are placed on the use of a codefendant's statement only where a joint trial occurs. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Showing of Prejudice from Joinder Required. — Defendant seeking to overturn the discretionary ruling of the trial judge must show that the joinder has deprived him of a fair trial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

The ruling upon a motion for severance shall not be disturbed on appeal unless defendant demonstrates an abuse of judicial discretion which effectively deprived him of a fair trial. State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982).

Unless the accused suffered some apparent and palpable injustice in the trial below, an appellate court will not interfere with the decision of the court on the motion for a severance. State v. Wilhite, 58 N.C. App. 654, 294 S.E.2d 396 (1982), rev'd on other grounds, 308 N.C. 798, 303 S.E.2d 788 (1983).

Unless joinder of codefendants results in the admission of evidence harmful to the defendant which would not have been admissible in a severed trial, the defendant is not prejudiced by the joinder. State v. Lowry, 318 N.C. 54, 347 S.E.2d 729 (1986); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Unsupported Statement of Possible Prejudice. — Where defendant's only assertion of possible prejudice was that he might have elected to testify in one of the cases and not in the others, this unsupported statement of possible prejudice was not sufficient to show abuse of discretion on the part of the trial judge in denying defendant's motion to sever the cases for trial. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977), cert. denied, 294 N.C. 186, 241 S.E.2d 521 (1978).

When Joint Trial Is Error. — Where the defendants' defenses are antagonistic, or where it is impossible for one defendant to receive a fair trial, it is error to allow a joint trial over the objection of the defendant. State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982).

Section 15A-926(b)(2) permits joinder where the state seeks to hold each defendant accountable for the same crimes. Under subdivision (c)(2) of this section joinder is not permitted, however, if severance is necessary for a fair determination of guilt or innocence. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Where defendant's failure to testify in his own defense was based on the position taken by his codefendant rather than the position taken by the State and defendant was denied the opportunity to put on potentially inculpatory evidence against his codefendant, joinder was inappropriate. State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (1994).

Fairness Controls over Time and Money Considerations. — Consolidation expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. However, no matter how appealing such public policy may be, it must not stand in the way of a fair determination of guilt or innocence. State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982).

Consolidation Held Not to Prejudice Right to Testify Only as to Certain Charges. — In a prosecution for rape, aggravated kidnapping and crime against nature, defendant's argument that he was prejudiced by consolidation of the cases because, had they not been consolidated, he could have elected to testify in one case if he so desired without being forced to testify in the others was without merit, since the offenses joined for trial were based on a series of acts or transactions connected together and constituted a continuing criminal episode; evidence of one offense would certainly be admissible in trials on the other offenses; defendant failed to show the manner in which his right against self-incrimination was violated; and defendant failed to move for severance at the close of all the evidence. State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817, cert. denied, 295 N.C. 554, 248 S.E.2d 731 (1978).

Defendant Waived Right to Severance. — Because defendant made his motion to sever at the first day of trial, he was required to renew his motion at the close of all of the evidence; therefore, where defendant failed to renew his motion at the close of all the evidence as required by this section, he waived his right to sever. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

The record and transcript indicated that the defendant failed to renew his motion to sever offenses at any time after his pretrial motion for same was denied. By statute, therefore, he waived any right to severance of offenses. State v. Spivey, 102 N.C. App. 640, 404 S.E.2d 23 (1991).

Since defendant failed to renew his pre-trial motion to sever his trial from his co-defendant at the close of all of the evidence, as required by G.S. 15A-927(a)(2), he waived his right to severance; the trial court did not err in ordering joinder of trials of two defendants charged with offenses arising out of a single attempt to escape from prison. State v. McDonald, 163 N.C. App. 458, 593 S.E.2d 793, 2004 N.C. App. LEXIS 510 (2004), cert. denied, 358 N.C. 548, 599 S.E.2d 910 (2004).

Defendant failed to renew defendant's motion to sever a possession of a firearm by a felon charge from a charge of stolen property at the close of all of the evidence as required by G.S. 15A-927(a)(2), and waived defendant's right to severance. State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007).

Effect of Signing "Notice of Waiver of Right". — The defendant waived appellate review of severance based on a Bruton violation by signing the "Notice of Waiver of Right" and stating in open court that there was "no objection." State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

No Motion to Sever. — Defendant made no motion to sever and waived the right to allege on appeal that the trial court erred in joining the offenses for trial. State v. Mitchell, 104 N.C. App. 514, 410 S.E.2d 211 (1991), cert. granted, 331 N.C. 120, 414 S.E.2d 764 (1992), discretionary review improvidently granted, 336 N.C. 22, 442 S.E.2d 24 (1994).

Severance Properly Denied. — Where intent to kill was not an element of defendant's felony murder conviction, he could not have been prejudiced by any evidence related to his intent; thus, the introduction of evidence about killing a cat could not have denied defendant a fair trial, and the trial court properly denied motion for a severance and a mistrial. State v. Cagle, 346 N.C. 497, 488 S.E.2d 535 (1997), cert. denied, 522 U.S. 1032, 118 S. Ct. 635, 139 L. Ed. 2d 614 (1998).

Where the state presented plenary evidence of defendant's guilt on the crime of accessory after the fact and any reference to defendant by expert/clinical psychologist, who stated that her brother was concerned for her mental health, only marginally affected defendant's own case, there was no error in the trial court's denial of defendant's motion to sever. State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

The joinder of defendant's drug offenses was upheld where the charges against defendant occurred within a six month period and indicated the same pattern of operation between defendant and the informant during this time. Defendant always retrieved the cocaine from the woods, on or near his property, would often plan the exchange with the informant ahead of time, always took cash in payment from him, and almost always delivered the cocaine to him in clear plastic bags; in other words, defendant had a common, continual method of transacting drug sales. State v. Manning, 139 N.C. App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS

983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

Failure to sever defendants was not improper where the defenses each defendant presented were not so antagonistic and irreconcilable that defendants were denied a fair trial, nor was any evidence admitted against one defendant that could be improperly construed against the other defendant in their trial for robbery with a dangerous weapon. State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004).

Motion made after verdict comes too late to avoid the waiver provision of subdivision (a)(2) of this section. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Joinder Upheld. — Defendant failed to show that the trial court abused its discretion in permitting joinder of murder charges against himself and his girlfriend or that he was deprived of a fair trial. State v. Green, 321 N.C. 587, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

In prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant failed to show that the trial court abused its discretion in permitting joinder or that he was deprived of a fair trial, where the defendant's argument was based entirely on a statement made by the co-defendant during his sentencing hearing, and there was no way for the Supreme Court to determine whether the co-defendant would have testified in the same way or would have testified at all if the defendants had been given separate trials, nor could it know whether any possible testimony by the co-defendant would have had any effect on the outcome of the defendant's trial. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Defendant failed to show any prejudice or an abuse of discretion by the judge's failure to sever cases against him for first degree sexual offenses for trial, where, although defendant argued consolidation made the case difficult to defend and tended to make the jury believe he was guilty of all offenses simply because there were so many, the fact remained that if the cases were tried separately the State could still have presented evidence of other similar sex crimes as evidence of a common scheme or plan. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Where testimony regarding defendant's statement to police, the only evidence which could be deemed prejudicial to defendant, was properly elicited by the State at defendant's consolidated trial, and could have been properly elicited by the State if defendant had been tried alone, and the evidence against codefendant was weak and resulted in her acquittal, defendant could not contend that his association with codefendant prejudiced the jury against him. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Substantial evidence of the defendant's guilt overrode any possible harm to the defendant resulting from a joint trial, where each victim testified that he or she was stabbed by the defendant with a knife, each victim was able to identify the defendant, one victim testified that she watched as the defendant repeatedly stabbed her husband, and an accomplice testified that the defendant stated his intent to kill the victims before his acts. State v. Roope, 130 N.C. App. 356, 503 S.E.2d 118 (1998), cert., 349 N.C. 374, 525 S.E.2d 189 (1998).

The trial court properly joined the defendant's case for trial with co-defendant's case where his out-of-court statement, redacted pursuant to this section, was adequate, the redaction did not prejudice the defendant, and the trial court's failure to instruct the jury that it could use the co-defendant's statement against him only was harmless error. State v. McKeithan, 140 N.C. App. 422, 537 S.E.2d 526, 2000 N.C. App. LEXIS 1205 (2000).

Trial court did not abuse its discretion in joining defendants' trials; defendants failed to use available procedures and instructions to limit impact of concealed weapon testimony and second defendant's defense was not antagonistic to first defendant, it was merely that he was in the wrong place at the wrong time. State v. Castrejon, — N.C. App. —, 635 S.E.2d 520, 2006 N.C. App. LEXIS 2121 (2006), cert. denied, appeal dismissed, 361 N.C. 222, 642 S.E.2d 709 (2007).

Joinder Held Error. — Where defendants were being jointly tried for the same capital offense when one defendant changed his plea to guilty, it was error for the trial to continue as both a sentencing proceeding as to one defendant and as a trial to determine the guilt or innocence of the other. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

The consolidation of defendants' charges for trial did not result in any unfair prejudice to defendant, where neither defendant put on a defense, and where there was nothing in the record to suggest that this course of action was forced on either defendant as a result of the other defendant's position or strategy. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

Given the conflict in defendants' respective positions at trial and the other evidence in the case, including the paucity of evidence on acting in concert, defendants were denied a fair trial by being tried together. State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (1994).

III. CODEFENDANT'S STATEMENTS, ETC.

This section is intended to protect a defendant's rights under U.S. Const.,

Amend. VI of confrontation and cross-examination which, because of the privilege against self-incrimination, may be lost when a codefendant's statement, inadmissible against but implicating the defendant, is admitted into evidence against the codefendant at a joint trial. State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986).

Subdivision (c)(1) codifies substantially the decision in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), which held that the receipt in evidence of the confession of one codefendant posed a substantial threat to the other codefendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents those who are implicated from calling the defendant who made the statement to the stand. State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978), cert. denied and appeal dismissed, 296 N.C. 738, 254 S.E.2d 179 (1979); State v. Whilhite, 56 N.C. App. 395, 289 S.E.2d 111, cert. denied and appeal dismissed, 305 N.C. 591, 292 S.E.2d 13 (1982); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986).

When Statement Regarding Codefendant Inadmissible. — A statement is inadmissible as to a codefendant only if it is made outside his presence and incriminates him. State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992).

Defendant was not entitled to have his co-conspirators' incriminating statements sanitized pursuant to subdivision (c)(1) of this section where the statements were admissible against him under G.S. 8C-1, Rule 801(d)(E) whether he is tried separately or jointly. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Subdivision (c)(1) Held Inapplicable. — Where the extrajudicial statements made by accomplices implicating the defendants were admitted at trial for the purpose of corroborating the testimony of the accomplices, the accomplices were subject to cross-examination by defendants, and subdivision (c)(1) of this section did not apply. State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978), appeal dismissed, 296 N.C. 738, 254 S.E.2d 179 (1979).

Where statement was part of the res gestae and therefore would have been admissible against both defendant and codefendant had they been tried separately, the trial judge correctly denied defendant's motion for appropriate relief under subdivision (c)(1) of this section. State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986).

The existence of antagonistic defenses will not, standing alone, warrant a severance. State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (1994).

Antagonistic defenses do not necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980); State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Where the State presented plenary evidence of defendant's guilt, apart from codefendant's testimony, and defendant had the opportunity to cross-examine codefendant, the trial court did not abuse its discretion in denying defendant's motion to sever based on antagonistic defenses. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

The existence of antagonistic defenses alone does not necessarily warrant severance; the focus is on whether the defendants have suffered prejudice, not on whether they contradict each other. State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1995).

Mere inconsistencies in defenses do not necessarily amount to such antagonism between defendants joined for trial as to deprive one or the other of a fair trial. Rather, the defenses must be so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty or so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants, resulting in a spectacle where the State simply stands by and witnesses a combat in which the defendants attempt to destroy each other. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Deletions from defendant's statement of references to codefendant did not materially change the nature of defendant's statement, and he was not prejudiced by admission of the "sanitized" statement. State v. Giles, 83 N.C. App. 487, 350 S.E.2d 868 (1986), cert. denied, 319 N.C. 460, 356 S.E.2d 8 (1987); State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988), aff'd, 330 N.C. 826, 412 S.E.2d 660 (1992).

The admission of co-defendant's confession with all references to defendant deleted was not prejudicial to defendant where the parts of co-defendant's confession about which defendant complained were of little importance to the case against defendant and the confession was largely corroborated by other evidence. State v. Littlejohn, 340 N.C. 750, 459 S.E.2d 629 (1995).

Where the State called a jail inmate as a witness to testify about conversations he had with defendant, in which defendant stated that he had gotten a gun from his friend and shot the victim, the trial court correctly prohibited the inmate from testifying that defendant was assisted by his friend, due to the likelihood that this reference would implicate codefendant in the shooting, substantially threatening his Sixth Amendment rights. Defendant was not prejudiced by the admission of the sanitized statement because it was not materially altered by deleting the reference to the codefendant. State v. Stafford, 150 N.C. App. 566, 564 S.E.2d 60, 2002 N.C. App. LEXIS 578 (2002), cert. denied, 357 N.C. 169, 581 S.E.2d 444 (2003).

Test Is Whether Conflict Deprived Defendants of Fair Trial. — The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982); State v. Wilhite, 58 N.C. App. 654, 294 S.E.2d 396 (1982), rev'd on other grounds, 308 N.C. 798, 303 S.E.2d 788 (1983).

Each case turns on its own facts, and an abuse of discretion may be shown when the defenses of the codefendants are antagonistic, and the conflict in the defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, a defendant would be denied a fair trial. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Denial of defendants' motions to sever was proper because very minimal conflict in defendants' respective positions at trial existed in as much as neither was claiming that the other was the guilty party with regard to the armed robbery of a fast food restaurant. State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005), review denied, appeal dismissed, 360 N.C. 290, 628 S.E.2d 384 (2006).

Defendants Charged with Same Crime. — Trial court did not err in granting the State's motion to join defendant's case with that of a codefendant for trial, where both defendants were charged with accountability for the same armed robbery; moreover, there was no merit to defendant's contention that, had the parties been tried separately, a witness's testimony that he saw a man not fitting defendant's description leave the getaway vehicle and run into the woods would not have been admissible against him, since the witness's testimony would have been admissible against defendant in any event as the witness's personal observation of one of the events taking place during the incident, and the testimony would be more favorable to defendant than prejudicial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

No error found in the denial of defendant's motion to sever his trial for sexual offenses and kidnapping from that of his codefendant. State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (1993).

Trial court did not abuse its discretion in joining defendants' cases for trial because the State of North Carolina sought to hold defendants accountable for the same crimes that arose at the same time, and the State's evidence was sufficient to show that defendants were involved in a common scheme to distribute marijuana. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Severance should be granted to avoid an evidentiary contest between defendants where the State simply stands by and witnesses a combat in which defendants attempt to destroy each other. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

In determining whether trials should be severed, mere inconsistencies in defenses do not necessarily amount to the kind of antagonism between defendants joined for trial that deprives one or the other of a fair trial. Rather, the defenses must be so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty or so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants resulting in a spectacle where the State simply stands by and witnesses a combat in which the defendants attempt to destroy each other. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Admission of Codefendant's Out-of-Court Statements. — In a prosecution for armed robbery there was no merit to defendant's contention that the trial court erred in joining his case for trial with that of a codefendant and that he was unfairly prejudiced by admission of codefendant's statements at their joint trial, where codefendant's extrajudicial statements were admissible against defendant under the spontaneous utterance exception to the hearsay rule, and defendant failed to show an abuse of the trial court's discretion in joining the charges against the two defendants. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983).

Where the testimony of the wife of defendant's codefendant concerning her husband's extrajudicial statements inculpating the defendant added nothing of significance to the defendant's own testimony, which constituted overwhelming untainted evidence of his guilt, error by the trial court in overruling defendant's objections to such testimony or in denying his motion to sever was harmless beyond a reasonable doubt. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986).

Where a declarant can be cross-examined, a codefendant implicated by extrajudicial statements made by the declarant is fully accorded his right to confrontation. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

The admission of co-defendant's confession into evidence did not violate defendant's rights under the Confrontation Clause because the confession was fully redacted and did not identify, much less incriminate, defendant. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

Trial court did not abuse its discretion in denying a motion to sever two defendants' trial, where an inmate was to testify that one of the defendants told him that defendants were going to claim that they were going to claim that they were forced to commit burglary, robbery, and kidnapping, because of defendants' collective criminal behavior in the commission of the crimes, and because the evidence was relevant and not overly prejudicial to the defendant that did not talk to the inmate and filed the motion to sever. State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004).

Joint trial of defendants was not in error because the defendants were not prejudiced by the admission of a redacted confession by one of the defendants; furthermore, one defendant was not prejudiced by his co-defendant's decision to support the disqualification during the trial of a juror who the court learned was being criminally investigated. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Disruptive Behavior of Codefendant. — The trial court did not abuse its discretion in denying defendants' motions for severance or for a mistrial on the ground that they did not receive a fair and impartial trial due to the in-court outbursts of a codefendant, where, when possible, the trial judge immediately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it, when it became apparent that the codefendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom and at this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do so, and where in his final charge to the jury, the judge again instructed the jury not to allow the codefendant's behavior to influence its decision. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 100 S. Ct. 300, 62 L. Ed. 2d 310 (1979).

§ 15A-928. Allegation and proof of previous convictions in superior court.

(a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. Except as provided in subsection (c) below, the State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.

(c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the case must then proceed as follows:

(1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.

(2) If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case. This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence.

(d) When a misdemeanor is tried de novo in superior court in which the fact of a previous conviction is an element of the offense affecting punishment, the State must replace the pleading in the case with superseding statements of charges separately alleging the substantive offense and the fact of any prior conviction, in accordance with the provisions of this section relating to indictments and informations. Any jury trial in superior court on the misdemeanor must be held in accordance with the provisions of subsections (b) and (c).

(e) Nothing contained in this section precludes the State from proving a prior conviction before a grand jury or relieves the State from the obligation or necessity of so doing in order to submit a legally sufficient case. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

When a defendant is tried for an offense carrying a higher statutory maximum punishment upon proof of prior convictions, there is no constitutional requirement that the defendant be afforded a two-step trial to keep the jury deciding guilt from learning of the prior convictions. Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967). Nevertheless, a two-step procedure is favored by many legal commentators, and North Carolina in 1967 adopted such a procedure as part of its habitual felon law in Article 2A of Chapter 14 of the General Statutes, Habitual Felons.

The Commission recommended a provision that contains some features of a two-step procedure. It is modeled after a section in the New York Criminal Procedure Law. If the defendant admits his guilt of the punishment-enhancing prior convictions upon a separate arraignment out of the presence of the jury, the fact of the prior convictions is settled and need not be submitted to the jury as an element of the crime. If the defendant does not admit the prior convictions, the State must prove them beyond a reasonable doubt before the jury.

The New York statute, C.P.L. § 200.60, applied only to indictments and informations, and the Commission's draft was also so limited. The General Assembly, however, added subsection (d) to make the procedure also apply to misdemeanors appealed for trial de novo in superior court.

Cross References. — As to alleging and proving prior convictions, see also G.S. 15A-924.

Legal Periodicals. — For note on current trends in recidivist statute procedures, see 45 N.C.L. Rev. 1039 (1967).

CASE NOTES

I. General Consideration.
II. Stipulation of Previous Convictions.

I. GENERAL CONSIDERATION.

The purpose of this section is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit or deny them before the State's evidence is concluded; because, as the statute makes plain, if the convictions are denied, the State can then present proof of that element of the offense to the jury, but cannot do so if the prior convictions are admitted. State v. Ford, 71 N.C. App. 452, 322 S.E.2d 431 (1984).

The purpose of this section is to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Applicability. — This statute applies solely to cases in which the fact that the accused had a prior conviction raises an offense of lower grade to one of higher grade. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980), appeal dismissed, 301 N.C. 724, 276 S.E.2d 285 (1981).

Impact of *Apprendi and Blakely*. — Defendant's claim that *Apprendi* and *Blakely* eliminated sentence-enhancement statute, and as a result rendered all recidivist statutes into substantive crimes with the effect that sentencing for either habitual misdemeanor assault or as a habitual violated the Double Jeopardy Clause's prohibition against multiple punishments for the same offense had to be rejected; *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements while defendant's argument was directed against the Fifth Amendment prohibition against double jeopardy, making *Blakely* and *Apprendi* inapposite. State v. Artis, 181 N.C. App. 601, 641 S.E.2d 314, 2007 N.C. App. LEXIS 261 (2007).

Section must be strictly followed in order to apprise defendant of the offense for which he is charged and to enable him to prepare an effective defense. Thus, the special indictment charging defendant with the previous conviction(s) of a specified offense must be filed with the principal pleading. Furthermore, the defendant must be arraigned upon the special indictment after commencement of the trial but before the close of the State's case. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

If there is no doubt that defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by subsection (c) of this section, the trial court's failure to arraign defendant is not reversible error. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Subsection (c) does not violate the right to jury trial embodied in N.C. Const., Art. I, § 24. See State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Effect of subsection (c) is not to deprive the defendant of a jury trial. It merely allows defendant, by judicially admitting his prior convictions, to preclude the State from adducing evidence of them and to require the judge to submit the case to the jury without reference to them and as if previous convictions were not an element of the offense. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Failure to be Present. — In light of the fact that defendant had waived his right to be at his trial on drug charges due to his unexplained absence from the court, there was no error on the part of the trial court with continuing with the habitual offender portion of defendant's trial since he was informed of the previous convictions the State intended to use and was given a fair opportunity to either admit or deny them or remain silent. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

Relevance of Evidence of Previous Conviction. — When evidence of the previous conviction is introduced it is relevant only to the issue whether defendant has previously been convicted of an offense identical to the substantive offense charged, and the judge must charge the jury that they shall not consider such a prior conviction in passing upon his guilt or innocence of the primary charge. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Standard of Proof. — Where the defendant denies the previous conviction the State must prove this element of the offense charged beyond a reasonable doubt. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Court erred in failing to dismiss the habitual misdemeanor assault charge where defendant was not properly arraigned; the State introduced no evidence of five prior convictions and failed to present evidence of an essential element of the charge requiring that the conviction for habitual misdemeanor assault be vacated. State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461, 2003 N.C. App. LEXIS 1799 (2003).

Court Erroneously Dismissed Habitual Felon Indictment. — Defendant was not subjected to a second prosecution for the same substantive offense as he claimed, rather the trial court erroneously determined that G.S. 15A-928 required the habitual felon indictment be dismissed due to its belief that defendant had not been properly arraigned regarding the habitual felon charge; the case was remanded for habitual felon proceedings. State v. Marshburn, 173 N.C. App. 749, 620 S.E.2d 282, 2005 N.C. App. LEXIS 2254 (2005).

Introduction of Previous Conviction for Purposes of Impeachment. — See State v. Guinn, 32 N.C. App. 595, 233 S.E.2d 73 (1977).

Prior Offense Was Required Before Higher Penalty Could Be Imposed. — Where the indictment did not charge defendant with a conviction for a prior offense and the State did not prove a prior conviction, the case was remanded for a new sentence hearing since both are required before the higher penalty can be imposed. State v. Williams, 93 N.C. App. 510, 378 S.E.2d 216 (1989).

Impaired Driving and Habitual Impaired Driving. — An indictment which alleges in one count the elements of impaired driving and alleges in a second count previous convictions which would elevate the impaired driving offense to habitual impaired driving is a valid indictment under this section and G.S. 15A-924. State v. Lobohe, 143 N.C. App. 555, 547 S.E.2d 107, 2001 N.C. App. LEXIS 311 (2001).

Trial court properly denied the defendant's motion to quash the indictment because the count of the indictment that was entitled and referenced "Habitual Impaired Driving" followed the required format of G.S. 15A-928. State v. Mark, 154 N.C. App. 341, 571 S.E.2d 867, 2002 N.C. App. LEXIS 1447 (2002), aff'd, 357 N.C. 242, 580 S.E.2d 693 (2003).

Special Indictments. — When the State attempted to elevate a misdemeanor charge of breaking into a coin-operated machine to felony status, a special indictment charging defendant as being an habitual felon, based in part on an alleged prior conviction for feloniously breaking into a coin-operated machine, could not serve as a substitute for the special indictment required under this section. State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993).

Indictment was insufficient to charge defendant with the felony of habitual misdemeanor assault where the absence of any indictment alleging violation of G.S. 14-33.2, habitual misdemeanor assault, rendered the principal indictment one which charged the defendant with only the misdemeanor of assault on a female. State v. Williams, 153 N.C. App. 192, 568 S.E.2d 890, 2002 N.C. App. LEXIS 1081 (2002).

Amendment of Indictment. — In a case in which the defendant was prosecuted for stalking and for having previously been convicted of stalking, the State was properly allowed to amend the indictment to place the allegation of the prior offense in a count separate from that of the current offense because the amendment was not a substantial alteration of the charge, prohibited by G.S. 15A-923(e); the amendment merely placed the last two sentences of the single count in the original indictment into a separate count, to comply with G.S. 15A-928, and defendant had prior notice that the State alleged defendant's prior conviction and intended to prove that conviction, so defendant had the opportunity to prepare a defense. State v. Stephens, 188 N.C. App. 286, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008).

Applied in State v. Wells, 59 N.C. App. 682, 298 S.E.2d 73 (1982).

Cited in State v. Moore, 27 N.C. App. 245, 218 S.E.2d 496 (1975); State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986); State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

II. STIPULATION OF PREVIOUS CONVICTIONS.

Defendant may stipulate the previous convictions charged against him under subsection (c) of this section. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Nothing in the State or federal Constitutions nor in the case law prevents the defendant himself from making a judicial admission or stipulating to an undisputed fact, albeit the fact is essential to the State's case. State v. Ford, 71 N.C. App. 452, 322 S.E.2d 431 (1984).

Defendant's conviction for habitual misdemeanor assault was proper where the stipulation by defense counsel that defendant had been convicted of the prior misdemeanors alleged in the indictment charging him with habitual misdemeanor assault was sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

Effect of Failure to Arraign Where Defendant Stipulates to Charges. — Fact that the trial court did not formally arraign defendant upon charge alleging previous convictions of habitual impaired driving and did not advise defendant that he could admit the previous convictions, deny them, or remain silent, as required by subsection (c) of this section, was not reversible error where defendant stipulated to his previous convictions. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Introduction by State of Defendant's Stipulation. — In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle, since the State merely introduced defendant's stipulation into evidence so there would be no doubt as to that particular element of the offense being satisfied; the State offered no other evidence in regard to defendant's prior conviction; and the court properly instructed the jury in its charge to consider the conviction only for the purpose of establishing an essential element of the offense and not as evidence of guilt or predisposition. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980), appeal dismissed, 301 N.C. 724, 276 S.E.2d 285 (1981).

Cross-examination for Impeachment Purposes Following Stipulation. — In a prosecution for driving under the influence, third offense, it was not error for the trial court to allow the State to cross-examine the defendant concerning prior convictions of driving under the influence of intoxicants though he had stipulated for the purpose of trial that he had been so previously convicted, where the evidence sought by the cross-examination of the defendant was for impeachment purposes and not as substantive evidence of an element of the offense charged. State v. Crouch, 42 N.C. App. 729, 257 S.E.2d 646 (1979).

Instruction on Prior Convictions Following Stipulation. — In a prosecution of a defendant for driving under the influence, second offense, and driving while his license was revoked, fourth offense, where the defendant stipulated to previous convictions of those crimes, the trial court did not err in instructing jury with respect to defendant's prior convictions, since the harm was in the fact that evidence of these prior convictions was before the jury and not in the instructions concerning them, and it was not error to cross-examine the defendant on these prior convictions for impeachment purposes. State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

Exhibit listing defendant's prior convictions was erroneously admitted; defendant stipulated that his license had been revoked and that he knew that it was revoked, and the State offered no justification for admission of the prior convictions, as opposed to just the license suspension. State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443, 2005 N.C. App. LEXIS 21 (2005).

Relief Precluded. — Where no fatal variance was shown between the indictment for felonious habitual impaired driving and proof at trial, since defendant's counsel stipulated to previous convictions as set out in the indictment, defendant failed to show that he was entitled to any relief with regard to the indictment. State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995).

§§ 15A-929, 15A-930: Reserved for future codification purposes.

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

(a) Except as provided in G.S. 20-138.4, the prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

(a1) Unless the defendant or the defendant's attorney has been notified otherwise by the prosecutor, a written dismissal of the charges against the defendant filed by the prosecutor shall be served in the same manner prescribed for motions under G.S. 15A-951. In addition, the written dismissal shall also be served on the chief officer of the custodial facility when the record reflects that the defendant is in custody.

(b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 435, s. 5; 1991, c. 109, s. 1; 1997-228, s. 1.)

OFFICIAL COMMENTARY

The case of Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), held that our system of "nol pros" was unconstitutional when it left charges pending against a defendant and he was denied a speedy trial. Thus the Commission here provides for a simple and final dismissal by the solicitor. No approval by the court is required, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. This section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, or if jeopardy had attached when the first charges were dismissed.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For note, "Double Jeopardy — When Does Jeopardy Attach in a Non-Jury Trial in North Carolina? — State v. Brunson," see 13 Campbell L. Rev. 123 (1990).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Judicial Authority Is Not Infringed. — Because the ultimate authority over managing the trial calendar is retained in the court, it cannot be said that this statute infringes upon the court's inherent authority or vests the district attorney with judicial powers in violation of the separation of powers clause. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Entry of Voluntary Dismissal Does Not Violate Right to Speedy Trial. — Under the present system of voluntary dismissals no indictment is left pending. If dismissed charges are later reinstated, defendant at this point would have standing to move for speedy trial relief. State v. Herald, 65 N.C. App. 692, 309 S.E.2d 546 (1983), appeal dismissed, 310 N.C. 479, 312 S.E.2d 887 (1984).

When Double Jeopardy Attaches in Bench Trial. — In a bench trial, double jeopardy does not attach until the introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

In a bench trial in district court where dismissal was taken to avert the necessity of introducing evidence rather than after its introduction, double jeopardy had not attached; jeopardy will attach only after introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989).

Subsequent Prosecution Following Voluntary Dismissal by State. — A voluntary dismissal taken by the State pursuant to this section does not preclude the State from instituting a subsequent prosecution for the same offense if jeopardy has not attached. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

The provisions of this section which allow a prosecutor to take a voluntary dismissal "at any time" do not bar the initiation of subsequent charges, if jeopardy has not attached and if an applicable statute of limitations has not run. State v. Lamb, 84 N.C. App. 569, 353 S.E.2d 857, aff'd, 321 N.C. 633, 365 S.E.2d 600 (1988).

The fact that investigation continues after dismissal under this section renders that dismissal no less final, because the prosecutor may not resume criminal proceedings against a suspect unless and until a new indictment is obtained. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

New Indictment on Same Charges Not Barred. — Dismissal under this section is a simple and final dismissal which terminates the criminal proceedings under that indictment. This section, however, does not bar the bringing of the same charges upon a new indictment. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Reindictment After Dismissal of Indictment "With Leave". — Where no criminal proceedings took place during the period from Aug. 14, 1984, when indictment against defendant was dismissed under this section "with leave" until new indictment on July 22, 1985, and defendant was not subject to prosecutorial control, the dismissal was proper and terminated all proceedings against the defendant, even though defendant's bail bond was not discharged. Thus, the reindictment and trial of defendant did not violate the former Speedy Trial Act. State v. Lamb, 84 N.C. App. 569, 353 S.E.2d 857, aff'd, 321 N.C. 633, 365 S.E.2d 600 (1988).

Provision of former G.S. 15A-701(b)(5) specifically excluding from computation of the 120-day time period "any period of delay from the date the initial charge was dismissed to the date the time limits for trials under this section would have commenced to run as to the subsequent charge" was applicable to defendant whose indictment was dismissed under this section, even though the notice of dismissal stated that the prosecutor entered a dismissal "with leave," and even though defendant remained on secured bail bond and the authorities continued to investigate the case, in view of the fact that since defendant appeared, the dismissal "with leave" language was mere surplusage, which added nothing to the notice of dismissal and took nothing away, and since although defendant's bail bond should have been discharged, as she was not required to appear or render herself amenable to the orders and processes of the court during that period, she was not prejudiced. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

"With Leave" Language in Notices of Dismissal Disapproved. — Although criminal investigations can always continue following a voluntary dismissal under this section, the insertion of "with leave" language in notices of dismissal under this section is disapproved, as no defendant whose indictment has been dismissed under this section should be made to feel that he or she is subject to prosecutorial control. State v. Lamb, 84 N.C. App. 569, 353 S.E.2d 857, aff'd, 321 N.C. 633, 365 S.E.2d 600 (1988).

Voluntary Dismissal at Probable Cause Hearing. — Voluntary dismissal taken by the State at a probable cause hearing does not preclude the State from instituting a subsequent prosecution for the same offense. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Trial court's determination that the evidence failed to show that prosecutor had in fact taken a voluntary dismissal of defendant's case at a Nov. 19, 1986, calendar call, although the evidence was somewhat ambiguous, would not be disturbed, where it could not be said that the evidence failed to support the trial court's decision. State v. Miller, 321 N.C. 445, 364 S.E.2d 387 (1988).

Prosecutor's Discretion Whether to Charge Defendant as Habitual Felon. — Because a prosecutor had the discretion whether to prosecute defendant as a habitual felon or not and had the authority to dismiss charges against defendant at any stage of the proceedings under G.S. 15A-931(a), the prosecutor could only seek habitual felon status under G.S. 14-7.2 and G.S. 14-7.6 as to a possession of a firearm charge and not as to attempted robbery and robbery charges. State v. Murphy, — N.C. App. —, 666 S.E.2d 880, 2008 N.C. App. LEXIS 1762 (2008).

Applied in State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (1981); State v. Simpson, 60 N.C. App. 436, 299 S.E.2d 257 (1983).

Cited in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978); State v. Gross, 66 N.C. App. 364, 311 S.E.2d 41 (1984); State v. Brunson, 327 N.C. 244, 393 S.E.2d 860 (1990); State v. Goodson, 101 N.C. App. 665, 401 S.E.2d 118 (1991).

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.

(a) The prosecutor may enter a dismissal with leave for nonappearance when a defendant:

(1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or

(2) Fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.

(a1) The prosecutor may enter a dismissal with leave pursuant to a deferred prosecution agreement entered into in accordance with the provisions of Article 82 of this Chapter.

(b) Dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement results in removal of the case from the docket of the court, but all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like.

(c) The prosecutor may enter the dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement orally in open court or by filing the dismissal in writing with the clerk. If the dismissal for nonappearance or pursuant to a deferred prosecution agreement is entered orally, the clerk must note the nature of the dismissal in the case records.

(d) Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor may reinstitute the proceedings by filing written notice with the clerk.

(e) If the defendant fails to comply with the terms of a deferred prosecution agreement, the prosecutor may reinstitute the proceedings by filing written notice with the clerk. (1977, c. 777, s. 1; 1985, c. 250; 1994, Ex. Sess., c. 2, s. 1.)

Legal Periodicals. — For article on the former North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Resumption of Speedy Trial Limitation. — Once the prosecutor entered a dismissal with leave for nonappearance of the defendant pursuant to this section, former G.S. 15A-701(b)(11) controlled and the speedy trial clock did not resume running against the State until the proceedings were reinstituted against the defendant. State v. Reekes, 59 N.C. App. 672, 297 S.E.2d 763, cert. denied, 307 N.C. 472, 298 S.E.2d 693 (1982).

Reinstitution of Proceedings Without New Indictment. — This section provides for a dismissal "with leave" when the defendant fails to appear and cannot be readily found. Under subsection (b), this dismissal results in removal of the case from the court's docket, but the criminal proceeding under the indictment is not terminated. All outstanding process retains its validity, and the prosecutor may reinstitute the proceedings by filing written notice with the clerk, without the necessity of a new indictment. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Noncompliance with Section Does Not Result in "Failure of Pleading To State an Offense." — Subsection (d), which provides for reinstatement of an indictment after a dismissal with leave is taken, is not "jurisdictional" in nature, nor does failure to strictly comply with its requirements result in the "failure of the pleading to charge an offense" within the meaning of G.S. 15A-952(d). Instead, the dismissal with leave contemplated in this subsection is a procedural calendaring device. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

No Prejudice to Defendant from Use of Dismisssal Without Leave. — Defendant was not prejudiced by the procedural calendaring device of dismissal with leave because the procedure was intended not to suspend or hamper prosecution of the case, but rather to facilitate its continuance during a period of time when the defendant was absent; accordingly, arraigning the defendant, who was fully aware of the charges, though the charges had been dismissed with leave and had not yet been reinstated, did not amount to the denial of a fair trial, and there was no plain error in the trial court's decision to permit the defendant to be tried on charges that had been dismissed with leave at the time of the arraignment. State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003).

Dismissal Used as Aggravating Factor in Subsequent Arrest. — Trial court properly found as an aggravating factor that the driving while impaired defendant was on pretrial release when arrested where the defendant was years earlier charged for driving with a revoked license and the charge was dismissed with leave, pursuant to G.S. 15A-932, because the defendant failed to appear in court. State v. Mark, 154 N.C. App. 341, 571 S.E.2d 867, 2002 N.C. App. LEXIS 1447 (2002), aff'd, 357 N.C. 242, 580 S.E.2d 693 (2003).

Waiver by Failure to Object. — State was authorized pursuant to G.S. 15A-932(d) to reinstate the charges filed against defendant that it had dismissed with leave, including practicing massage therapy without a license in violation of G.S. 90-634(a)(1). Although defendant claimed that the State had not followed the proper procedure in reinstating the charges, the record showed that defendant did not object at defendant's arraignment, and, thus, any error was waived. State v. Viera, 189 N.C. App. 514, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (2008).

Applied in State v. Morehead, 62 N.C. App. 226, 302 S.E.2d 834 (1983).

Cited in State v. Graham, 61 N.C. App. 271, 300 S.E.2d 716 (1983).

§§ 15A-933 through 15A-940: Reserved for future codification purposes.

ARTICLE 51.

Arraignment.

OFFICIAL COMMENTARY

It is the purpose of this Article not only to define arraignment in any court but also to provide for a separate time of arraignment in superior court. Time for jurors and witnesses will be saved if matters not requiring their presence can be disposed of before they are brought in. The Commission feels that it is important to our system of justice that unnecessary impositions on the time of citizens be avoided. Thus, in the more populous counties here defined as those having as much as 20 weeks of criminal court (and others which the Chief Justice may designate), a separate time for arraignment will be required. In other counties it is authorized on an optional basis.

The Commission is under no illusion that this will cure problems of delay, or that it will end the practice of waiting until a jury is ready before entering a guilty plea, but it does set a pattern within which improvement is possible.

§ 15A-941. Arraignment before judge only upon written request; use of two-way audio and video transmission; entry of not guilty plea if not arraigned.

(a) Arraignment consists of bringing a defendant in open court or as provided in subsection (b) of this section before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.

(b) An arraignment in a noncapital case may be conducted by an audio and video transmission between the judge and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding.

(c) Prior to the use of audio and video transmission pursuant to subsection (b) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for the judicial district or set of districts and approved by the Administrative Office of the Courts.

(d) A defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment. If a bill of indictment is not required to be served pursuant to G.S. 15A-630, then the written request for arraignment must be filed not later than 21 days from the date of the return of the indictment as a true bill. Upon the return of the indictment as a true bill, the court must immediately cause notice of the 21-day time limit within which the defendant may request an arraignment to be mailed or otherwise given to the defendant and to the defendant's counsel of record, if any. If the defendant does not file a written request for arraignment, then the court shall enter a not guilty plea on behalf of the defendant.

(e) Nothing in this section shall prevent the district attorney from calendaring cases for administrative purposes. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1993, c. 30, s. 3; 1995 (Reg. Sess., 1996), c. 725, s. 7.)

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

CASE NOTES

Purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him, and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Should the defendant fail to plead after the prosecutor has read the charges or otherwise fairly summarized them, the court must record the fact, and defendant must be tried as if he had entered a plea of not guilty. State v. Riddle, 66 N.C. App. 60, 310 S.E.2d 396, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Reading or Summarizing Charges Before Jury Is Constitutional. — The fact that under this section the district attorney reads the charges or fairly summarizes them to the defendant before the jury is not a violation of defendant's right to due process and equal protection as required by the Constitutions of the State of North Carolina and the United States. State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179, appeal dismissed, 290 N.C. 664, 228 S.E.2d 455 (1976).

Failure to Conduct Formal Arraignment. — Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980); State v. Riddle, 66 N.C. App. 60, 310 S.E.2d 396, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Failure of the record to show a formal arraignment does not entitle defendant to a new trial where the record indicates that defendant was tried as if he had been arraigned and had entered a plea of not guilty. State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982); State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied, 307 N.C. 271, 299 S.E.2d 217 (1982).

The failure to conduct a formal arraignment itself is not reversible error. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Failure to conduct an arraignment on a capital charge does not constitute reversible error per se. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

The trial court did not commit reversible error by trying defendant on a capital charge without first conducting a formal arraignment, where in view of the fact that the record was replete with pretrial motions, letters, and orders which were prefaced by listing the charges against defendant, and in view of the fact that defendant was tried as if he had pled "not guilty," defendant was not prejudiced by the lack of a formal arraignment. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Defendant's Duty to Object If Not Informed of Charges. — Where the record showed that an arraignment took place and defendant, duly represented by counsel, entered a plea of not guilty, defendant was not prejudiced by failure of the record to show that the charges were read or summarized to defendant as required by this section, since it was the duty of defendant to object and to have appropriate entries made in the record to show the basis for the objection if he was not properly informed of the charges. State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

An objection to the arraignment made just before trial begins some months later does not suffice to preserve defendant's complaint about what might have occurred when the arraignment actually took place. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

If a defendant feels that he has not been properly informed of the charges against him at arraignment, it is his duty to object at that time and to have appropriate entries made in the record to show the basis for the objection. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Charges read to a defendant need not appear in the record. State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982).

Arraignment does not affect the time for discovery for a defendant represented by counsel. State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Defendant Waived Right to Arraignment. — Because the record contained no written request by defendant for an arraignment on the habitual felon charge, he waived his right to arraignment and could not argue error in proceeding to trial the same week as his arraignment. State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (2004).

Plea Entered at Arraignment Does Not Foreclose Substantive Changes to Habitual Felon Indictment. — Plea entered at an arraignment pursuant to G.S. 15A-941(a) is, in essence, a preliminary plea because it is not entered in every instance. Thus, the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial. State v. Cogdell, — N.C. App. —, — S.E.2d —, 2004 N.C. App. LEXIS 717 (May 4, 2004).

No Need to Request Arraignment on Appeal De Novo From District to Superior Court. — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S. 15A-943(b), which defendant adequately invoked; as the superior court was not the court of original jurisdiction, the prosecutor never submitted a bill of indictment for defendant nor was defendant indicted, so there was no 21-day period from which defendant needed to file a written request for an arraignment. State v. Vereen, 177 N.C. App. 233, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

Applied in State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002).

Cited in State v. Cross, 293 N.C. 296, 237 S.E.2d 734 (1977); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995); State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998); State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003).

§ 15A-942. Right to counsel.

If the defendant appears at the arraignment without counsel, the court must inform the defendant of his right to counsel, must accord the defendant opportunity to exercise that right, and must take any action necessary to effectuate the right. If the defendant does not file a written request for arraignment, the court, in addition to entering a plea of not guilty on behalf of the defendant, shall also verify that the defendant is aware of the right to counsel, that the defendant has been given the opportunity to exercise that right, and must take any action necessary to effectuate that right on behalf of the defendant. (1777, c. 115, s. 85, P.R.; R.C., c. 35, s. 13; Code, s. 1182; Rev., s. 3150; C.S., s. 4515; 1973, c. 1286, s. 1; 1995 (Reg. Sess., 1996), c. 725, s. 8.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Failure to Inquire into Defendant's Indigency. — Where a defendant executed a written waiver of assigned counsel before a district court judge, defendant thereafter filed an affidavit of indigency and request for appointed counsel, a superior court judge found that defendant was not an indigent, and defendant appeared at his arraignment and trial three weeks later without counsel, the trial court was required by this section to inquire at the arraignment into the question of defendant's indigency at that time, and defendant is entitled to a new trial by reason of the court's failure to make such inquiry. State v. Elliott, 49 N.C. App. 141, 270 S.E.2d 550 (1980).

Waiver of Right Is Good Until Termination of Proceeding. — A waiver in writing of the right to assigned counsel once given was good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant. State v. Elliott, 49 N.C. App. 141, 270 S.E.2d 550 (1980).

Failure to Inform Defendant Represented by Counsel of Right Thereto Not Prejudicial. — Although defendant argued that it did not appear that he was ever advised of his right to counsel pursuant to this section, where it was clear from the record that defendant was represented by counsel, he could not claim that he was prejudiced by not being informed of such right. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Applied in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

Cited in State v. Jones, 342 N.C. 523, 467 S.E.2d 12 (1996); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

§ 15A-943. Arraignment in superior court — Required calendaring.

(a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.

(b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

(c) Notwithstanding the provisions of subsection (a) of this section, in any county where as many as three simultaneous sessions of superior court, whether criminal, civil, or mixed, are regularly scheduled, the prosecutor may calendar arraignments in any of the criminal or mixed sessions, at least every other week, upon any day or days of a session, and jury cases may be calendared for trial in any other court at which criminal cases may be heard, upon such days. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 471.)

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

I. General Consideration.
II. Scheduling of Arraignment under Subsection (a).
III. Trial Date Where Defendant Pleads Not Guilty.

I. GENERAL CONSIDERATION.

No Arraignment May Take Place Except at Time Calendared. — In order to effect the intent of the legislature, this statute must be construed to require not only that the solicitor (now prosecutor) "calendar arraignments" as provided but also that every arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Notice of Arraignment. — There was no reversible error, even if the State improperly published the calendar for a capital murder defendant's arraignment on the same day the arraignment was held, since the defendant had a full week's interval between the arraignment and the trial. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

Failure to Conduct Formal Arraignment Proceeding Not Error. — Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

Failure to Assert Right Not to Be Tried the Week of Defendant's Arraignment Was Not Ineffective Assistance of Counsel. — The defense attorney's failure to move for a continuance in the defendant's drug case and thereby assert the defendant's rights under this section did not amount to ineffective assistance of counsel where the defendant did not indicate to the court in what manner he was unprepared for trial, how additional time would have aided in his preparation, or what options the attorney failed to explain to him. State v. Frazier, 142 N.C. App. 361, 542 S.E.2d 682 (2001).

Trial court did not err by arraigning defendant on the same day his trial began, as defendant did not object; accordingly, defendant waived his right to a week's interlude between his arraignment and trial, and the trial court did not err in proceeding to trial immediately. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Defendant Did Not Need to File Written Request for Arraignment. — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S. 15A-943(b), which defendant adequately invoked, where defendant sought a continuance to obtain additional evidence for trial; there was no indictment, so there was no 21-day period from which defendant needed to file a written request for an arraignment. State v. Vereen, 177 N.C. App. 233, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

Applied in State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002).

Cited in State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179 (1976); State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978); Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979); State v. Hunt, 297 N.C. 131, 254 S.E.2d 19 (1979); State v. Winstead, 78 N.C. App. 180, 336 S.E.2d 721 (1985); State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993).

II. SCHEDULING OF ARRAIGNMENT UNDER SUBSECTION (A).

Legislative intent in enacting the last sentence of subsection (a) of this section was to minimize the imposition to the time of jurors and witnesses, and not to ensure the impartiality of jurors. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979); State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982).

The last sentence of subsection (a) of this section does not indicate a legislative intent that prospective jurors not be allowed to observe proceedings involving other defendants because they might somehow become prejudiced against a defendant who might later be tried before them. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979).

The financial interest of the State as well as the private interests of the individual jurors and witnesses are served by requiring arraignments to be calendared on days when jurors and witnesses are not called. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Violation of Subsection (a) Alone Not Reversible. — The thrust of subsection (a) of this section is the promotion of the efficient use of time by the courts; defendant has no direct interest in this underlying value, but, rather, his only interest is in his vested right to a week's interval between his arraignment and trial which is provided under subsection (b) of this section. Accordingly, a violation of subsection (a) of this section standing alone — that is, a failure to calendar a defendant's arraignment — does not constitute reversible error when defendant nevertheless is given a week's interval between his arraignment and trial. State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983).

Beginning the defendant's trial the same day that he was formally arraigned was reversible error although he never explicitly cited this section in his motion for a continuance; his need for a continuance was based upon the same purposes for which the statute was enacted and the defense counsel did not have sufficient time during the brief recess between arraignment and trial to fully discuss the State's latest plea offer with the defendant. State v. Cates, 140 N.C. App. 548, 537 S.E.2d 508, 2000 N.C. App. LEXIS 1214 (2000).

Defendant Waived Right to Arraignment. — Because the record contained no written request by defendant for an arraignment on the habitual felon charge, defendant waived his right to arraignment and could not argue error in proceeding to trial the same week as his arraignment. State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (2004).

III. TRIAL DATE WHERE DEFENDANT PLEADS NOT GUILTY.

Purpose of Subsection (b). — Subsection (b) of this section is designed to ensure both the State and the defendant a sufficient interlude to prepare for trial. This is necessary because before arraignment neither the State nor defendant may know whether the case need proceed to trial. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The week's interim provided in subsection (b) assures an opportunity for trial preparation and thereby helps to avoid preparation which may well be not only extensive but also unnecessary. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Subsection (b) vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Subsection (b) of this section vests defendant with a right to at least a week's interim between his arraignment and trial in order to prepare his case. State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983).

Provisions of subsection (b) are more than directory. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Prejudice Presumed from Violation of Subsection (b). — To require a defendant to show prejudice when asserting the violation of his statutory right under subsection (b) of this section, which he has insisted upon at trial, would be manifestly contrary to the intent of the legislature, which has provided that the week's time between arraignment and trial must be accorded him unless he consents to an earlier trial. Prejudice under these circumstances must necessarily be presumed. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

And Violation Is Reversible Error. — The infringement of the defendant's right under subsection (b) of this section not to be tried without his consent during the week following his not guilty plea, where there was no waiver by defendant, was reversible error. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Proceeding with defendant's trial over his objection on the same day as his arraignment on superseding indictment constitutes reversible error and necessitates a new trial. State v. McCabe, 80 N.C. App. 556, 342 S.E.2d 580 (1986).

But Defendant May Waive Right. — Defendant waived his statutory right not to be tried the week he was arraigned by failing to assert his right under this section in the trial court, since he did not move for a continuance under subsection (b) of this section and thereby consented to be tried in the same week as his arraignment. State v. Davis, 38 N.C. App. 672, 248 S.E.2d 883 (1978).

Where defendant failed to assert his right not to be tried in the week in which he was arraigned by seeking a continuance of his trial, he waived this statutory right. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Subsection (b) Held Violated. — The trial court violated the provisions of subsection (b) of this section by proceeding with defendant's trial over his objection on the same day as his arraignment. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

§ 15A-944. Arraignment in superior court — Optional calendaring.

In counties other than those described in G.S. 15A-943 the prosecutor may, but is not required to, calendar arraignments in the manner described in that section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

CASE NOTES

Cited in State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981).

§ 15A-945. Waiver of arraignment.

A defendant who is represented by counsel and who wishes to plead not guilty may waive arraignment prior to the day for which arraignment is calendared by filing a written plea, signed by the defendant and his counsel. (1973, c. 1286, s. 1.)

CASE NOTES

Effect of Waiver on Day of Trial. — Where defendant waives arraignment on the day of trial, there is no need to submit a written waiver and this section is inapplicable. State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982).

Effect of Failure to Sign Written Waiver. — Where defendant's counsel signed written waiver of arraignment and entered pleas of not guilty on his behalf, and defendant does not even suggest, much less affirmatively show, that the waiver and pleas were entered without his full knowledge or concurrence, defendant did not fulfill his burden of establishing that his right to a fair trial was impaired or prejudiced due to the mere fact that he did not also personally sign the written waiver of arraignment. State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Riddle, 66 N.C. App. 60, 310 S.E.2d 396, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Where defendant in no way was prejudiced by the lack of formal arraignment he cannot claim reversible error. State v. Riddle, 66 N.C. App. 60, 310 S.E.2d 396, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

§§ 15A-946 through 15A-950: Reserved for future codification purposes.

ARTICLE 52.

Motions Practice.

OFFICIAL COMMENTARY

This Article attempts to bring together for the first time a number of provisions relating to motions practice in criminal cases. As the Commission's 1973 proposal only relates to pretrial procedure, it may be subject to later amendment and additions as the Commission works on trial and appeal procedure.

Even as to pretrial motions, of course, this Article does not purport to be exclusive. The next Article, for instance, is devoted to the motion to suppress, and there are a number of particular provisions scattered through this proposal dealing with particular types of motions that must or may be made.

The philosophy of this Article is to restate certain aspects of motions practice using simplified terminology, but not at present to repeal any of the common law even by implication unless it is incompatible with explicit provisions of the Commission's proposal. For example, the terminology "motion to dismiss" is used in several places instead of such common-law terminology "motion to quash," "plea in bar," or "plea in abatement." No doubt many persons will use the old terminology for some time, and they should not be penalized for it. On the other hand, positive provisions requiring that certain motions be made by five o'clock P.M. on the Wednesday preceding a session of court at which the case is scheduled would supersede a common-law rule that the motion was timely if made at arraignment.

At least for the time being the Commission finessed the problem of specifying the impact of the granting of a motion to dismiss. Obviously if dismissal comes after jeopardy has attached, the prosecution may not be renewed. Certain other grounds for dismissal by their nature would also finally dispose of the charge. The effect in other situations, though, has been left to case law.

§ 15A-951. Motions in general; definition, service, and filing.

(a) A motion must:

(1) Unless made during a hearing or trial, be in writing;

(2) State the grounds of the motion; and

(3) Set forth the relief or order sought.

(b) Each written motion must be served upon the attorney of record for the opposing party or upon the defendant if he is not represented by counsel. Service upon the attorney or upon a party may be made by delivering a copy of the motion to him or by mailing it to him at his address of record. Delivery of a copy within the meaning of this Article means handing it to the attorney or to the party or leaving it at the attorney's office with an associate or employee. Service by mail is complete upon deposit of the motion enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the Postal Service of the United States.

(c) All written motions must be filed with the court. Proof of service must be made by filing with the court a certificate:

(1) By the prosecutor, attorney, or defendant making the motion that the paper was served in the manner prescribed; or

(2) Of acceptance of service by the prosecutor, attorney, or defendant to be served.

The certificate must show the date and method of service or the date of acceptance of service. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section requires that written motions be served on the other party, be filed with the court, and contain a certificate indicating service on the other party. The motion is to be served on the attorney of record for the other party, or on the defendant if he has no attorney. Provisions relating to service are set forth.

Motions made at a hearing or trial are exempt from the requirement that they be in writing. The in-writing, service, and filing requirements for motions not made in court apply to motions in the district court as well as in the superior court. This may force more formality upon the district court than in some instances has been true in the past, but the Commission believes that an orderly record of the motions in a cause should be available. Though not specifically required, it is the expectation of the Commission that a notation of motions of consequence made during a trial or hearing, and the judge's rulings upon them, will be made and kept by the court if there is no transcript of the hearing or trial. As the Commission has primarily dealt with pretrial procedure, it has not yet formulated its recommendations concerning the recording of court proceedings.

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

CASE NOTES

In ruling on motion to dismiss, evidence must be considered in light most favorable to State, giving the State the benefit of all reasonable inferences. State v. Gray, 58 N.C. App. 102, 293 S.E.2d 274, cert. denied, 306 N.C. 746, 295 S.E.2d 482 (1982).

Ex Parte Continuance Voidable But Not Void. — Because this section requires actual notice by service of process where a motion is written, ex parte order of continuance issued by one superior court judge may have been voidable, but it was nevertheless not void. It was therefore binding on judge presiding at defendant's trial until defendant attacked it in a proper manner; and defendant could not attack it collaterally by moving under the Speedy Trial Act for dismissal of the charges against him, under a contention that the time excluded by the order should not toll time under the Act because the order was ex parte. State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986).

Motion to Vacate Necessary to Void Order Issued Without Notice. — While subsection (b) of this section requires that each written motion be served upon the attorney of record of the opposing party or upon the defendant if he is not represented by counsel, an order issued without notice where actual notice is required is irregular and thus voidable, but not void, and it stands until set aside by a motion to vacate. It could not be attacked collaterally under the Speedy Trial Act. State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990).

A written motion for joinder of defendants may be made at any time prior to trial; the motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Oral Motion for Joinder Not Error. — Trial court did not err by allowing the State's oral motion for joinder of a juveniles' cases for trial when the motion was not written as required by G.S. 15A-926(b)(2) and the juvenile did not object to joinder at trial. Regardless, the trial court had discretion to allow the oral motion for joinder pursuant to G.S. §§ 15A-926(b)(2), 15A-951(a), and 15A-952(b) and (f). In re R.D.L., 191 N.C. App. 526, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (2008).

Preservation of Claim. — Defendant failed to preserve defendant's Sixth Amendment claim of ineffective assistance of counsel as: (1) defendant never raised the claim in defendant's written motion for appropriate relief (MAR), even though defendant was permitted to raise the argument at any time after the verdict under G.S. 15A-1415; (2) by making a Sixth Amendment argument during the hearing, defense counsel essentially was attempting to amend the MAR to include the constitutional argument; (3) there was no evidence that after the post-conviction hearing, defendant moved to amend the MAR in writing under G.S. 15A-1420(a)(3) and G.S. 15A-951(c) either to conform it to evidence adduced at the hearing or to raise claims based on such evidence under G.S. 15A-1415(g); and (4) defendant's Sixth Amendment claim could not be considered a new MAR under G.S. 15A-1412. State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007).

Applied in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976); State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980); State v. Seay, 59 N.C. App. 667, 298 S.E.2d 53 (1982); State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984); State v. Ford, 70 N.C. App. 244, 318 S.E.2d 914 (1984); State v. Parrish, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

Cited in State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179 (1976); State v. Duncan, 30 N.C. App. 112, 226 S.E.2d 182 (1976); State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

(a) Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion.

(b) Except as provided in subsection (d), when the following motions are made in superior court they must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time:

(1) Motions to continue.
(2) Motions for a change of venue under G.S. 15A-957.
(3) Motions for a special venire under G.S. 9-12 or G.S. 15A-958.
(4) Motions to dismiss under G.S. 15A-955.
(5) Motions to dismiss for improper venue.
(6) Motions addressed to the pleadings, including:
  a. Motions to dismiss for failure to plead under G.S. 15A-924(e).
  b. Motions to strike under G.S. 15A-924(f).
  c. Motions for bills of particulars under G.S. 15A-924(b) or G.S. 15A-925.
  d. Motions for severance of offenses, to the extent required by G.S. 15A-927.
  e. Motions for joinder of related offenses under G.S. 15A-926(c).

(c) Unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if a written request is filed for arraignment and if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.

If a written request for arraignment is not filed, then any motion listed in subsection (b) of this section must be filed not later than 21 days from the date of the return of the bill of indictment as a true bill.

(d) Motions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time.

(e) Failure to file the motions in subsection (b) within the time required constitutes a waiver of the motion. The court may grant relief from any waiver except failure to move to dismiss for improper venue.

(f) When a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial.

(g) In superior or district court, the judge shall consider at least the following factors in determining whether to grant a continuance:

(1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;

(2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation; and

(3) Whether the case involves physical or sexual child abuse when a victim or witness is under 16 years of age, and whether further delay would have an adverse impact on the well-being of the child.

(4) Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission. (1973, c. 1286, s. 1; 1989, c. 688, s. 5; 1995 (Reg. Sess., 1996), c. 725, s. 9; 1997-34, s. 12.)

OFFICIAL COMMENTARY

Subsection (a) states an important general rule designed to encourage the early filing of motions. The more matters that can be raised and disposed of prior to trial, the fewer interruptions there will be during the course of the trial itself.

Subsections (b) and (c) require the advance filing of certain listed motions. The presence of the motion for a continuance at the head of the list is noteworthy. One of the most common complaints of citizen witnesses is that they are commanded to take time from their own affairs to attend court — and often sit around for several hours, or even days, before being dismissed and told they must come back yet another time because the case is continued. One important amendment made in the course of passage of this legislation was the deletion of motions under G.S. 15A-954(a) from the early-filing requirement. For discussion of this matter, see the commentary under G.S. 15A-954.

Subsections (d) and (e) generally restate the provisions of the common law, except that the time in question is the advance time recommended by the Commission rather than the time of an arraignment immediately preceding the trial. As subsections (b) and (c) by their terms apply only in superior court, the existing common law still applies as to timeliness of motions in district court. The second sentence of subsection (e) providing that no relief could be granted in the case of failure to move to dismiss for improper venue was originally intended to preserve the rule of G.S. 15-134 that venue will be conclusively laid in the county alleged unless timely motion challenging venue is made. In this connection, however, G.S. 15A-135 might be noted, which expressly preserves the right of most defendants to move to dismiss for improper venue on trial de novo in superior court.

Subsection (f) is designed to give the judge flexibility in ruling upon motions made before trial. It should be kept in mind that pretrial venue of cases originating in superior court is, except for the probable cause hearing, in the judicial district rather than the county. This may facilitate hearings upon pretrial motions that can be disposed of on affidavit or representations of counsel. If witnesses must be summoned to a hearing before the judge can rule upon the motion, he may prefer to wait until the date of the trial and hear the motion before or during trial. The judge would certainly exercise his discretion to hear the motion before the commencement of the trial if the attachment of jeopardy prior to the ruling upon the motion would prejudice one of the parties.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For note on enforcing criminal discovery in North Carolina through preclusion of the insanity defense as a sanction for the defendant's failure to give timely notice, in light of State v. Nelson, 76 N.C. App. 371, 333 S.E.2d 499 (1985), modified and aff'd, 316 N.C. 350, 341 S.E.2d 561 (1986), see 21 Wake Forest L. Rev. 191 (1985).

CASE NOTES

I. General Consideration.
II. Motions to Continue.
III. Motions to Dismiss.
IV. Motions for Joinder.
V. Time for Making Motions.

I. GENERAL CONSIDERATION.

Noncompliance with Requirements of § 15A-932 Does Not Result in "Failure of Pleading To State an Offense". — Section 15A-932(d), which provides for reinstatement of an indictment after a dismissal with leave is taken, is not "jurisdictional" in nature, nor does failure to strictly comply with its requirements result in the "failure of the pleading to charge an offense" within the meaning of subsection (d) of this section. Instead, the dismissal with leave contemplated in G.S. 15A-932(b) is a procedural calendaring device. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

Counsel in criminal cases are encouraged to offer affidavits or other evidence when making motions to continue pursuant to this section. State v. Branch, 306 N.C. 101, 291 S.E.2d 653 (1982).

Motion in limine to exclude prejudicial evidence comes within the purview of subsection (a) of this section. State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506, rev'd on other grounds, 300 N.C. 180, 265 S.E.2d 223 (1980).

Failure of the trial judge to set a time certain for the presentation of evidence on defendant's motion for a change of venue did not amount to a refusal to give defendant a meaningful opportunity to be heard or to exercise his discretion where the judge indicated that he was ready to hear evidence on the defendant's motion on the day of trial, considering that the judge also said that he would reconsider the substance of the motion if problems appeared during jury selection, and that the defendant showed no prejudice relating to the panel chosen. State v. Artis, 316 N.C. 507, 342 S.E.2d 847 (1986).

Delay in Ruling on Motion Held Not Abuse of Discretion. — The trial court did not abuse its discretion in failing to rule on defendant's 26 pretrial motions until the day before the trial where only three months had elapsed since the filing of the first motion, defendant showed no vindictiveness on the part of the district attorney in not bringing the motions on for hearing earlier, and defendant showed no prejudice on the delay in ruling on the motions. State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485, cert. denied, 298 N.C. 571, 261 S.E.2d 127 (1979).

Failure to Object to Impropriety in the Indictment. — The defendant waived his right to object to any impropriety in the indictment, such as a contention of vindictive prosecution, where the defendant failed to make a motion to the trial court to dismiss the indictment for robbery with a dangerous weapon. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893, 2000 N.C. LEXIS 357 (2000), cert. denied, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000).

Failure to Object to Selection of Grand Jury Foreman. — Capital murder defendant waived any claim that his constitutional rights were denied because of racial discrimination in selection of foreman to the grand jury that indicted him, where the defendant made no motion challenging any aspect of the indictment and only raised the issue for the first time on appeal. State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

Applied in State v. Duncan, 30 N.C. App. 112, 226 S.E.2d 182 (1976); State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Street, 45 N.C. App. 1, 262 S.E.2d 365 (1980); State v. Cox, 48 N.C. App. 470, 269 S.E.2d 297 (1980); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984); State v. Begley, 72 N.C. App. 37, 323 S.E.2d 56 (1984); State v. Pippin, 72 N.C. App. 387, 324 S.E.2d 900 (1985); State v. Parrish, 73 N.C. App. 662, 327 S.E.2d 613 (1985); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993); State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993); State v. Skeels, 346 N.C. 147, 484 S.E.2d 390 (1997); State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003).

Cited in State v. Morrow, 31 N.C. App. 654, 230 S.E.2d 568 (1976); State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Hyatt, 32 N.C. App. 623, 233 S.E.2d 649 (1977); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977); State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517 (1978); State v. Vincent, 35 N.C. App. 369, 241 S.E.2d 390 (1978); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250 (1980); State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Benfield, 55 N.C. App. 380, 285 S.E.2d 299 (1982); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986); State v. Flowers, 318 N.C. 208, 347 S.E.2d 773 (1986); State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987); Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990); State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991); State v. Skeels, 346 N.C. 147, 484 S.E.2d 390 (1997); Nivens v. Gilchrist, 319 F.3d 151, 2003 U.S. App. LEXIS 2453 (4th Cir. 2003).

II. MOTIONS TO CONTINUE.

Motion for continuance is ordinarily addressed to the sound discretion of the trial judge, whose ruling is not subject to review absent an abuse of discretion. State v. Weimer, 300 N.C. 642, 268 S.E.2d 216 (1980); State v. Winston, 47 N.C. App. 363, 267 S.E.2d 43 (1980).

A motion for continuance, even when filed in a timely manner pursuant to this section, is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion. State v. Branch, 306 N.C. 101, 291 S.E.2d 653 (1982); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

A motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Review of Action on Motion Involving Constitutional Issue. — When a motion for continuance raises a constitutional issue, trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

A motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing that he abused that discretion. However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law. State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

When a motion for a continuance raises a constitutional issue and is denied, the denial is grounds for a new trial only when the defendant shows that the denial was erroneous and also that his case was prejudiced as a result of the error. State v. Bunch, 106 N.C. App. 128, 415 S.E.2d 375, cert. denied, 332 N.C. 149, 419 S.E.2d 575 (1992); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Review of Action on Motion Not Involving Constitutional Issue. — A motion for continuance which does not implicate constitutional rights is ordinarily addressed to the discretion of the trial court, and its denial will not be held error on appeal in the absence of an abuse of discretion. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Motion to Secure Alibi Witness Presents Constitutional Question. — Since the right to present one's defense is guaranteed by U.S. Const., Amend. VI, made applicable to the states through U.S. Const., Amend. XIV, denial of defendant's motion for a continuance in order to secure the presence of alibi witnesses presents a constitutional question. State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

Defendant Must Show Error and Prejudice for New Trial. — Defendant must show both error in the denial of his motion to continue and that he was prejudiced thereby before he will be granted a new trial. State v. Winston, 47 N.C. App. 363, 267 S.E.2d 43 (1980).

Even assuming that the trial court erred in denying his motion for a continuance, defendant failed to show any prejudicial error. Defendant's mere intangible hope that something helpful may have turned up in a transcript from a prior trial did not afford him a basis for delaying trial. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Even Where Constitutional Issue Raised. — Denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error. State v. Branch, 306 N.C. 101, 291 S.E.2d 653 (1982).

Denial of a motion for a continuance, regardless of its nature, is grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced thereby. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Motion Not Supported by Proof of Sufficient Grounds Properly Denied. — Trial court did not err in refusing to grant a longer continuance to afford defendant a reasonable opportunity to locate a material witness when defendant's oral motion therefor, made on the date set for trial, was not supported by some form of detailed proof indicating sufficient grounds for further delay. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

A trial judge should not grant a continuance unless the reasons therefor are fully established. Therefore, an affidavit showing sufficient grounds should be filed in support of a motion to continue. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Trial court's denial of the defendant's motion to continue before the defendant's probation revocation hearing was not a manifest abuse of discretion because of the ground that the defendant asserted for the continuance, which was for the defendant to obtain employment to pay court ordered payments on which the defendant was in arrears, rather than for the defendant's counsel to obtain time to present a defense for the defendant. State v. Turner, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1884 (Apr. 16, 2002).

Showing of Abuse Required Where Defendant Failed to File Motion on Time. — Rule requiring the defendant to make a showing of abuse by the trial court in denying his motion for a continuance should be applied with even greater vigor in cases in which the defendant has waived his right to make a motion to continue by failing to file the motion within the time prescribed by this section. State v. Branch, 306 N.C. 101, 291 S.E.2d 653 (1982).

Denial of Motion Held Proper. — Trial court did not abuse its discretion in denying defendant's motion to continue trial where counsel had approximately 55 days to prepare for trial and neither defense counsel nor defendant asserted that they expected to present any witnesses on defendant's behalf or that defendant intended to testify. State v. Bunch, 106 N.C. App. 128, 415 S.E.2d 375, cert. denied, 332 N.C. 149, 419 S.E.2d 575 (1992).

Trial court properly denied defendant's motion for a continuance pursuant to G.S. 15A-952 after defense counsel questioned defendant's competency to proceed during jury selection, as during the period between the trial court's ruling on the motion and an evaluation by a doctor which found defendant competent, the only proceedings that took place were the State's questioning and excusal of a prospective juror for cause, the excusal of another prospective juror by the trial court based on his work schedule, and the State's questioning and acceptance of one juror, and therefore the trial court's ruling on the motion to continue was not the source of any prejudice to defendant pursuant to G.S. 15A-1443. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Trial court properly denied defendant's motions for a continuance to locate and subpoena the informant, as defendant did not show that he made a real effort to identify and locate the informant during the nine months between his arrest and his trial. State v. Collins, 160 N.C. App. 310, 585 S.E.2d 481 (2003), aff'd, 358 N.C. 135, 591 S.E.2d 518 (2004).

Defendant's motion for a continuance made with respect to his pretrial hearing was properly denied where the record established that substitute second chair counsel was adequately prepared to proceed; the attorney filed numerous motions on defendant's behalf, met several times with the prosecutors, and engaged in aggressive and informed cross-examination. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

When defendant had not shown how additional time would have helped him to better prepare had a continuance been granted, his motion for a continuance was properly denied; moreover, because of the overwhelming evidence of defendant's guilt, he was not materially prejudiced by the denial. State v. Smith, 178 N.C. App. 134, 631 S.E.2d 34, 2006 N.C. App. LEXIS 1290 (2006).

Trial court did not err when the court denied defendant's first motion to continue, which was made pro se, because nearly three months passed between defendant's indictment and the trial date, and defendant offered the names of no witnesses who were necessary to his defense and made no showing as to any relevant facts for which he needed time to gather evidence. Furthermore, defendant was not prejudiced by the denial of his second motion to continue, which was made by his court-appointed counsel, because defendant contributed to the delay in appointment of counsel, and the trial court granted a two business day recess for the procurement of the necessary witness. State v. Worrell, 190 N.C. App. 387, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008), appeal dismissed, review denied, 362 N.C. 688, 671 S.E.2d 531 (2008).

Denial of Motion Held Improper. — The defendant was entitled to a new trial because the court's denials of his repeated motions for a continuance resulted in a violation of his constitutional rights to effective assistance of counsel, to confront his accusers, and to due process of law. Defendant's counsels had only thirty-four days to prepare for a complex, bifurcated capital case, involving multiple incidents in multiple locations over a two-day period, which they took over from another attorney who had done little other than filing pretrial motions and trying to persuade the defendant to accept a plea bargain. No evidence existed that any witness interviews had been performed; the orders based on the trial court's rulings on pretrial motions had not been prepared; and a jury questionnaire was not submitted for distribution to prospective jurors. State v. Rogers, 352 N.C. 119, 529 S.E.2d 671, 2000 N.C. LEXIS 430 (2000).

Dismissal with prejudice of defendant's appeal and denial of defendant's motion to continue was unsupported by findings a defendant willfully failed to appear because defendant was jailed in Tennessee at the time of trial. Hodges v. Hodges, 156 N.C. App. 404, 577 S.E.2d 121, 2003 N.C. App. LEXIS 105 (2003).

Specific Findings of Fact Not Required. — Where the facts presented in defendant's motion were not in dispute, the judge was not required to make specific findings of fact in denying defendant's motion for a continuance. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

III. MOTIONS TO DISMISS.

Motion to dismiss an indictment when there is ground for challenge to the array must be made at or before the time of arraignment, or it is waived. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Motion to quash a murder indictment on the basis of racial discrimination in the selection of the grand jury foreman is deemed a motion to dismiss an indictment based on a challenge to the array under G.S. 15A-955(1) because it in effect challenges the grand jury which indicted the defendant, and under this section it must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Discretion in Refusing to Hear Untimely Motion to Dismiss. — Where defendants' motion to dismiss came at the conclusion of the evidence, under either common-law practice or this section, the motion was untimely and was therefore addressed to the discretion of the trial judge. His exercise of that discretion in refusing to hear the motion is not reviewable on appeal. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

IV. MOTIONS FOR JOINDER.

Provisions of this section apply only to motions for joinder made by a defendant. State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

Oral Motion for Joinder at Trial Is Too Late. — A motion for joinder of cases made orally after the present case was called for trial came too late. The motion should have been made at defendant's arraignment. Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pretrial stage of the proceedings. State v. Moore, 41 N.C. App. 131, 254 S.E.2d 191 (1979).

Oral Motion for Joinder Not Error. — Trial court did not err by allowing the State's oral motion for joinder of a juveniles' cases for trial when the motion was not written as required by G.S. 15A-926(b)(2) and the juvenile did not object to joinder at trial. Regardless, the trial court had discretion to allow the oral motion for joinder pursuant to G.S. §§ 15A-926(b)(2), 15A-951(a), and 15A-952(b) and (f). In re R.D.L., 191 N.C. App. 526, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (2008).

Discretion of Trial Court on Motion for Joinder. — Because a motion for joinder is addressed to the trial court's sound discretion, his ruling will not be disturbed absent a showing of abuse of discretion. State v. Riggs, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

It was not error for court to allow State's motion to join all offenses on the day defendant's trial began, where defendant made no showing of abuse of discretion or of any resulting prejudice. State v. Riggs, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

V. TIME FOR MAKING MOTIONS.

Written and Oral Motions for Joinder. — A written motion for joinder of defendants may be made at any time prior to trial; the motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Judge May Allow Late Motions. — It is within the discretion of the trial judge to permit pretrial motions to be filed at a later time than set out in the statute. State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

Deadline for filing motions required. — Failure at arraignment to give pro se defendant a definite date to file motions for a bill of particulars and change of venue coupled with the trial court's later refusal to hear the motions constituted an abuse of discretion which prejudiced defendant. State v. Ferebee, 128 N.C. App. 710, 499 S.E.2d 459 (1998).

§ 15A-953. Motions practice in district court.

In misdemeanor prosecutions in the district court motions should ordinarily be made upon arraignment or during the course of trial, as appropriate. A written motion may be made prior to trial in district court. With the consent of other parties and the district court judge, a motion may be heard before trial. Upon trial de novo in superior court, motions are subject to the provisions of G.S. 15A-952, and except as provided in G.S. 15A-135, no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

In district court there are no jurors in criminal cases to be inconvenienced if motions are heard during the course of the trial. In addition, motions in district court are usually more expeditiously made and disposed of than in superior court. For these reasons, the section indicates that, in general, motions in district court will be made upon arraignment or during the course of trial — in the same manner as at present. If a party wishes to raise a matter by motion before trial, he may do so, but the hearing may not be held prior to trial unless all parties consent.

The section is intended to state existing law in providing that in general a party is not prejudiced upon trial de novo in superior court by any ruling upon or failure to make timely motion on the subject in district court. The rule as to venue is somewhat altered, in accordance with the provisions of G.S. 15A-135.

CASE NOTES

Cited in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993).

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

(a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

(1) The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant.

(2) The statute of limitations has run.

(3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.

(4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

(5) The defendant has previously been placed in jeopardy of the same offense.

(6) The defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still pending and valid.

(7) An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.

(8) The court has no jurisdiction of the offense charged.

(9) The defendant has been granted immunity by law from prosecution.

(10) The pleading fails to charge an offense as provided in G.S. 15A-924(e).

(b) Upon suggestion to the court that the defendant has died, the court upon determining that the defendant is dead must dismiss the charges.

(c) A motion to dismiss for the reasons set out in subsection (a) may be made at any time. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section refers to motions to dismiss all criminal pleadings including indictments.

Special additional provisions relating to indictments are treated in G.S. 15A-955.

Several of the provisions are new to North Carolina statutory law, but it is believed that a case law foundation exists for all of them. It should be stressed that some of the motions here listed are, and others are not, motions which are normally to be heard prior to trial.

Two of the motions treated in this section have been spawned by relatively recent cases. The speedy-trial motion grows out of the decision in Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967); although there are specific provisions in Article 35 of Chapter 15A, and these must be followed if applicable, Klopfer unquestionably gives a right that may go beyond the specifics of Article 35. The provisions of subdivision (a)(4) are intended to embody the holding of the Supreme Court of North Carolina in State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971). It is assumed that the drastic relief called for under this motion would be granted most sparingly.

Subsection (b) of this section involves a "suggestion to the court"; if the defendant is dead, he cannot make a motion, and if the solicitor is apprised of the death of a defendant he could enter a voluntary dismissal under Article 50.

The General Assembly added subsection (c) to reinforce its deletion of motions under subsection (a) from the early-filing requirement of G.S. 15A-952(b). In the process, one category of motions has been left in doubt. Section 15A-952(b)(6), subparagraph a, requires early filings of "motions to dismiss for failure to plead under G.S. 15A-924(e)." Section 15A-954(a)(10) includes, as a motion which may be made any time, one on the ground that "the pleading fails to charge an offense as provided in G.S. 15A-924(e)." As G.S. 15A-924(e) simply states that the court must dismiss a pleading that does not state the crime in the manner required in G.S. 15A-924(a) unless an amendment is allowable, it becomes difficult to interpret these provisions. At the least, however, G.S. 15A-954(a)(10) would continue the old rule that a pleading which is so defective a statement of the crime that it cannot be amended is subject to a motion to dismiss at any time — including in an appellate court or after judgment.

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

- I. General Consideration.
- II. Speedy Trial.
  - A. In General.
  - B. Pre-indictment Delay.
- III. Flagrant Violation of Constitutional Rights.
- IV. Unconstitutionality Of Statute On Face Or As Applied.
- V. Double Jeopardy.
- VI. Previous Adjudication of Issue.

I. GENERAL CONSIDERATION.

Right to a full evidentiary hearing is not inherent in this section. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

In the absence of a showing of actual prejudice, the courts should consider dismissal in cases of serious crimes with extreme caution. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

Substantial Evidence Standard. — Substantial evidence for purposes of a motion to dismiss for insufficient evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Sufficiency of the Evidence. — Without sufficient evidence that defendant was responsible for the premises, the charge of knowingly maintaining a place to keep a controlled substance in violation of G.S. 90-108(a)(7) should have been dismissed. State v. Harris, 157 N.C. App. 647, 580 S.E.2d 63 (2003).

Defendant's motion to dismiss the charges of armed robbery and first degree felony murder against him at the close of all the evidence was properly denied since there was sufficient evidence that the shooting was committed as part of a continuous transaction, and to show an interrelationship between the attempted armed robbery and the homicide. State v. Gillis, 158 N.C. App. 48, 580 S.E.2d 32, 2003 N.C. App. LEXIS 941 (2003).

In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence. State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Question for the court on a motion to dismiss for insufficient evidence is whether there is substantial evidence: (1) of each essential element of the offense charged, and (2) of the defendant being the perpetrator of such offense. State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Trial court properly denied defendant's motion to dismiss, pursuant to G.S. 15A-954, with respect to sexual offense charges against him which he allegedly committed against his 16-year-old daughter, as the evidence was sufficient to support the jury verdict, finding defendant guilty of second-degree sexual offense in violation of G.S. 14-27.5, where he physically and sexually attacked her; defendant's claim that there were inconsistencies in the testimony and a lack of physical evidence to bolster the victim's testimony lacked merit, as there was no physical evidence bolstering requirement, and inconsistencies were for the jury to resolve. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Trial court's denial of defendant's motion to dismiss, as well as the denial of his post-trial motion to set aside the verdict, was proper where there was sufficient evidence to support an inference of constructive possession for purposes of defendant's possession of cocaine charge, as a police investigator saw defendant at a suspected drug dealer's home, he saw defendant drive away with a known drug runner from the home, and the runner informed the investigator where to find drugs in the vehicle; defendant was the driver of the vehicle where the cocaine was found and all reasonable inferences provided support for the conviction. State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

Evidence of scales and plastic bags with marijuana found in defendants' residence was sufficient evidence for the issue of manufacturing to be submitted to a jury; moreover, a co-defendant testified that one defendant used the scale and vacuum sealer found in the kitchen to weigh and package marijuana for distribution. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Testimony by a co-defendant that defendants stored marijuana in a house where they resided and sold marijuana from an apartment was insufficient to support the charge of trafficking by transportation because no one testified to observing defendants personally or actively moving or carrying any controlled substance. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Because substantial evidence of each element of an offense charged had to be shown to exist when a court ruled on a motion to dismiss, an adjudication finding that respondent, a juvenile, was delinquent for having the felonious possession of his mother's stolen car had to be reversed; the State introduced substantial evidence that he had possession of the stolen car, but the State failed to introduce any evidence as to the car's condition or that it was worth more than $1,000, as G.S. 14-71.1 required. Thus, a trial court erroneously denied respondent's motion to dismiss the charge against him. In re J.H., 177 N.C. App. 776, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

Defendant's motion to dismiss was properly denied as there was ample evidence that defendant shot the victim since: (1) defendant and the victim fought with each other before the shooting and defendant pulled a knife on the victim; (2) after the fight, defendant sat in defendant's truck and pointed a gun toward the victim's house; (3) the victim and the victim's brother identified defendant's voice as the voice they heard when the shooting occurred; (4) defendant's girlfriend saw defendant leave in defendant's truck shortly before the shooting; and (5) a .22 rifle and bullets were found in defendant's shop. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Testimony that defendant and the victim wrestled for a gun, which the witness was told was a nine-millimeter, in the victim's bedroom, that defendant was using a smaller gun to hit the victim, and the witness did not see who fired the gunshot that led to the victim's death, was sufficient to support the denial of defendant's motion to dismiss because it was sufficient for the jury to reasonably infer that defendant shot the victim, either with defendant's own gun or the victim's gun, and thus to allow the jury to conclude that defendant acted to cause the victim's death. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

Defendant was not entitled to dismissal of the charge of assault with a deadly weapon inflicting serious injury because evidence showing that the victim went to the hospital, took pain medication for two weeks, walked with a limp for one to two weeks, and did not fully heal for approximately one month after being shot in the knee was sufficient to show that the victim sustained a serious injury as required to support defendant's conviction. State v. Tice, 191 N.C. App. 506, 664 S.E.2d 368, 2008 N.C. App. LEXIS 1507 (2008).

Trial court did not err in denying defendant juvenile's motion to dismiss the charge of felonious breaking and entering and larceny and then finding defendant delinquent on the charges because the State presented substantial evidence of a felonious breaking and entry sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt; the office of a county cooperative extension service director was not held out to the public, and even if defendant had implied consent to enter the office because it was necessary for the general public to have access to it, stealing cash from the director's purse constituted an act sufficient to render implied consent void ab initio. In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

Denial of defendant's motion to dismiss was not erroneous because the State presented sufficient evidence to submit the charge of third degree sexual exploitation of a minor to the jury even if G.S. 14-190.17A required knowledge of both the character and content of the material as the jury was allowed to review all twelve computer files to determine if the names reflected the materials' content, and there was sufficient evidence to support a finding that defendant possessed the material in question, including the fact that the computer and a receipt for its purchase by defendant were found at defendant's place of business. State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (2008).

Given that the State presented sufficient evidence showing that defendant and two other men committed a breaking and entering into the victims' occupied residence, at night, taking a chain necklace, a PlayStation, some games, and a VCR and asking, "where is the money?" every element of a charge of first-degree burglary was shown to support the denial of a motion to dismiss. State v. Farrar, 190 N.C. App. 202, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008).

Even if defendant was not observed entering a vehicle, denial of the defendant's motion to dismiss a charge of violating G.S. 14-56, breaking and entering a motor vehicle with intent to commit larceny, was supported by sufficient circumstantial evidence that he committed the violation. His unlawful possession of property which had been in the vehicle a short time before was sufficient to support an inference of entry. State v. Baskin, 190 N.C. App. 102, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

Trial court did not err by denying defendant's motion to dismiss for insufficiency of the evidence as defendant did not challenge the admission of evidence of a mitochondrial DNA match between defendant's mother and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's mother, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Conviction For Attempt Permitted Where Completed Crime Was Charged. — Trial court properly denied defendant's motion to dismiss the charge of statutory sexual offense where there was evidence of each element of attempted statutory sexual offense, and G.S. 15-170 permitted the conviction for the attempted crime where the completed crime was charged. State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003).

Where an officer stated defendant sped at a rate "very much" in excess of 15 miles per hour over the speed limit and driving into oncoming traffic prior to slamming on the brakes and sliding to a halt in front of an occupied mobile home, that was sufficient evidence for the jury to find defendant guilty of eluding an officer while speeding in excess of 15 miles over the speed limit and driving recklessly; thus, defendant was not entitled to dismissal of the charges. State v. Davis, 163 N.C. App. 587, 594 S.E.2d 57, 2004 N.C. App. LEXIS 408 (2004), cert. denied, 358 N.C. 547, 599 S.E.2d 564 (2004).

Defendant was not entitled to dismissal of action charging her with misdemeanor cruelty to animals where there was evidence that defendant knew the dogs were being kept, with her consent, at her home and in her backyard, that the dogs were tied up with no shelter, food, or water, and that the dogs had been allowed to become emaciated and one dead dog had been left, still tied up, to the point of decay. State v. Coble, 163 N.C. App. 335, 593 S.E.2d 109, 2004 N.C. App. LEXIS 368 (2004).

Motion to Dismiss Equivalent to Motion to Quash. — A motion to dismiss under this section for failure of the indictment to charge an offense as provided in G.S. 15A-924 is the functional equivalent of a motion to quash under prior practice. State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Trial court properly denied defendant's motion to dismiss, pursuant to G.S. 15A-954, a violent habitual felon indictment pursuant to G.S. 14-7.7 against defendant; there was substantial evidence that defendant had two prior felony convictions, because even though one of the judgments listed the convicted person's race as black while defendant was white, G.S. 14-7.10 created the requirements for a statutory prima facie case, and since the prosecution met that standard, any discrepancies in the details contained in the judgments were for the jury to consider in weighing the evidence; the trial court also declined to dismiss the charge on grounds that one of the convictions did not qualify for use as an underlying felony, as voluntary manslaughter was a superseded offense pursuant to G.S. 14-7.7(b)(2), and as the offense had been upgraded by the General Assembly to a class D felony, G.S. 14-18. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Refusal to Dismiss Was Proper. — Defendant's motion to dismiss pursuant to G.S. 15A-954 the first-degree kidnapping charge under G.S. 14-39 was properly denied; there was sufficient evidence to find that defendant did not leave the child in a safe place, where defendant left the child in the middle of the night in an isolated, rural, wooded area with which the child was unfamiliar. State v.

Sakobie, 157 N.C. App. 275, 579 S.E.2d 125, 2003 N.C. App. LEXIS 645 (2003).

Trial court correctly denied defendant's motions to dismiss and submitted the charge of possession of a firearm by a felon to the jury, as the evidence was sufficient to raise a jury question regarding defendant's possession of the gun; defendant jointly owned the car with his girlfriend and had been the sole driver of the car the entire day of the robbery, and the State's evidence indicated that the gun could readily be seen when the driver's door was opened, suggesting that defendant must have known of the presence of the gun. State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680, 2003 N.C. App. LEXIS 1491 (2003).

In a prosecution for obtaining property by false pretenses, in violation of G.S. 14-100, the trial court properly denied defendant's motion to dismiss for insufficient evidence, pursuant to G.S. 15A-954, as the State produced sufficient evidence that a pawn shop owner was actually deceived by defendant's false representation that he owned stolen cameras. State v. Simpson, 159 N.C. App. 435, 583 S.E.2d 714, 2003 N.C. App. LEXIS 1531 (2003), aff'd, 357 N.C. 652, 588 S.E.2d 466 (2003).

Trial court did not err by failing to dismiss, pursuant to G.S. 15A-954, the failure to appear charge, in violation of G.S. 15A-543, against defendant, as there was evidence that defendant was ordered by the magistrate to appear for trial, failure to appear was a substantive crime under G.S. 15A-543, and defendant failed to establish that defendant was selectively prosecuted. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Trial court did not err in denying defendant's motion to dismiss, pursuant to G.S. 15A-954, in defendant's prosecution for financial identity fraud under G.S. 14-113.20(a), where the indictment alleged that defendant misrepresented his identity for the purpose of avoiding legal consequences; the indictment alleged proper grounds for the charge, the State presented substantial evidence in support of the grounds, and there was no fatal variance between the indictment and the evidence at trial. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Defendant's conviction of involuntary manslaughter, G.S. 14-18, was affirmed; the trial court properly refused to admit a synopsis of defendant's statement given to police officer, as the synopsis did not did not fall within the recorded recollection hearsay exception under G.S. 8C-1, N.C. R. Evid. 803(5), because there was no showing that defendant had an insufficient recollection of events, and the trial court properly denied defendant's motion to dismiss pursuant to G.S. 15A-954, because the state adequately proved the elements of the crime of voluntary manslaughter. State v. Alston, 161 N.C. App. 367, 588 S.E.2d 530, 2003 N.C. App. LEXIS 2185 (2003), aff'd, 359 N.C. 61, 602 S.E.2d 674 (2004).

Trial court properly denied defendant's motion to dismiss the armed robbery charges against him, and the evidence was sufficient to support defendant's armed robbery conviction, where: (1) the sole eyewitness testified that she heard someone yell "give me your shit" and "I don't have anything, man," (2) the eyewitness testified that defendant rummaged through the victim's car, (3) the victim's wallet and other personal items were ultimately found strewn outside his car, and (4) prior to the shooting, the eyewitness saw the victim put a handgun in his car. State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Trial court did not err in denying defendant's motion to dismiss an obstruction and delay of a public officer charge under G.S. 14-223 as: (1) defendant inserted herself into an investigation of a school fight, (2) she interfered with the school safety officer's attempts to secure a student in his patrol car by physically blocking him from closing his car door, and repeatedly ignoring his instructions to step away, (3) she attempted to incite the gathering crowd to interfere, (4) at her own car, she again refused to cooperate with the officer to the point of running across the street, with the result that the student was left alone in the patrol car, and (5) the officer was unable to continue with his investigation of the fight, and he was required to seek back-up. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Trial court did not err in denying defendants' motions to dismiss conspiracy charge because substantial evidence existed, in that: (1) a co-defendant testified that defendants had agreed to distribute marijuana, were engaged in distributing marijuana, and stored marijuana in the house where defendants lived and sold marijuana from an apartment; (2) defendants each had access to the marijuana found in a garage; (3) one defendant was at the apartment when a law-enforcement agent made a controlled delivery of a package containing marijuana; and (4) marijuana, scales, packaging materials, and weapons were found at both the apartment and in the bedrooms and public areas of the house. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Evidence from a co-defendant that defendant had access to a garage at their residence where one to two thousand dime bags were found, that defendant had access to the kitchen where a scale and vacuum sealer were found, and that defendant used bags found in the garage to distribute marijuana, when coupled with evidence that the police found, which included among other things, a set of scales and plastic bags containing marijuana residue in defendants bedroom, was sufficient to submit to the jury the issue of whether defendant was trafficking in marijuana by manufacture. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Motion to dismiss the charge of possession with intent to manufacture, sell, and deliver methamphetamine was properly denied where defendant testified to knowingly assisting her husband in manufacturing methamphetamine by ordering chemistry ware for him; her testimony that 2.9 grams of methamphetamine found at her residence was for personal use was contradicted by expert testimony that indicated the items found were consistent with materials used in manufacturing methamphetamine and packaging controlled substances and that plastic bags such as those found at defendant's residence could be used to package controlled substances into smaller amounts for sale. State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

Trial court properly denied defendant's motion to dismiss charge of manufacturing methamphetamine within 300 feet of a school where the State presented physical evidence seized from inside and around defendant's residence that was consistent with methamphetamine manufacturing from which a reasonable juror could find that defendant manufactured methamphetamine within 300 feet of an elementary school. State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

After threatening a victim with a knife and blinding her by taping her eyes shut, defendant penetrated the victim vaginally from the front, then withdrawing, turning her on her side and re-penetrating her vaginally; here, there was sufficient evidence to show that defendant committed two separate acts of first degree rape such that defendant's motion to dismiss the second count of first degree rape and defendant's motion to dismiss the second degree kidnapping charge were properly denied. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Trial court did not err in denying defendant's motion to dismiss for insufficient evidence as the evidence supported defendant's conviction for first-degree murder; there was sufficient evidence to support the elements of premeditation and deliberation in the form of defendant's statements and conduct before and after the killing, ill will between the parties, and the nature and number of the victim's wounds. The victim's back was turned when defendant fired defendant's weapon, giving defendant adequate time to weigh the consequences of the act. State v. Bass, 190 N.C. App. 339, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008), appeal dismissed, cert. denied, 362 N.C. 683, 670 S.E.2d 566 (2008).

Dismissal on Unsworn Representations Held Error. — The court erred in allowing motion to dismiss indictments which on their face sufficiently alleged the offense of embezzlement, where even assuming, arguendo, that the court could consider extraneous evidence in ruling on the motion, only the unsworn representations of defense counsel at the hearing on defendant's motion, to the effect that defendant was a partner in the victimized partnership, were before the court. State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Motion to Dismiss on Basis of Insufficient Evidence Properly Denied. — Trial court properly denied defendant's motion to dismiss, pursuant to G.S. 15A-954, and properly convicted defendant of second-degree kidnapping, G.S. 14-39(a); testimony from the victim and other witnesses showed that defendant had grabbed the victim while he was seated inside his car, threw the victim to the ground, and knocked the victim onto the hood of his car, and that the victim could not flee from defendant because defendant continued to hold the victim while assaulting him, and therefore there was sufficient evidence that defendant restrained and terrorized the victim as required by the kidnapping statute. State v. Washington, 157 N.C. App. 534, 579 S.E.2d 463, 2003 N.C. App. LEXIS 728 (2003).

Defendant's motion to dismiss a charge of possession of marijuana with intent to sell and deliver, in violation of G.S. 90-95(a), was properly dismissed because the State met its burden of proving that defendant possessed marijuana and that he intended to sell or deliver it where: (1) the marijuana, along with surveillance equipment and other drug paraphernalia, was found in a common area of a house that was listed on defendant's driver's license and car registration as his home address; (2) defendant received mail at the address; (3) although the evidence tended to show that defendant shared the house with at least one other individual, considering the totality of the circumstances, a reasonable inference could be drawn that defendant had the power to control the use and disposition of the substance since it was located in a common area of his residence. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Defendant's motion to dismiss a charge of conspiracy was properly denied because there was substantial evidence from which a jury could infer an agreement between defendant and his roommate where (1) defendant admitted to living with the roommate and that the house had surveillance equipment in place; and, (2) defendant signed for a package that contained cocaine, placed it in his car, then moved it to another car which was subsequently driven away by the inmate. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Defendant's motion to dismiss a charge of violating G.S. 90-108(a)(7) by knowingly keeping or maintaining a dwelling house for the purpose of keeping or selling a controlled substance, was properly denied because there was sufficient evidence showing more than temporary occupancy where defendant received mail at the address for approximately one year, his driver's license showed the address as his home address, and his car was registered at the address. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Defendant's motion to dismiss charges of trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of G.S. 90-95(h)(3) was properly dismissed because there was sufficient evidence from which a jury could reasonably infer that defendant knowingly possessed cocaine where, although a package containing cocaine was addressed to someone else, (1) defendant identified himself as the addressee and signed for the package using the name of the addressee, (2) defendant exercised control over the package by taking it inside, placing it in one vehicle, and then moving it to another vehicle, and (3) surveillance equipment, guns, and plastic bags containing traces of cocaine were found in the residence. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

In a possession with intent to sell or deliver case, the trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence because the evidence showed that: (1) the undercover officers approached defendant and asked if they could get drugs; (2) defendant advised the undercover officers that he could get them marijuana or cocaine if they gave him money first; (3) the officers gave defendant money, and he returned with two bags of marijuana and one bag of cocaine; (4) a special agent testified that the substance submitted for testing was cocaine; and (5) any conflicting testimony about the color of the baggie containing the cocaine defendant sold to the undercover officers was a discrepancy in the state's evidence, properly considered by the jury in weighing the reliability of the evidence. State v. Bunn, 173 N.C. App. 729, 619 S.E.2d 918, 2005 N.C. App. LEXIS 2301 (2005).

Trial court did not err in denying defendant's motion to dismiss for insufficient evidence because the evidence established that: (1) defendant failed the field sobriety tests; (2) defendant's eyes were bloodshot and defendant's speech was slurred; (3) there was an empty can of beer in defendant's vehicle and defendant admitted to having had four beers; and (4) defendant refused to take an Intoxilyzer test. State v. Johnson, 186 N.C. App. 673, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

Arrest Warrant Insufficient. — Because the arrest warrant failed to charge defendant with the commission of a simple assault under G.S. 14-33(a), the trial court erred in failing to dismiss the charge as stated in the criminal pleading and the appellate court vacated defendant's conviction for assault. State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

Denial of Motion Held Appropriate. — Defendant's motion to dismiss charges of larceny by employee because the State presented insufficient evidence to support the offense charged in the indictments was properly denied because shorthand references at trial to the victim did not fatally vary from the indictments, nor did defendant show she was prejudiced by the use of these references. State v. Morris, 156 N.C. App. 335, 576 S.E.2d 391, 2003 N.C. App. LEXIS 113 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

It was proper to deny defendant's motion to dismiss the charge of injury to prisoner by jailer because defendant's duties as a courtroom bailiff were such that defendant could be considered the "keeper of a jail" in the context of G.S. 162-55. State v. Shepherd, 156 N.C. App. 603, 577 S.E.2d 341, 2003 N.C. App. LEXIS 325 (2003).

Trial court did not err in denying defendant's motion to dismiss his second-degree kidnapping charge under G.S. 14-39(a), and there was sufficient evidence that defendant restrained the victim for the purpose of facilitating a felony where there was sufficient evidence from which the jury could find that defendant intended to rape the victim; further, the evidence of restraint forming the basis of the kidnapping charge was independent of the restraint inherent in the attempted rape charge as defendant pushed the victim down the hallway of her residence, away from her sister's bedroom, into her bedroom and pinned her on her bed, which constituted evidence that defendant took the victim to a more secluded area to prevent others from witnessing or hindering the rape. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Trial court did not err in denying defendant's motion to dismiss his attempted second-degree rape charge and the evidence was sufficient to support defendant's conviction, including defendant's intent to rape the victim, where defendant: (1) forced entry into the victim's residence at 4:00 a.m., (2) pinned the victim to her bed, (3) threatened the victim, (4) grabbed the victim's breast and between her legs, and (5) despite resistance, did not end the assault until the police arrived. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Trial court did not err in denying defendant's motion to dismiss his first-degree burglary charge and the evidence was sufficient to support the jury's finding that defendant intended to rape the victim at the time that he forced his way into the victim's residence where: (1) defendant forced the victim into her bedroom, pushed her onto the bed, threw his body on top of hers, and pinned her down; (2) defendant removed duct tape from his pocket, whereupon the victim renewed her efforts to escape and called for help; (3) defendant repeatedly touched the victim's breast and vagina and, despite her resistance, did not end the assault until law-enforcement officers arrived; and (4) although defendant asserted that he merely wished to use the telephone or the restroom when he entered the home, none of the acts he committed within the residence furthered these asserted goals. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Defendant's conviction and sentence on a charge of first-degree murder, pursuant to G.S. 14-17, was upheld; defendant's argument that the trial court erred in denying his motion to dismiss for insufficient evidence, pursuant to G.S. 15A-954, was waived because defendant failed to renew his motion at the close of all the evidence as required by N.C. R. App. P. 10(c)(3); the trial court properly excluded the victim's uncommunicated threats to defendant into evidence, because defendant failed to put on evidence of self-defense, as was required to admit such evidence, pursuant to G.S. 8C-1, Rule 803(3); and defendant did not suffer any prejudice pursuant to G.S. 15A-1443(a) because defendant testified to substantially the same evidence that was contained in the uncommunicated threat. State v. Messick, 159 N.C. App. 232, 585 S.E.2d 392, 2003 N.C. App. LEXIS 1493 (2003).

Defendant was not entitled to dismissal, pursuant to G.S. 15A-954, of the second-degree rape charge, in violation of G.S. 14-27.3, against defendant; there was sufficient evidence of constructive force to convict defendant, where the victim testified that defendant threatened the victim that if he did not do what defendant asked, defendant would pull a gun on him. State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003), appeal dismissed, cert. denied, 357 N.C. 581, 589 S.E.2d 363 (2003).

Where defendant's co-conspirator testified that he and defendant planned to break into and rob a convenience store of cigarettes and he saw defendant take a large white bag and break into the store and take the cigarettes, where another witness saw defendant with a large white bag of cigarettes the following day, and where cigarettes valued at $3,500 were missing after the break-in, the trial court properly denied defendant's motion to dismiss the felony charge because the State had proved all of the essential elements of the crime. State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003).

Trial court properly denied defendants' motion to dismiss, pursuant to G.S. 15A-954, in their criminal trial wherein they were charged with robbery with a dangerous weapon in violation of G.S. 14-87, as there was substantial evidence of each essential element of the offense and of defendants' identities as the perpetrators; a restaurant employee who was held at gunpoint while the restaurant was robbed testified as to the elements of the offense, and an accomplice who also worked in the restaurant identified defendants as the perpetrators. State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003).

Defendant's motion to dismiss a kidnapping charge was properly denied because the evidence indicated that defendant's assault on a victim was complete and that defendant then removed the victim to a different location to facilitate defendant's flight from the assault scene. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

Defendant's motion to dismiss an assault with a deadly weapon with intent to kill inflicting serious injury charge was properly denied because evidence that defendant attacked the victim, placed her in his trunk and kept her there unconscious, seriously injured, and bleeding for four hours, in addition to the use of a deadly weapon and the severity of the victim's injuries, was sufficient to show the element of an intent to kill in the assault charge. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

Defendant's motion to dismiss a charge of trafficking in cocaine by possession and of possession with intent to manufacture, sell, or deliver cocaine was properly denied; defendant's lack of knowledge of the weight of the cocaine was irrelevant because he knew that he possessed cocaine. State v. Foster, 162 N.C.

App. 665, 592 S.E.2d 259, aff'd, 359 N.C. 179, 604 S.E.2d 913 (2004).

Trial court did not err in denying defendant's motion to dismiss the possession charge because a juror could reasonably have inferred that defendant had the power and intent to control the cocaine found next to the driver's seat in the vehicle and therefore, constructively possessed the cocaine. The arresting officer observed defendant in the vehicle seemingly nervous and evasive, and when stopped, defendant ultimately fled. State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (2004).

Evidence of drug paraphernalia found in various areas of the house where both defendants resided, and the testimony of a co-defendant that both defendants were engaged in the sale of marijuana and both had access to the garage where marijuana was found, were sufficient for the issue of possession to survive a motion to dismiss. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Trial court properly denied defendant's motion to dismiss the possession of a firearm by a convicted felon charge because the state presented ample circumstantial evidence suggesting that defendant had possession of a gun before he was tackled to the ground by police officers. State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579, 2007 N.C. App. LEXIS 75 (2007).

Trial court properly denied defendant's motion to dismiss the assault with a deadly weapon on a government officer charge because, in light of the evidence showing that a gun was only inches from defendant's outstretched hand and that defendant was actively, forcefully, and to some degree successfully resisting the officers' attempt to arrest the defendant, the defendant's failure to physically touch the weapon did not preclude the commission of an assault with the firearm. State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579, 2007 N.C. App. LEXIS 75 (2007).

Denial of defendant's motion to dismiss for failure to establish that the crime alleged occurred in the state of North Carolina was proper because testimony by a city police officer and forensic chemist provided sufficient circumstantial evidence to support a finding that the crime occurred in North Carolina. State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876, 2007 N.C. App. LEXIS 1805 (2007), appeal dismissed, 362 N.C. 178, 657 S.E.2d 663 (2008).

Denial of defendant's motion to dismiss was proper, as the State established defendant's knowing possession of child pornography. Defendant had written in a chat dialogue, "thanks for the pics" or "thanks for the pictures," several files bore date stamps that matched the date stamp on the chat, and the evidence suggested defendant deleted temporary Internet files so that defendant would avoid being caught with too many at once. State v. Dexter, 186 N.C. App. 587, 651 S.E.2d 900, 2007 N.C. App. LEXIS 2313 (2007).

Defendant's appeal of an order denying his motion to dismiss the charges of misdemeanor and felony habitual driving while intoxicated (DWI) was dismissed because defendant had no right to appeal pursuant to G.S. 15A-1444(e); defendant, who pled guilty to the felony habitual DWI charge after his motion to dismiss was denied, had no statutory right to appeal his conviction, and he waived appellate review of his double jeopardy argument. State v. Corbett, 191 N.C. App. 1, 661 S.E.2d 759, 2008 N.C. App. LEXIS 1132 (2008).

Denial of Motion Held Inappropriate. — Trial court erred in denying defendant's motion to dismiss the charges of possession with intent to sell and deliver cocaine and trafficking in cocaine by possession where the State failed to present substantial evidence of possession or that defendant exerted control over premises where drugs were found. State v. Acolatse, 158 N.C. App. 485, 581 S.E.2d 807 (2003).

State failed to produce evidence sufficient to support either the second element of affray, that the fight occurred in a public place, or the third element of affray, that the fight caused terror to the people, in its case against the juvenile; therefore, the hearing judge erroneously denied the juvenile's motion to dismiss the affray charge. In re May, 357 N.C. 423, 584 S.E.2d 271, 2003 N.C. LEXIS 833 (2003).

Maiming of a victim's ear occurs only when a victim's ear is totally severed from the victim's head or a part of a victim's ear is totally severed from the rest of the victim's ear; thus, defendant's motion to dismiss a maiming charge should have been granted where the State failed to prove that the victim's ear had been completely removed from the victim's head. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

Trial court erred in denying defendant's motion to dismiss the charge of sexual offense by a person in a parental role for insufficiency of the evidence where there was no evidence to support the finding that defendant and the victim had a relationship analogous to that of a parent and child; the evidence, taken in the light most favorable to the State, was sufficient to establish only that defendant babysat for the victims and was not the mother's boyfriend or a de facto stepfather. State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738, 2004 N.C. App. LEXIS 300 (2004), appeal dismissed, cert. denied, 358 N.C. 733, 601 S.E.2d 861 (2004).

Defendant's motion to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances should have been granted because the evidence did not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor was there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (2004).

Trial court's granting of a motion to suppress did not mandate a pretrial dismissal of the underlying indictments because the district attorney could have elected to dismiss or proceed to trial without the suppressed evidence and attempted to establish a prima facie case; if so, defendant could have moved to dismiss at the close of the state's evidence and renewed the defendant's motion at the close of all evidence under G.S. 15-173. State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646, 2007 N.C. App. LEXIS 1947 (2007).

Trial court erred in denying a juvenile's motion to dismiss the charge of disorderly conduct in a school in violation of G.S. 14-288.4(a)(6) because although the juvenile's behavior was an annoyance to the dean of students of a high school, it did not rise to the level of criminal activity; there was no evidence that the school or classroom instruction was substantially disrupted, that the juvenile was aggressive or violent, or that the juvenile used disturbing or vulgar language. In re S.M., 190 N.C. App. 579, 660 S.E.2d 653, 2008 N.C. App. LEXIS 992 (2008).

Sufficient Evidence to Sustain Conviction. — Defendant's motion to dismiss pursuant to G.S. 15A-954 the larceny of a motor vehicle charge was properly denied, as there was sufficient evidence that defendant intended to deprive the owner of the owner's vehicle permanently; defendant drove the vehicle for defendant's personal use until defendant was stopped hours later by police, and defendant gave no indication that defendant intended to return the vehicle. State v. Sakobie, 157 N.C. App. 275, 579 S.E.2d 125, 2003 N.C. App. LEXIS 645 (2003).

Motion to dismiss the charges of misdemeanor stalking and communicating threats was properly denied where there was sufficient evidence to show that defendant followed or was in the presence of the victim on more than one occasion without legal purpose and with the intent to cause her emotional distress by placing her in fear of death or bodily injury, and that defendant communicated threats to the victim through a third party. State v. Thompson, 157 N.C. App. 638, 580 S.E.2d 9, 2003 N.C. App. LEXIS 952 (2003), cert. denied, 357 N.C. 469, 587 S.E.2d 72 (2003).

There was substantial evidence to withstand defendant's motions to dismiss. The evidence established that the victim, defendant's biological daughter, was between 13 and 15 years old, an essential element of statutory rape under section G.S. 14-27.7A(a), during the time she lived with defendant, and defendant engaged in almost daily sexual intercourse with her. There was also sufficient evidence of defendant's age because it was biologically impossible for defendant to be less than six years older than the victim and to be her father. State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003).

Denial of defendant's motion to dismiss was upheld after the appellate court determined that there was sufficient evidence that defendant was the perpetrator of the crime and that he acted with premeditation and deliberation; among other things, there was fiber evidence and evidence connected with defendant's boat linking him to the crime, and evidence of an elaborate process of concealing the body to support premeditation and deliberation. State v. Dawkins, 162 N.C. App. 231, 590 S.E.2d 324, 2004 N.C. App. LEXIS 116 (2004), cert. denied, 358 N.C. 237, — S.E.2d — (2004).

Denial of defendants' motions to dismiss was upheld as the evidence was sufficient to establish that defendants willfully attempted to evade or defeat a tax or its payment in violation of G.S. 105-236(7), and tended to show that one defendant failed to file an income tax return for four years despite the fact that his gross income exceeded his federal and state exemption allowances and necessitated that he file a return in each of those years. State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004).

Trial court did not err in denying defendant juvenile's motion to dismiss the charge of felonious larceny and then finding defendant delinquent on the charges because the State presented substantial evidence of a felonious larceny sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt; the State's evidence tended to show that: (1) a county cooperative extension service director observed defendant sitting in the library across the hall from her office; (2) she left her office; (3) when the director returned she was greeted by defendant, who was standing in her office; (4) defendant had not been given permission to enter the director's office; and (5) upon entering her office, the director discovered that her pocketbook had been tampered with and money was missing. In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

Applied in State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977); State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978); State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983); State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360 (1989); State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000); State v. Cook, 164 N.C. App. 139, 594 S.E.2d 819, 2004 N.C. App. LEXIS 741 (2004); State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004); State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004).

Cited in State v. Raines, 30 N.C. App. 176, 226 S.E.2d 546 (1976); State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977); State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978); State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978); State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817 (1978); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979); State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979); State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980); State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981); State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. White, 54 N.C. App. 451, 283 S.E.2d 571 (1981); State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983); State v. Alston, 81 N.C. App. 459, 344 S.E.2d 339 (1986); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); State v. Agee, 93 N.C. App. 346, 378 S.E.2d 533 (1989); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993); State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998); State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998); State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998); State v. Malette, 350 N.C. 52, 509 S.E.2d 776 (1999); State v. Safrit, 154 N.C. App. 727, 572 S.E.2d 863, 2002 N.C. App. LEXIS 1536 (2002).

II. SPEEDY TRIAL.

A. In General.

Right to speedy trial is an integral part of the fundamental law of this State. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Guaranteed by U.S. Const., Amend. VI. — Every person formally accused of crime is guaranteed a speedy and impartial trial by this section and U.S. Const., Amends. VI and XIV. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

In order to prevail on allegations of a constitutional due process violation of the right to a speedy trial, a defendant must show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

Period Covered by Speedy Trial Right. — The due process right to a speedy trial relates to the period of time between the date of the occurrence of the alleged offense, and the date when a defendant is "accused" of committing the alleged crime. A defendant becomes "accused" of the crime for this purpose when he is either arrested or indicted, whichever occurs first. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Length of the delay is not per se determinative of the question of whether a defendant has been denied a speedy trial. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

It cannot be said precisely how long a delay is too long, but rather the courts must engage in a balancing test. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

Right to a speedy trial is necessarily relative, for inherent in every criminal prosecution is the probability of delay. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

No Exact Time Limit. — Neither the Constitution nor the legislature has attempted to fix the exact time within which a trial must be had. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

Interrelated factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

In determining whether an accused has been denied his right to a speedy trial, the courts have weighed four factors: (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

Unless some fixed time limit is prescribed by statute, speedy trial questions must be resolved on a case-by-case basis. While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right, and (4) the extent to which defendant has been prejudiced. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

A claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant. The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. State

v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Facts of Case Must Be Considered. — The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

Good Faith Delays. — The constitutional guarantee of a speedy trial does not outlaw good faith delays which are reasonably necessary for the State to prepare and present its case. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Appellate court did not err in affirming the trial court's denial of defendant's motion to dismiss arguing defendant's speedy trial right was violated, as application of the four-factor Barker test did not show that the four-year delay between defendant's indictment for the killing of another man and defendant's plea bargain to second-degree murder right before trial was the result of the State's inaction or unreasonableness; rather, the evidence showed that the trial court had a crowded docket regarding murder charges and that defendant was not prejudiced by the delay, and, thus, denial of the motion to dismiss was not error. State v. Spivey, 357 N.C. 114, 579 S.E.2d 251, 2003 N.C. LEXIS 422 (2003).

Undue delay which is arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense" violates the constitutional right to a speedy trial. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Delay Due to Investigation. — In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, defendant was not denied his right to a speedy trial by a preindictment delay of four and one-half months, where the delay was necessary to protect an undercover investigation, and defendant failed to show that any evidence was lost as a result of the delay which would have been helpful to his defense. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The legitimate need to protect the existence of an ongoing undercover investigation from exposure has been frequently recognized by the federal courts as a reasonable justification for delay in bringing an indictment. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

Criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Congestion of criminal court dockets has consistently been recognized as a valid justification for delay in bringing an accused to trial. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

Delay Held Not Unreasonable. — Where the record indicates that the delay in the prosecution of a case was due to congested criminal dockets, good-faith efforts to obtain custody of absent codefendants and understandable difficulty in locating out-of-state witnesses, one of whom was a fugitive from justice, an 11-month delay was not unreasonable and the delay itself was not prejudicial to defendant in preparing and presenting his defense. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

There was no error in denying defendant's motion to dismiss because defendant's constitutional right to a speedy trial was not violated even though almost two years passed between the date of the offenses and trial; defendant failed to demonstrate actual or substantial prejudice resulting from the delay as he alleged only anxiety and concern, and also failed to meet his burden of showing that the reason for the delay was the neglect or willfulness of the prosecution. State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886, 2004 N.C. App. LEXIS 188 (2004).

Motion to Dismiss Ipso Facto Denied by Denial of Motion to Suppress. — Where the trial court actually did find facts and enter conclusions of law in denying defendant's motion to suppress evidence of defendant's confessions to police, by so denying the motion to suppress, the motion to dismiss was denied, ipso facto, for there was no showing of a constitutional violation by defendant upon which to base the motion. Thus the failure of the trial judge to enter an additional order specifically denying by name the motion to dismiss would be, at most, harmless error. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Prisoners confined for unrelated crimes are entitled to the benefits of the constitutional guarantee of a speedy and impartial trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Burden of Proving Denial of Speedy Trial. — The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768,

cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

The burden is on an accused who asserts denial of a speedy trial to show that the delay has prejudiced him in his ability to defend himself, and prejudice will not be presumed merely upon a showing of a long period of delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

The burden is on the defendant who asserts the denial of his right to a speedy trial to show the delay was the result of the State's intentional and unnecessary postponement for its own convenience or advantage; and, at least in the absence of intentional governmental delay for the purpose of harassing or gaining advantage over defendant, the burden is on defendant to affirmatively demonstrate actual and substantial prejudice. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Delay for Long Period. — Ordinarily, the burden is on the defendant to show that the delay was due to the willful neglect of the prosecution and could have been avoided by a reasonable effort. The courts of this State, however, have recognized an exception to this general rule where the defendant shows a long period of delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

Once the defendant showed a 17-month delay after his request for a speedy trial, the State should have presented evidence fully explaining the reasons for the delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

Weight Given Demand for Speedy Trial. — The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Although the failure to assert the right to a speedy trial has not been held to be a waiver of the right to a speedy trial, it does make it difficult for a defendant to prove that he was denied such a right. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Irreparable Prejudice Necessary to Dismissal. — It is only when one can show that there has been a constitutional violation resulting in irreparable prejudice to the preparation of defendant's case that a dismissal is warranted under subdivision (a)(4) of this section. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

B. Pre-indictment Delay.

Section affords no protection to one who has not yet been "accused". — An individual becomes "accused" of a crime for the purpose of analysis under U.S. Const., Amend. VI when he is either arrested or indicted for the crime. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

The speedy trial provision has no application until a putative defendant in some way becomes accused. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Proof of Intentional Delay. — Defendant must show that the State intentionally delayed indictment in order to impair his defense or to gain tactical advantage, a claim requiring inquiry into the nature of or reason for the delay. To prevail on this point, a defendant essentially must prove that the State unnecessarily delayed seeking indictment. State v. Holmes, 59 N.C. App. 79, 296 S.E.2d 1 (1982).

To grant a motion to dismiss for pre-indictment delay, defendant must show both intentional delay on the part of the State in order to impair defendant's ability to defend himself and actual and substantial prejudice from the pre-indictment delay. State v. Parker, 66 N.C. App. 293, 311 S.E.2d 321 (1984).

Prejudice Not Presumed by Long Pre-indictment Delay. — Prejudice will not be presumed merely upon a showing of a long period of pre-indictment delay. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Passage of time is inherent in any preindictment delay situation, and prejudice is not presumed simply upon a showing of a lengthy preindictment delay. State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994), overruled on other grounds, State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996).

Proving Pre-indictment Delay Violated Due Process Rights. — For defendant to carry the burden on his motion to dismiss for pre-indictment delay violating his due process rights pursuant to U.S. Const., Amends. V and XIV, he must show both (1) actual and substantial prejudice from the pre-indictment delay and (2) that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant. State v. Holmes, 59 N.C. App. 79, 296 S.E.2d 1 (1982).

Delay Due to Continuing Investigation. — Where there is an ongoing investigation that will be jeopardized by arrests and indictments resulting from the operation and where the undercover agent remains actively involved in the operation, indictment may be delayed until completion of the drug investigation. In such instances, delay in issuance will not, without more, prejudice the defendant's due process interest in a timely indictment. State v.

Holmes, 59 N.C. App. 79, 296 S.E.2d 1 (1982).

Pre-indictment delay attributable to an ongoing investigation of the case is reasonable, justified, and for legitimate purposes. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

General allegation of prejudice supported merely by claims of faded memory will not sustain the defendant's burden of proof on the issue of prejudice from pre-indictment delay. The defendant must show that the evidence or testimony lost because of faded memory would have been helpful, was significant and was lost because of preindictment delay. State v. Holmes, 59 N.C. App. 79, 296 S.E.2d 1 (1982).

III. FLAGRANT VIOLATION OF CONSTITUTIONAL RIGHTS.

Subdivision (a)(4) Used Sparingly. — Since subdivision (a)(4) of this section contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Denial of access of a witness to a breathalyzer test when the State's sole evidence of the offense of driving while impaired was the personal observation of the authorities would constitute a flagrant violation of defendant's constitutional right to obtain witnesses under N.C. Const., Art. I, § 23 as a matter of law and would require that the charges be dismissed. State v. Ferguson, 90 N.C. App. 513, 369 S.E.2d 378, cert. denied, 323 N.C. 367, 373 S.E.2d 551 (1988).

State Suppressed Relevant Evidence Requiring Granting of Defendant's Motion to Dismiss. — Trial court properly granted defendant's motion to dismiss the charge of felony assault on a government officer or employee on the grounds of prosecutorial misconduct and a Brady violation because the State suppressed material and exculpatory evidence, which flagrantly violated defendant's rights to due process of law under Brady, G.S. 15A-954(a)(4), and defendant was irreparably prejudiced by the State's failure to provide the evidence; a poster and photograph, which had been destroyed, were relevant to defendant's case because the crime with which he was charged arose out of the incident that gave rise to the injuries depicted in the photograph. State v. Williams, 190 N.C. App. 301, 660 S.E.2d 189, 2008 N.C. App. LEXIS 856 (2008).

Destruction of Evidence After Defendant Requested Production of Evidence. — Defendant was entitled to dismissal of a charge of misdemeanor assault on a government official under G.S. 15A-954, because the State destroyed a poster and the photos used to create the poster after defendant requested production of such evidence, and the evidence was material and favorable to defendant, as admission would have supported claim of self-defense. State v. Williams, 362 N.C. 628, 669 S.E.2d 290, 2008 N.C. LEXIS 978 (2008).

No Grounds Warranting Dismissal. — Although defendant argued that magistrate failed to inquire into all of the statutory considerations before setting the conditions of his pretrial release, there was no basis in the case to suggest that defendant was denied access to anyone; he was allowed to attempt to call an attorney, and was allowed to call his wife from the jail only minutes after he asked to do so in the magistrate's office; therefore, there was no violation of defendant's constitutional rights which would warrant dismissal of the charges against him. State v. Eliason, 100 N.C. App. 313, 395 S.E.2d 702 (1990).

Defendant's allegation that the prosecution delayed trying his case after it had been calendared in order to locate missing witnesses and, thereby, gain a tactical advantage, did not warrant dismissal of the case nor did the behavior complained of rise to a sufficiently egregious level. State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130, 1999 N.C. App. LEXIS 1245 (1999).

Defendant's constitutional rights were not violated under G.S. 15A-954(a)(4) by the prosecutor's statements to the court during a pretrial detention hearing concerning defendant's possible presence on the National Terrorist Watch List. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

IV. UNCONSTITUTIONALITY OF STATUTE ON FACE OR AS APPLIED.

Although the defendant was unconstitutionally detained in connection with the assault on a female charge, he was not entitled pursuant to this section to dismissal of the charge of assault with a deadly weapon where he failed to demonstrate irreparable prejudice; the State did not dismiss the assault on a female charge and subsequently file different, more severe charges against defendant to avoid the consequences of an unconstitutional pretrial detention; rather, its actions were based on information that the victim's injuries were more serious than originally thought. State v. Clegg, 142 N.C. App. 35, 542 S.E.2d 269, 2001 N.C. App. LEXIS 42 (2001), cert. denied, 353 N.C. 453, 548 S.E.2d 529 (2001).

Selective Prosecution of Tax Evaders. — The prosecution of individuals who publicly assert privileges not to pay taxes does not necessarily constitute selection for prosecution upon an impermissible basis. Such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

V. DOUBLE JEOPARDY.

When Double Jeopardy Attaches in Bench Trial. — In a bench trial, double jeopardy does not attach until the introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

In a bench trial in district court where dismissal was taken to avert the necessity of introducing evidence rather than after its introduction, double jeopardy had not attached; jeopardy will attach only after introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

Double Jeopardy Did Not Attach. — Under North Carolina law, with the concurrence of the defendant, a judge may declare a mistrial at any time during the trial; where, after the trial started, the trial court judge discovered that he was familiar with certain aspects of the case, and where defendant did not object to the trial court's order of a mistrial, the mistrial was appropriate, and double jeopardy did not prevent later prosecution. State v. Cummings, 169 N.C. App. 249, 609 S.E.2d 423, 2005 N.C. App. LEXIS 513 (2005).

Revocation of License Did Not Place Defendant in Prior Jeopardy. — Double jeopardy principles did not mandate dismissal of a driving while intoxicated charge because the confiscation and retention of defendant's South Dakota driver's license and imposition of a fee were not punishment and, therefore, did not place defendant in prior jeopardy for the offense. State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

VI. PREVIOUS ADJUDICATION OF ISSUE.

Common Law Collateral Estoppel Codified. — Subdivision (a)(7) is a codification of the common law principle of collateral estoppel as it is applied in criminal cases. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Indictment Barred by Collateral Estoppel. — State's first indictment of defendant, charging manslaughter of "a natureless living female fetus...," was dismissed for failure to allege a material element of manslaughter (that is, that defendant did kill another living human being), and the State did not appeal; therefore, collateral estoppel barred the State's second indictment for manslaughter, alleging that defendant did "kill and slay a living human being...," which referred to the same victim and incident. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

First Indictment Accurate Enough to Inform and Protect Defendant from Second Indictment. — Whether defendant was indicted for manslaughter of a fetus, as the victim was described in the first indictment, or an unborn child, as the victim was described in the second indictment, the crime alleged was the same; therefore, the wording of the first indictment was accurate enough to inform defendant of the charge against him, and precise enough to protect him from the second indictment on what amounted to the same charge. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Collateral Estoppel Did Not Bar Trial. — Collateral estoppel under G.S. 15A-954(a)(7) did not bar trial on a second set of 10 checks that were the subject of obtaining money by false pretenses indictments since even if the victim gave permission as to the first four checks litigated in a first trial, a jury could still find that the victim did not give permission to defendant to cash the 10 checks; because of the lack of joinder and the fact that the transactions in the second case occurred at a different time, the only issues decided in the first trial were whether defendant obtained money by false pretenses when negotiating each of the first four checks. State v. Spargo, 187 N.C. App. 115, 652 S.E.2d 50, 2007 N.C. App. LEXIS 2312 (2007), review denied, appeal dismissed, 362 N.C. 370, 663 S.E.2d 858 (N.C. 2008).

Habitual Felon. — Where a defendant was acquitted on a charge of being a violent habitual felon, his later trial on the same charge, involving a different primary offense but the same two predicate offenses, was barred by collateral estoppel. State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516, 2001 N.C. App. LEXIS 727 (2001).

No Double Jeopardy Where Prior Crimes Used in Sentencing. — Trial court's denial of defendant's pretrial motion to dismiss two murder charges against him, in violation of G.S. 14-17, based on double jeopardy, pursuant to G.S. 15A-954, was proper because the fact that in a prior murder case against defendant, the State had introduced evidence of the two murders in support of the aggravating circumstance described in G.S. 15A-2000(e)(11) was not tantamount to the State putting defendant on trial for those crimes; the jury's consideration of defendant's "other crimes of violence" in making its penalty recommendation on one murder was not logically equivalent to defendant receiving multiple punishment for the same crime. State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003), cert. denied, 541 U.S. 943, 124 S. Ct. 1670, 158 L. Ed. 2d 368 (2004).

Defendant was not entitled to dismissal of a habitual felon indictment because the use of defendant's prior conviction for possession of cocaine to support defendant's conviction for possession of a firearm by a felon and defendant's sentencing as a habitual felon did not constitute double jeopardy. State v. Williams, 191 N.C. App. 96, 662 S.E.2d 397, 2008 N.C. App. LEXIS 1152 (2008).

Not Applicable to Federal Proceeding. — Subsection (a)(7) was not applicable where the State of North Carolina was not a party to the federal criminal proceeding, nor was any showing made that the state was in privity with the federal government in prosecuting the defendant on the federal drug charges. State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994).

§ 15A-955. Motion to dismiss — Grounds applicable to indictments.

The court on motion of the defendant may dismiss an indictment if it determines that:

(1) There is ground for a challenge to the array,
(2) The requisite number of qualified grand jurors did not concur in finding the indictment, or
(3) All of the witnesses before the grand jury on the bill of indictment were incompetent to testify. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

The Commission purposely kept the grounds for challenging an indictment valid on its face to as few grounds as possible. There is North Carolina case law to support all three listed grounds.

CASE NOTES

"All of the Witnesses" Construed. — The trial court did not err in denying defendant's motion to dismiss indictment for conspiracy to commit trafficking in cocaine on the grounds that it was based upon allegedly perjured testimony because, assuming arguendo that the testimony was perjured and that it could have rendered a grand jury witness incompetent to testify within the meaning of subsection (3), this could not be said to satisfy the requirement that "all of the witnesses" were incompetent to testify before the grand jury. State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993).

Motion Must Be Made at or Before Time of Arraignment. — A motion to dismiss an indictment when there is ground for a challenge to the array must be made at or before the time of arraignment, or it is waived. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Motion to quash a murder indictment on the basis of racial discrimination in the selection of the grand jury foreman is deemed a motion to dismiss an indictment based on a challenge to the array under subdivision (1) of this section because it in effect challenges the grand jury which indicted the defendant, and under G.S. 15A-952 it must be made within the time limitations stated in 15A-952(c) unless the court permits filing at a later time. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Motion Subject to § 15A-952(c). — A motion to dismiss or quash an indictment because of irregularity in the selection of the grand jury is subject to the time limitation of G.S. 15A-952(c). State v. Duncan, 30 N.C. App. 112, 226 S.E.2d 182, cert. denied, 290 N.C. 779, 229 S.E.2d 34 (1976).

Challenge to the Grand Jury Array. — The trial court, upon defendant's motion, may dismiss an indictment when there is ground for a challenge to the grand jury array; this motion must be made at or before the arraignment or it is waived. State v. Kirkland, 119 N.C. App. 185, 457 S.E.2d 766 (1995), cert. denied, 341 N.C. 654, 462 S.E.2d 521 (1995), aff'd per curiam, 342 N.C. 891, 467 S.E.2d 242 (1996), cert. denied, 519 U.S. 875, 117 S. Ct. 195, 136 L. Ed. 2d 132 (1996).

Sufficiency of the Evidence. — There was substantial evidence to withstand defendant's motions to dismiss. The evidence established that the victim, defendant's biological daughter, was between 13 and 15 years old, an essential element of statutory rape under G.S. 14-27.7A(a), during the time she lived with defendant, and defendant engaged in almost daily sexual intercourse with her. There was also sufficient evidence of defendant's age because it was biologically impossible for defendant to be less than six years older than the victim and to be her father. State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003).

Testimony that the victim's mother did not give the victim permission to go with defendant was sufficient to support his conviction for kidnapping. Thus, the trial court did not err in denying defendant's motion to dismiss. State v. Quinn, 166 N.C. App. 733, 603 S.E.2d 886, 2004 N.C. App. LEXIS 2025 (2004).

Superior court did not err in denying defendant's motion to dismiss misdemeanor charge of failure to work after being paid, as a conflict in the evidence presented created a question for the jury to resolve; moreover, even though the $100 defendant received was intended for purchasing materials, his conviction was supported by the evidence presented, as he still obtained an advance of money, provisions, goods, wares or merchandise on the false promise of completing the work. State v. Octetree, 173 N.C. App. 228, 617 S.E.2d 356, 2005 N.C. App. LEXIS 1923 (2005).

Denial of defendant's motion to dismiss a driving while intoxicated charge for insufficient evidence was not error. The State presented sufficient evidence to take the case to a jury, as defendant was pulled over with open containers of alcohol in the passenger compartment of defendant's vehicle, and officers observed defendant in a visibly impaired condition. State v. Johnson, 187 N.C. App. 190, 652 S.E.2d 341, 2007 N.C. App. LEXIS 2254 (2007).

G.S. 15A-955 limits the grounds on which an indictment may be dismissed and omits sufficiency of the evidence to sustain a conviction as a possible basis. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Applied in State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977).

Cited in Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990).

§ 15A-956. Deferral of ruling on motion to dismiss when charge to be reinstituted.

If a motion to dismiss is made at arraignment or trial, upon motion of the prosecutor the court may recess the proceedings for a period of time requested by the prosecutor, not to exceed 24 hours, prior to ruling upon the motion. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section went through several versions within the Commission. Only the caption now reflects the underlying purpose for the section. The Commission believed that if a pleading against a defendant was dismissed on a technical ground and the defendant was properly subject to renewed prosecution on the charge, he should not upon dismissal of the charge be given an interlude of freedom in which to flee.

The first draft considered by the Commission stated that after dismissal the court could retain jurisdiction over the person of the defendant for a limited period. There were objections to allowing the court to do this after a formal finding of a defect in the papers on which the court's jurisdiction over the person is based. Therefore, the Commission adopted the technique of allowing the court to defer its ruling on the motion to dismiss. This same approach was taken by the Commission in G.S. 15A-604(b)(3). In G.S. 15A-629(b), because it involved the grand jury, it was necessary to take the approach rejected by the Commission for this section. That situation is somewhat distinguishable, however, in that the process on which the defendant is bound over to superior court is not specifically declared defective.

§ 15A-957. Motion for change of venue.

If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

(1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or

(2) Order a special venire under the terms of G.S. 15A-958.

The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue. (1973, c. 1286, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 63.)

OFFICIAL COMMENTARY

Former G.S. 15-135 provided for a change of venue to an "adjacent" county with the consent of the defendant. The Commission decided to spell out with more precision exactly to what counties venue may be moved upon the defendant's motion. It should be noted, though, that G.S. 15A-133 would permit a change of venue to any county within the State with the consent of both the defendant and the solicitor.

The provision allowing the judge to order the special venire rather than grant the motion for a change of venue is intended to embody existing case law.

Legal Periodicals. — For note discussing the motion for change of venue in light of State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983), see 7 Campbell L. Rev. 73 (1984).

CASE NOTES

I. General Consideration.
II. Burden of Proof; Evidence.
III. Out of Court Information.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided prior to the 1987 (Reg. Sess., 1988) amendment, which substituted references to "prosecutorial district as defined in G.S. 7A-60" for "judicial district."*

The purpose of this section is to insure that jurors decide cases based on evidence introduced at trial and not on something they have heard outside the courtroom. State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).

Inherent Authority to Change Venue in Interests of Justice. — The statutory power of the court to change the venue of a trial is limited to transferring the case to an adjoining county in the judicial district or to another county in an adjoining judicial district. Notwithstanding this apparent statutory limitation upon the power of a court to order a change of venue, a court of general jurisdiction, of which the superior court is one, has the inherent authority to order a change of venue in the interests of justice. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

Trial court did not abuse its discretion by changing venue of kidnapping and murder trial to different county; defendant had requested a change and the State had consented, and the trial court had inherent power to change venue in the interests of justice notwithstanding the apparent statutory limitation of G.S. 15A-957. State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

The trial court did not violate this section, § 15A-958, or § 15A-133 by ordering a special venire from another county; as the defendant never moved for a change of venue, this section did not apply and there was no violation of G.S. 15A-133 where the trial court ruled on the issue of venue for jury selection. Furthermore, given the nature and circumstances of the alleged crimes against two law-enforcement officers and defendants' acquiescence to the stipulation and proposal at the hearing, the trial court had the inherent authority to order the change of venue for the limited purpose of jury selection. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

The test for whether a change of venue should be granted is whether the defendant has established that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial, and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Scarborough, 92 N.C. App. 422, 374 S.E.2d 620 (1988), reversed on other grounds, 324 N.C. 542, 379 S.E.2d 857 (1989).

The defendant must demonstrate that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information, either through the media or by word of mouth, rather than upon the evidence presented at trial, and would therefore be unable to remove from their minds any preconceived impressions they might have formed. State v. King, 326 N.C. 662, 392 S.E.2d 609 (1990).

Discretion of Trial Judge. — Motions for change of venue on the grounds of unfavorable publicity are addressed to the discretion of the trial judge and will not be disturbed on appeal unless a manifest abuse of such discretion is shown. State v. Boyd, 20 N.C. App. 475, 201 S.E.2d 512, appeal dismissed, 285 N.C. 86, 203 S.E.2d 59, cert. denied, 419 U.S. 860, 95 S. Ct. 111, 42 L. Ed. 2d 95 (1974); State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890, cert. denied, 444 U.S. 874, 100 S. Ct. 156, 62 L. Ed. 2d 102 (1979); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982).

A motion for change of venue is addressed to the sound discretion of the trial judge and his ruling will not be overturned in the absence of an abuse of discretion. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980); State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982); State v. Wilhelm, 59 N.C. App. 298, 296 S.E.2d 664 (1982); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982); State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983); State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

Motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

A motion for change of venue or for a special venire panel is addressed to the sound discretion of the trial judge, and abuse of discretion must be shown before there is any error. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

A motion for change of venue on the grounds of local prejudice because of pretrial publicity is addressed to the sole discretion of the trial judge and a manifest abuse of discretion must be shown before there is any error. State v. Jackson, 30 N.C. App. 187, 226 S.E.2d 543 (1976).

The decision whether to order a change of venue or a special venire rests in the discretion of the trial judge, and his decision will not be reversed except for gross abuse, such as the denial of a constitutional right. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 90 (1979).

The determination of whether the defendant has met his burden on a motion for change of venue rests within the sound discretion of the trial court. Absent a showing of abuse of discretion, its ruling will not be overturned on appeal. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Determination that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial is addressed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

Although the evidence of pretrial publicity, most of which was favorable to defendant or factually neutral, was substantial at the time of defendant's motion for a change of venue, the trial court did not abuse its discretion in recognizing facts in support of its refusal which, ultimately, may have impacted whether the environment for defendant's trial was prejudicial; or in stating its belief that the best evidence of whether pretrial publicity was prejudicial or inflammatory was jurors' responses to voir dire questioning. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

When Motion Should Be Granted. — A motion for a change of venue should be granted when it is established that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Legitimate concern of county residents in trying criminal defendants locally is not the test for determining whether venue should be changed. The test is whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Failure to Grant Relief Where Reasonable Likelihood Shown. — If, under the evidence presented, there is a reasonable likelihood that a fair trial cannot be had, it is an abuse of discretion to fail to grant a change of venue or a special venire panel. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

Failure of the trial judge to set a time certain for the presentation of evidence on defendant's motion for a change of venue did not amount to a refusal to give defendant a meaningful opportunity to be heard or to excuse his discretion where the judge indicated that he was ready to hear evidence on the defendant's motion on the day of trial, considering that the judge also said that he would reconsider the substance of the motion if problems appeared during jury selection and that the defendant showed no prejudice relating to the panel chosen. State v. Artis, 316 N.C. 507, 342 S.E.2d 847 (1986).

Proceeding to trial without ruling on defendants' motion for change of venue constituted a denial of that motion. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, cert. denied and appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

As to findings of facts and the totality of the circumstances justifying trial judge to transfer venue in a sexual offense case involving children, see State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Specific Findings of Fact. — Although the trial court did not make findings of fact in support of its order for change of venue, it is not required to do so, and in light of the detailed statements by the trial court in the record about the factors it was considering in determining the State's request for change of venue, the court did not abuse its discretion in ordering the change of venue State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

Denial of Motion Held Proper. — Where the record discloses that the presiding judge conducted a full inquiry, examined the press releases and the affidavits in support of the motion, and where the record fails to show that any juror objectionable to the defendant was permitted to sit on the trial panel, or that defendant had exhausted his peremptory challenges before he passed the jury, denial of the motion for change of venue was not error. State v. Harding, 291 N.C. 223, 230 S.E.2d 397 (1976); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

In a trial for first-degree murder, where the accounts carried by the local news media did not appear to have been beyond the bounds of propriety or to have been inflammatory, the prominence of the victim did not seem to have unfairly affected the trial, and defendant failed to include in the record the voir dire examination of the jury, thereby failing to disclose that the defendant exhausted his peremptory challenges, that he had to accept any juror objectionable to him or even that any juror had prior knowledge or opinion as to this case, there was no abuse of discretion by the trial judge in denying defendant's motion for change of venue or for special venire. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Where the evidence tended to show that the sole newspaper article was confined primarily to a history of prior proceedings involving defendant, and that the "spot" newscast from a television station was critical of law-enforcement officers for their handling of the case, the trial court correctly found that defendant had failed to show that he was prejudiced by this publicity. State v. Jackson, 30 N.C. App. 187, 226 S.E.2d 543 (1976).

Without allegations and proof that the news articles were inflammatory, a trial judge acts within his discretion in denying a change of venue. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

Trial court did not commit error in denying defendant's motion for a change of venue or a special venire, where six of 12 jurors stated that they had not heard of the case before they came to court, and the other six said that they could decide the case based on the evidence presented and not on what they had heard of the case outside of the courtroom, and where there was no evidence of the impact of newspaper articles relating to defendant other than the evidence of their publication. State v. Abbott, 320 N.C. 474, 358 S.E.2d 365 (1987).

Where there was no evidence of the effect of news reports on the residents of the county in which the trial was held, and five jurors had no prior knowledge of the case, five had read something about it, two had heard it discussed and all stated unequivocally that they could make their decisions unaffected by anything they had heard or read, the trial court's denial of defendant's motion for a change of venue would not be disturbed. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where, among other things, defendant neither alleged nor proved that information in the media was inaccurate or untrue, defendant did not demonstrate that it was likely that the jurors would improperly base their decisions on any pretrial evidence of which they were aware, he produced no evidence on the circulation of newspapers containing articles about him, there was no evidence of how the articles had impacted on the community's opinion of him, and he presented no evidence showing how the comments of a prospective jury member tainted the opinions of the other members as alleged, there was no ground for reversing the lower court's decision denying defendant's motion for change of venue. State v. Scarborough, 92 N.C. App. 422, 374 S.E.2d 620 (1988), rev'd on other grounds, 324 N.C. 542, 379 S.E.2d 857 (1989).

Where jurors who served in defendant's trial all indicated unequivocally that they would decide the case based on the evidence at trial and had not formed an impression or preconceived opinion about the guilt or innocence of the defendant, and where defendant made no other showing of identifiable prejudice, denial of defendant's motion for change of venue was not error. State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989).

Trial court did not abuse its discretion either by concluding that the defendant had failed to rebut the presumption of juror impartiality, or by denying the defendant's motion for a change of venue, where court asked prospective juror whether they had read or heard about defendant's case before coming to court and whether they had formed opinions which would make them partial, and where prospective jurors who stated that they had formed opinions or that they could not give defendant fair and impartial trial were summarily excused by trial court. Further, defendant excused peremptorily six of the first 12 jurors who stated that they knew nothing about the case and all five actual jurors who had heard or read about the case stated unequivocally that they formed no opinions about the case and would base their decisions solely on evidence presented at trial. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Defendant failed to demonstrate that it is reasonably likely that the jurors based their decision upon pretrial information rather than the evidence presented at trial and thus, the trial court did not abuse its discretion in denying defendant's motion for change of venue or special venire. State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (1993).

Trial court's denial of defendant's motion for a change of venue was upheld. State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993).

Where, to assure a fair and impartial venire, the trial court permitted individual voir dire of prospective jurors to discuss pretrial publicity, defendant did not establish a reasonable likelihood that pretrial publicity prevented him from receiving a fair and impartial trial, and the trial court did not err in denying defendant's motion for a change of venue. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

While a number of the prospective jurors questioned indicated they had read or heard of the crime, and each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based solely upon the evidence presented at trial, the trial court did not err in denying defendant's motion for a change of venue. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Defendant failed to meet his burden of showing that pretrial publicity precluded him from receiving a fair and impartial trial where newspaper articles submitted in support of his motion for change of venue were factual in nature related to the facts of the crimes, defendant's arrest, his subsequent escape attempt, and a petition circulated by the family of one of the victims seeking a speedy disposition of defendant's trial; none of these articles was shown to be inflammatory or biased against defendant. State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996).

Denial of Motion Not Proper. — In light of the totality of the circumstances, ruling of the trial court that defendant had the burden of proof by a preponderance of the evidence to demonstrate that pretrial publicity had been so extensive and inflammatory that it would be virtually impossible or at least highly unlikely that a fair and impartial jury could be seated and drawn from the venire county jurors was error requiring a new trial. State v. Moore, 319 N.C. 645, 356 S.E.2d 336 (1987).

Applied in State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992).

Cited in State v. Moore, 335 N.C. 567, 440 S.E.2d 797; State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978); State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986); State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995); State v. Billings, 348 N.C. 169, 500 S.E.2d 423 (1998); State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002); State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459, 2007 N.C. App. LEXIS 581 (2007).

II. BURDEN OF PROOF; EVIDENCE.

Burden on Moving Party. — Under this statute, the burden is on the moving party to show that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Hill, 347 N.C. App. 275, 493 S.E.2d 264 (1997).

Burden of Showing Prejudice on Defendant. — The burden of showing "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" falls on the defendant. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890, cert. denied, 444 U.S. 874, 100 S. Ct. 156, 62 L. Ed. 2d 102 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980); State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

The burden of proof in a hearing on a motion for change of venue is upon the defendant. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C.

413, 251 S.E.2d 472 (1979); State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

Where several prospective jurors had read or heard about the case, but only one individual had heard the radio broadcast and one potential juror had seen something on television and the record was equally clear that defendant removed those veniremen who demonstrated a modicum of knowledge about the case, the defendant did not conclusively establish that he could not receive a fair and impartial trial in the county. State v. Myers, 73 N.C. App. 650, 327 S.E.2d 276, rev'd on other grounds, 315 N.C. 308, 337 S.E.2d 581 (1985).

The burden is on the moving party to show that due to pretrial publicity there is a reasonable likelihood that defendant will not receive a fair trial. State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).

The burden of proof in a hearing on a motion for a change of venue due to existing prejudice in the county in which a prosecution is pending is upon the defendant. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

The burden is on the defendant to show that pretrial publicity precluded him from receiving a fair trial and, in meeting that burden, he must show that jurors had prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991).

Defendant failed to meet his burden of proving that pretrial publicity tainted his chances of receiving a fair and impartial trial. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

The defendant bears the burden of establishing that it is reasonably likely that prospective jurors would base their decision in the case on pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Defendant's Surveys Must Take Into Account Potential Jurors' Attitudes. — The evidence presented was insufficient to show infection of the jury pool so as to deprive defendant of a fair trial and require a change of venue. Defendant presented two telephone surveys which indicated that media coverage of the crimes was widespread and that a large number of persons was aware of the crimes and defendant's identity but failed to measure the prejudicial effect of the media coverage on potential jurors' attitudes toward the presumption of innocence or their ability to confine their determinations as jurors to the evidence presented in court. Although the surveys asked questions relating to the death penalty and defendant's guilt, answers to these questions were outside the context of the presumption of innocence and the juror's duty to consider only the evidence presented at trial and were not reliable evidence of bias or prejudice. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Defendant Must Show Likelihood That Fair Trial Will Be Prevented. — In order to prevail on a motion for change of venue, the defendant must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979); State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982); State v. Wilhelm, 59 N.C. App. 298, 296 S.E.2d 664 (1982); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

To acquire a change of venue, defendant must prove existence of a prejudice so great that he cannot obtain a fair and impartial trial. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

The burden of proving that a fair and impartial trial cannot be received due to pretrial publicity falls on the defendant. State v. Myers, 73 N.C. App. 650, 327 S.E.2d 276, rev'd on other grounds, 315 N.C. 308, 337 S.E.2d 581 (1985).

The test for determining whether venue should be changed is whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial. Stated otherwise, a defendant's motion for a change of venue should be granted when he establishes that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Moore, 319 N.C. 645, 356 S.E.2d 336 (1987).

Test for determining whether pretrial publicity mandated a change of venue was whether it was reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed, and a defendant had the burden of proving the existence of a reasonable likelihood that defendant could not receive a fair trial in that county on account of prejudice from such pretrial publicity; but to meet this burden, defendant had to show that jurors had prior knowledge concerning the case, that defendant exhausted peremptory challenges, and that a juror objectionable to the defendant sat on the jury. State v. Wright, 184 N.C. App. 464, 646 S.E.2d 625, 2007 N.C. App. LEXIS 1481 (2007).

In deciding whether a defendant met defendant's burden of showing prejudice pursuant to a motion for a change of venue, it was relevant to consider that the chosen jurors stated that the jurors could ignore the jurors' prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial; a determination of whether a defendant had carried defendant's burden of showing that pretrial publicity precluded defendant from receiving a fair trial rested within the trial court's sound discretion. State v. Wright, 184 N.C. App. 464, 646 S.E.2d 625, 2007 N.C. App. LEXIS 1481 (2007).

Only in the most extraordinary cases could an appellate court determine solely upon evidence adduced prior to the actual commencement of jury selection in a criminal case that a trial court had abused its discretion by denying a motion for change of venue due to existing prejudice against a defendant; the existence of pretrial publicity by itself did not establish a reasonable likelihood that defendant could not receive a fair trial in the county where the crime was committed. State v. Wright, 184 N.C. App. 464, 646 S.E.2d 625, 2007 N.C. App. LEXIS 1481 (2007).

And That Verdict Is Likely on Prior Conclusions. — The defendant in a prosecution for second degree murder, upon his motion for change of venue, was required to go forward with evidence tending to affirmatively show that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences rather than upon conclusions induced solely by evidence and arguments presented in open court. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979); State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage and formed or expressed opinions based upon their exposure. The defendant must additionally show that it is reasonably likely that prospective jurors would base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Where the defendant fails to show that potential jurors would base their conclusions and verdict upon pretrial publicity and preconceived impressions, he has failed to show a reasonable likelihood that pretrial publicity will prevent a fair trial even though the case has received widespread publicity and some prospective jurors have formed or expressed opinions about the case. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

On a motion for change of venue pursuant to this section, the defendant must show that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. The determination of whether the defendant has met this burden of proof rests in the sound discretion of the trial judge and his ruling will not be overturned on appeal absent a showing of gross abuse of discretion. State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

The defendant failed to meet his burden of showing that prospective jurors were tainted by pretrial information where he merely provided a broad statement from his investigator that certain unnamed witnesses were afraid to testify for the defense because they feared reprisal from other unnamed parties and where he failed to exercise all his preemptory challenges. State v. Farmer, 138 N.C. App. 127, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000).

Defendant did not meet defendant's burden to show defendant was denied a fair trial when a trial court did not grant defendant's motion for a change of venue because defendant did not present the appellate court with a transcript of the jury selection proceedings in defendant's trial; thus, defendant could not show that any jurors were unable to render a verdict consistent with the evidence presented at trial, nor did defendant renew defendant's motion for a change of venue after the trial court first denied the motion but said the motion would be reconsidered if defendant chose to raise the motion again. State v. Wright, 184 N.C. App. 464, 646 S.E.2d 625, 2007 N.C. App. LEXIS 1481 (2007).

What Defendant Must Show to Establish That Trial Was Unfair. — A defendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Where a jury has been selected to try the defendant and the defendant has been tried, the defendant must prove the existence of an opinion in the mind of a juror who heard his case that will raise a presumption of partiality. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Statements by Jurors That Pretrial Publicity Would Not Affect Verdict. — In a prosecution for second degree murder in which most of the prospective jurors stated specifically that the publicity surrounding the case would have no effect upon them and that they would base their verdict upon the evidence and give the defendant a fair trial, and the one juror who indicated he had formed a preliminary opinion concerning the case, upon further questioning, specifically stated that he could put all such opinions or predispositions from his mind and give the defendant a fair trial upon the evidence presented in open court, the trial court did not err in denying the defendant's motion for change of venue. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Motion for change of venue was properly denied where the transcript of the jury selection process reveals that while numerous jurors had heard about the case through television or newspaper accounts of the killings, only one juror had tentatively formed an opinion about defendant's guilt. This juror was immediately excused by defense counsel with the consent of the prosecutor and each juror selected to hear the case stated unequivocally that he or she would determine defendant's guilt or innocence solely on the basis of evidence introduced at trial. State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

Where each juror stated unequivocally that he could set aside what he had heard previously about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, defendant failed to establish an abuse of discretion by the trial court in refusing to grant a change of venue. State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

A murder defendant was not entitled to a change of venue or a special venire on the ground of pretrial publicity; although several jurors selected indicated that they had read or heard about the case, all but one stated that they had not formed an opinion about the case and could set aside any information, and the one juror who had formed an opinion about the defendant stated unequivocally that he could set his opinion aside and base his decision on the evidence. State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999).

Evidence of Existing Community Prejudice. — The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective juror's responses to questions during the jury selection process. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Opinion Testimony as to Fair Trial Not Determinative. — Although opinion testimony of members of the community in which the defendant is to be tried as to whether the defendant can receive a fair trial may, in proper circumstances, be relevant and admissible, such evidence is not determinative on the question. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Where each juror stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court, the trial court did not abuse its discretion in denying defendant's challenges for cause of these jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Failure to Exhaust Peremptory Challenges. — When a defendant alleges prejudice on the basis of pretrial publicity and does not show that he exhausted his peremptory challenges, or that there were jurors who were objectionable or had prior knowledge of the case, defendant has failed to carry his burden of establishing the prejudicial effect of the pretrial publicity. State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982).

III. OUT OF COURT INFORMATION.

Section Not Restricted to Media-Inspired Prejudice. — This section, which requires a change of venue or a special venire panel where prejudice is so great as to prevent a fair trial, is not restricted to media-inspired prejudice. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Word-of-Mouth Publicity. — Motions under this section on grounds of unfavorable, prejudicial publicity may be based on word-of-mouth publicity. There is no requirement that the publicity originate in the media. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

Factual news accounts regarding the commission of a crime and the pretrial proceedings relating to that crime do not of themselves warrant a change in venue. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Erroneous News Accounts. — No error in denial of motion for a change of venue as erroneous reports by newspaper and television were not prejudicial. State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), cert. denied, 523 U.S. 1031, 118 S. Ct. 1323, 140 L. Ed. 2d 486 (1998).

Pretrial Publicity. — Standing alone, evidence of pretrial publicity does not establish a reasonable likelihood that a fair trial cannot be had. State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

Defendants must ordinarily establish specific and identifiable prejudice against them as a result of pretrial publicity. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Where the totality of the circumstances reveals that a county's population is "infected" with prejudice against a defendant, the defendant has fulfilled his burden of showing that he would not receive a fair trial in that county. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

The fact that a codefendant's trial was transferred on account of pervasive prejudice did not show that the defendant should have been granted a change in venue or special venire owing to pretrial publicity, where codefendant's trial was after the defendant's trial, and publicity from the defendant's trial most likely created much of the prejudice against codefendants. State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999).

A defendant must establish specific and identifiable prejudice against him as a result of pretrial publicity by demonstrating that jurors with prior knowledge decided the case, that he exhausted his peremptory challenges, and that a juror objectionable to him sat on the jury. State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Where defendant failed to move for a change of venue or a special venire due to alleged prejudicial pretrial publicity in defendant's capital murder case, the matter was not preserved for appellate review under N.C. R. App. P. 10(b)(1). State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

Trial court did not abuse its discretion by determining that a reasonable likelihood existed that prejudicial pretrial publicity would prevent a fair trial the third time and, therefore, ordering a venire with regard to defendant's felonious breaking and entering trial, because the county had a very small population and massive publicity was generated surrounding defendant's two previous mistrials; also, during the second trial, the trial court had heard testimony that the victim and her husband owned a mini-mart frequented by many residents in the community. State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

Defendant's motion to transfer venue or for a special venire under G.S. 15A-957 was properly denied as: (1) any jurors who might have been influenced by pretrial publicity had been screened out by the jury selection process; (2) defendant indicated defendant was satisfied with the jury at the conclusion of the jury selection process and did not renew defendant's motion; and (3) defendant had not demonstrated such widespread and pervasive prejudice in the community that defendant could not receive a fair trial. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Factual News Accounts. — regarding the commission of a crime and the pretrial proceedings alone are not sufficient to establish prejudice against the defendant. State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

General factual coverage of a crime is not innately prejudicial. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

Where pretrial newspaper articles were found to be factual and devoid of any prejudicial speculations or characterizations, and the record disclosed that defendant had not exhausted his peremptory challenges nor that any juror had prior knowledge of the case, the trial judge did not abuse his discretion in denying defendant's motion for a change of venue. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

If the defendant shows only the publicity consists of factual, noninflammatory news stories, denial of a motion for change of venue is proper. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Defendant failed to meet his burden of proving that pretrial publicity tainted his chances of receiving a fair and impartial trial, where newspaper articles which appeared in local and state newspapers and short news segments on television were primarily factual accounts of the murder of victim and the arrest of defendant. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Where the defendant showed only that the publicity surrounding his case consisted of factual, noninflammatory news stories published almost four years prior to his retrial, the trial court's denial of a change of venue was proper. State v. Cole, 343 N.C. 399, 471 S.E.2d 362 (1996), cert. denied, 519 U.S. 1064, 117 S. Ct.

703, 136 L. Ed. 2d 624 (1997).

General Newspaper Coverage of Case. — Defendant's motion for change of venue was properly denied where, with the exception of the coverage of defendants' arrest, the newspaper articles alleged to be prejudicial were of a very general nature and likely to be found in any jurisdiction to which the trial might be moved, the coverage of the arrest indicated only that defendants were charged with a crime and in no way intimated defendants were guilty, and the record did not indicate that any prospective jurors had read or been influenced by the articles. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

The trial court did not abuse its discretion in denying defendants' motion for change of venue based on pretrial publicity in radio broadcasts and newspaper articles where the articles were of a general nature likely to be found in any jurisdiction to which the trial might be moved; the coverage of defendants' arrest only indicated that defendants had been charged with a crime; the articles were factual, noninflammatory, and contained for the most part information that could have been offered in evidence at defendants' trial; and no juror objected to by defendants because of pretrial publicity was seated on the jury. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Assault defendant claiming negative pretrial publicity on the basis of one newspaper article failed to show that trial judge abused his discretion in denying defendant's motion for change of venue; defendant failed to show that the article intimated he was guilty or that any juror was even aware of the article's existence. State v. Shubert, 102 N.C. App. 419, 402 S.E.2d 642 (1991).

Accurate News Coverage of Prior Trial. — The argument that news coverage which accurately reports the circumstances of a murder case and previous trial can be so innately conducive to the inciting of local prejudices as to require a change of venue is devoid of merit. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 90 (1979); State v. Wilhelm, 59 N.C. App. 298, 296 S.E.2d 664 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 395 (1983).

Bare Allegation of General Ill Will in Community. — Where defendant presents nothing more than an allegation of general ill will in the community, there is no evidence which would support a reversal for abuse of discretion. State v. Whitaker, 43 N.C. App. 600, 259 S.E.2d 316 (1979).

Fact that the defendants in a murder case were black and the victim white is not per se grounds for a change of venue or special venire. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 90 (1979).

§ 15A-958. Motion for a special venire from another county.

Upon motion of the defendant or the State, or on its own motion, a court may issue an order for a special venire of jurors from another county if in its discretion it determines the action to be necessary to insure a fair trial. The procedure for securing this special venire is governed by G.S. 9-12. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is essentially a cross reference to G.S. 9-12, which is left unchanged.

CASE NOTES

The test for determining whether venue should be changed is whether, due to pretrial publicity, there is a reasonable likelihood that defendant will not receive a fair trial. Stated otherwise, defendant's motion for a change of venue should be granted when he establishes that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Moore, 319 N.C. 645, 356 S.E.2d 336 (1987).

Pretrial Publicity by Itself Insufficient. — The existence of pretrial publicity by itself does not establish a reasonable likelihood that defendant cannot receive a fair trial in the county where the crime was committed. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Word-of-Mouth Publicity. — Motions under this section on grounds of unfavorable, prejudicial publicity may be based on word-of-mouth publicity. There is no requirement that the publicity originate in the media. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

The trial court did not violate this section, § 15A-957, or § 15A-133 by ordering a special venire from another county; as the defendant never moved for a change of venue, G.S. 15A-957 did not apply and there was no violation of G.S. 15A-133 where the trial court ruled on the issue of venue for jury selection. Furthermore, given the nature and circumstances of the alleged crimes against two law-enforcement officers and defendants' acquiescence to the stipulation and proposal at the hearing, the trial court had the inherent authority to order the change of venue for the limited purpose of jury selection. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Discretion of Trial Judge. — Motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

A motion for change of venue or for a special venire panel is addressed to the sound discretion of the trial judge, and abuse of discretion must be shown before there is any error. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

A motion for a special venire is a pretrial order, the granting or denial of which is within the trial court's sound discretion. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C. 557, 284 S.E.2d 495 (1981).

Trial court did not abuse its discretion by determining that a reasonable likelihood existed that prejudicial pretrial publicity would prevent a fair trial the third time and, therefore, ordering a venire with regard to defendant's felonious breaking and entering trial, because the county had a very small population and massive publicity was generated surrounding defendant's two previous mistrials; also, during the second trial, the trial court had heard testimony that the victim and her husband owned a mini-mart frequented by many residents in the community. State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

Discretion of Trial Judge. — Where defendant failed to move for a change of venue or a special venire due to alleged prejudicial pretrial publicity in defendant's capital murder case, the matter was not preserved for appellate review under N.C. R. App. P. 10(b)(1); the trial judge was not required to order a special venire ex meru moto when the jurors stated that they could be impartial. State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

Abuse of Discretion. — If, under the evidence presented, there is a reasonable likelihood that a fair trial cannot be had, it is an abuse of discretion to fail to grant a change of venue or a special venire panel. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

As to error in granting State's motion for special venire after denial of earlier order, in absence of a change of circumstances, see State v. Duvall, 304 N.C. 557, 284 S.E.2d 495 (1981).

As to findings of facts and the totality of the circumstances justifying trial judge to transfer venue in a sexual offense case involving children, see State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

The potential jurors' responses to questions on voir dire are the best evidence of whether pretrial publicity was prejudicial or inflammatory; if each juror states unequivocally that he or she can set aside pretrial information about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Denial of Motion Upheld. — Where all of the jurors selected to hear the case stated unequivocally that they had formed no opinions about the matter and would base their decision solely on the evidence presented, in light of such evidence, the trial court did not abuse its discretion by denying defendant's motion for a special venire from another county. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Trial court did not err in concluding that defendant failed to meet his burden of proving that pretrial publicity prevented his receiving a fair and impartial trial where each prospective juror was examined in detail during voir dire were asked whether they had heard or read about defendant's case and whether they had formed any opinions and some jurors were excluded. State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

Denial of Motion Held Error. — In light of the totality of the circumstances, ruling of the trial court that defendant had the burden of proof by a preponderance of the evidence to demonstrate that pretrial publicity had been so extensive and inflammatory that it would be virtually impossible or at least highly unlikely that a fair and impartial jury could be seated and drawn from the venire county jurors was error requiring a new trial. State v. Moore, 319 N.C. 645, 356 S.E.2d 336 (1987).

Cited in State v. Moore, 335 N.C. 567, 440 S.E.2d 797 (1993); State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984); State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000); State v. Farmer, 138 N.C. App. 127, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000); State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

(a) If a defendant intends to raise the defense of insanity, the defendant must file a notice of the defendant's intention to rely on the defense of insanity as provided in G.S. 15A-905(c) and, if the case is not subject to that section, within a reasonable time prior to trial. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

(b) In cases not subject to the requirements of G.S. 15A-905(c), if a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant must within a reasonable time prior to trial file a notice of that intention. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

(c) Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect. The court's denial of relief under this subsection is without prejudice to the defendant's right to rely on the defense at trial. If the motion is denied, no reference to the hearing may be made at the trial, and recorded testimony or evidence taken at the hearing is not admissible as evidence at the trial. (1973, c. 1286, s. 1; 1977, c. 711, s. 25; 2004-154, s. 10.)

OFFICIAL COMMENTARY

The Commission recommended two new notices to be given by defendants: notice of the defense of insanity and notice of alibi. The General Assembly struck the notice of alibi provision but retained the requirement that a defendant give the State notice of the defense of insanity.

This section covers two overlapping situations. The first relates to an intention to raise the defense of insanity. The second relates to an intention to introduce expert testimony relating to mental disease, defect, or other mental state. A defendant intending to raise the defense of insanity would almost always wish to come forward with his own expert; however, there may be a number of situations where the defense of insanity itself is not technically raised but expert testimony as to mental state will be introduced to negative the defendant's culpability with respect to some element of the offense. This section would require notice in either situation.

The defendant must give the notices required in this section whether a demand is made by the solicitor or not.

For comparable provisions, see Special Advisory Committee of the Florida Supreme Court, April 17, 1972, Proposed Revision of Florida Criminal Procedure Rules, Rule 3.210 (b); N.Y.C.P.L. § 250.10. See also comment to Pa. Rules Crim. Proc. § 311 (Pretrial Conference).

Legal Periodicals. — For comment discussing the insanity defense in North Carolina, see 14 Wake Forest L. Rev. 1157 (1978).

For note on enforcing criminal discovery in North Carolina through preclusion of the insanity defense as a sanction for the defendant's failure to give timely notice, in light of State v. Nelson, 76 N.C. App. 371, 333 S.E.2d 499 (1985), modified and aff'd, 316 N.C. 350, 341 S.E.2d 561 (1986), see 21 Wake Forest L. Rev. 191 (1985).

For note on the battered woman syndrome, see 11 Campbell L. Rev. 263 (1989).

For article, "Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent," see 68 N.C.L. Rev. 763 (1990).

For comment discussing reform of insanity defense in North Carolina, "Insanity Defense: Should the Shock of the *Hayes* Verdict Compel North Carolina to Fix What 'Ain't Broke'?," see 25 Wake Forest L. Rev. 547 (1990).

CASE NOTES

Applicability. — This section does not apply to competency hearings. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Notice of Alibi Not Required by Section. — In enacting this section, which requires notice of the defense of insanity, the General Assembly removed language that would have required notice of alibi as well. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Time for Filing of Notice. — Although no reference is made in subsection (a) of this section to a specific subsection of G.S. 15A-952, it seems clear that G.S. 15A-952(c) covers the time within which pretrial motions must be made. State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517, cert. denied, 295 N.C. 263, 245 S.E.2d 779 (1978).

Burden of Proof Is on Defendant. — Although doctors testified that in their opinion the defendant did not know right from wrong in regard to the acts at issue in defendant's trial for first degree murder, a police officer testified the defendant had "very normal" demeanor and that she appeared to be oriented to time and was responsive to questions; therefore, since the burden was on the defendant to prove insanity, the jury did not have to believe the expert witnesses, and the evidence supported the verdicts, it was not error to refuse to set them aside. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Record established as a matter of law that good cause existed for allowing late filling of the notice of defense of insanity, when on the date of trial counsel responsible for trial of the case was justifiably unavailable due to a medical emergency involving his daughter, and other counsel, who had been employed by defendant's mother, wife and sister was required to assume responsibility for the defendant's defense. State v. Nelson, 316 N.C. 350, 341 S.E.2d 561 (1986).

Proof of Insanity Where Notice Rejected as Untimely. — Under the general plea of not guilty, a defendant may prove affirmative defenses such as insanity even if his notice under subsection (a) of this section has been rejected as untimely. State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517, cert. denied, 295 N.C. 263, 245 S.E.2d 779 (1978).

Evidence of Insanity Allowed Even Though Notice Not Given. — The court committed prejudicial error in refusing to allow defendant to introduce evidence of his insanity, even though a timely notice of "intent to rely on the defense of insanity" had not been filed in accord with this section. Notwithstanding the statutory mandate, an accused may prove any affirmative defense, including insanity, under the general plea of not guilty. State v. Nelson, 76 N.C. App. 371, 333 S.E.2d 499 (1985), modified and aff'd, 316 N.C. 350, 341 S.E.2d 561 (1986).

Expert Examination of Defendant. — Where a defendant gives notice of his intent to pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

In cases where a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Cross-Examination of Expert Using Testimony from Pretrial Insanity Hearing Improper. — Trial court erred in allowing the State to cross-examine experts using testimony from defendant's pretrial insanity hearing as G.S. 15A-959(c) did not limit the bar on using hearsay testimony to "substantive evidence," but stated a blanket prohibition; the error was not harmless as the only issue at trial was defendant's sanity at the time of the murder, and substantial evidence including the testimony of all three expert witnesses tended to show that defendant was insane. State v. Durham, 175 N.C. App. 202, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

Denial of Bifurcated Trial Held Proper. — The trial court did not abuse its discretion in denying of defendant's motion for a bifurcated trial on issues of his guilt or innocence and of his insanity where motion was made on the ground that he intended to raise inconsistent defenses of self-defense and insanity where nothing in the record indicated that defendant made more than a bare assertion of an intention to claim self-defense, where there was nothing inherently inconsistent between the two defenses and where the evidence of self-defense was meager if it existed at all. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Instruction on Burden of Proof. — The trial court's instruction that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" rather than to the "satisfaction" of the jury was favorable to defendant, since "reasonable satisfaction" imposes a lesser burden than "satisfaction." State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Instruction Where Insanity Defense Not in Fact Presented. — Where defendant filed notice of intent to raise the defense in insanity, as required by this section, and, pursuant to G.S. 15A-1213, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity, it was proper at the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense. State v. Hart, 44 N.C. App. 479, 261 S.E.2d 250 (1980).

Instruction Misstated the Law. — Where the prosecuting attorney by his argument implied that the defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime, this was an incorrect statement of the law. A criminal defendant may only plead not guilty, guilty or no contest; if a defendant pleads not guilty he may raise the defense of insanity by filing a pretrial motion that he intends to rely on that defense. State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993).

Applied in State v. Grainger, 29 N.C. App. 694, 225 S.E.2d 595 (1976).

Cited in State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Byrd, 39 N.C. App. 659, 251 S.E.2d 712 (1979); State v. Davis, 77 N.C. App. 68, 334 S.E.2d 509 (1985); State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986); State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988); State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999); State v. Gillespie, 180 N.C. App. 514, 638 S.E.2d 481, 2006 N.C. App. LEXIS 2512 (2006).

§§ 15A-960 through 15A-970: Reserved for future codification purposes.

ARTICLE 53.

Motion to Suppress Evidence.

OFFICIAL COMMENTARY

With the decision in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and its progeny, objections to the introduction of various kinds of evidence by the State in criminal trials have become more and more frequent — and the issues have become more and more complicated. Ruling on a constitutional objection to admission of evidence during trial may require interrupting the course of the trial with a lengthy voir dire. Courts all over the country by the late 1960's began utilizing in many instances the pretrial motion to suppress evidence to minimize interruptions during trial. This procedure has been used in North Carolina, despite the lack of any statutory authority for it. This Article prescribes a pretrial procedure for hearing motions to suppress evidence in superior court. As criminal trials in district court are not before a jury and interruptions are not so great a problem, the proposal does not require any change in procedure in district court; it does, however, provide that pretrial motions to suppress may be heard with the consent of all parties.

Another factor affecting the Commission's decision to recommend pretrial motions to suppress is the need to give the State a right to appeal from an adverse ruling. Considerations of jeopardy required that a decision to suppress evidence precede the commencement of the trial if the State is to be afforded a right to appeal. Support for the State's right to appeal the suppression of evidence comes from many quarters. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 140 (1967); A.B.A. Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals § 1.4(a)(ii) (1970).

The original draft of this Article was based upon Article 710 of the New York Criminal Procedure Law, but it underwent substantial modifications in the course of the Commission's deliberations.

§ 15A-971. Definitions.

As used in this Article the following definitions apply unless the context clearly requires otherwise:

(1) Evidence. — When referring to matter in the possession of or available to a prosecutor, any tangible property or potential testimony which may be offered in evidence in a criminal action.

(2) Potential Testimony. — Information or factual knowledge of a person who is or may be available as a witness. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The source of these definitions is N.Y.C.P.L. § 710.10.

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For comment discussing search and seizure in North Carolina in light of State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), see 19 Wake Forest L. Rev. 675 (1983).

For note discussing the exclusionary rule in probation revocation hearings in light of State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982), see 19 Wake Forest L. Rev. 845 (1983).

For note discussing adoption of the trustworthiness doctrine in the treatment of defendants' confessions and admissions, in light of State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985), see 64 N.C.L. Rev. 1285 (1986).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

Exclusive method of challenging evidence on grounds that its exclusion is constitutionally required is a motion to suppress made in compliance with the procedural requirements of this Article. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982); State v. Harris, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

This Article sets forth the exclusive method for challenging evidence on the ground that its exclusion is constitutionally required. State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984).

Trial Court's Change of Decision from Pretrial Grant. — Trial court did not err by changing its decision with regard to defendant's motion to suppress and subsequently allowing drug-related evidence seized from the shrubbery around defendant's mobile home at trial, because a ruling on such a motion was preliminary in nature, which did not automatically cause exclusion pursuant to G.S. 15A-979(a). Since the trial court's ruling on the motion to suppress was not final, it was well within the trial court's authority to reverse its decision at trial. State v. McNeill, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005).

Article places the burden on the defendant of demonstrating that he has raised his motion to suppress according to its mandate. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

The defendant has the burden of showing that he has complied with the procedural requirements of this Article. State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984).

Failure to Meet Burden Constitutes Waiver. — The burden is on defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of this Article; failure to carry that burden waives the right to challenge evidence on constitutional grounds. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Generally, motions to suppress needed to be made before trial, and a miscalculation of the strength of the State's case was not a sufficient excuse for the failure to make a motion to suppress prior to trial; where defendant failed to bring himself within an exception to general rule, his objection at trial was meritless since the objection, treated as a motion to suppress, was untimely. State v. Jones, 157 N.C. App. 110, 577 S.E.2d 676, 2003 N.C. App. LEXIS 381 (2003).

Failure to Pursue Claims Under U.S. Const., Amend. IV in State Court Bars Federal Habeas Corpus. — Having failed to use the opportunity for litigating his claim under U.S. Const., Amend. IV in State court under this Article, the defendant was foreclosed from pursuing it on federal habeas corpus. Sallie v. North Carolina, 587 F.2d 636 (4th Cir. 1978), cert. denied, 441 U.S. 911, 99 S. Ct. 2009, 60 L. Ed. 2d 383 (1979).

Evidence of Prior Conviction. — Not only is it preferable policy to require a defendant to object to or move to suppress the admission of evidence of a prior conviction in the sentencing stage of a criminal trial, such a requirement is consistent with the general procedural rules. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Cited in State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980); State v. Joyner, 54 N.C. App. 129, 282 S.E.2d 520 (1981); State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

When an indictment has been returned or an information has been filed in the superior court, or a defendant has been bound over for trial in superior court, a defendant who is aggrieved may move to suppress evidence in accordance with the terms of this Article. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

An early draft authorized within the Commission motions to suppress in superior court at any time after initiation of the charge in district court — even before the probable cause hearing. One result of this approach would have been to relieve district court judges of the responsibility of ruling upon complicated constitutional issues underlying many motions to suppress. (See commentary to G.S. 15A-611 for discussion of the compromise position reached on that point.) A majority of the Commission, however, thought that the case should be technically within the superior court's jurisdiction before a motion to suppress may be made in that court. Therefore, under this Article, once the case is bound over to superior court, the motion to suppress is permitted. This section also specifies that the motion may be made upon return of an indictment or the filing of any information to take care of the rare situations in which a case is initiated in superior court without any preliminaries in district court.

The Commission discussed at length who should have standing to object to the introduction of unlawfully obtained evidence. The alternatives considered were:

(1) Eliminate the standing requirement, as has been done in California. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

(2) Spell out in the statute the various bases for standing. See, e.g., American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 4, § 8.01(5) (1971).

(3) Utilize the word describing who has standing used in Rule 41(e) of the Federal Rules of Criminal Procedure — that is, a person who is "aggrieved." This would give North Carolina the benefit of case law as to standing developed in the federal courts and in the courts of many other states which also use the same terminology. Although that rule relates to exclusion of evidence gained by an unlawful search and seizure, it is thought that the principles developed could be applied by analogy to other evidence subject to suppression under this Article.

As may be noted, the Commission and the General Assembly concurred in choosing alternative (3).

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

Article Sets Forth Exclusive Method for Suppressing Evidence. — The exclusive method of challenging evidence on grounds that its exclusion is constitutionally required is a motion to suppress made in compliance with the procedural requirements of this Article. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Burden is on defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of this Article; failure to carry that burden waives the right to challenge evidence on constitutional grounds. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Defendant has the burden of establishing that he is an "aggrieved" party before his motion to suppress will be considered. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

When Defendant "Aggrieved". — A defendant is "aggrieved" and "may move to suppress evidence" under this section only when it appears that his personal rights, not those of some third party, may have been violated. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979); State v. Sanders, 317 N.C. 602, 346 S.E.2d 451 (1986).

Defendant Held Not "Aggrieved." — The defendant was not "aggrieved," within the meaning of this section, in a prosecution for murder where he was not on the premises at the time of the search and seizure, he neither owned nor rented the shed which was searched, and possession of the shotgun shells seized was not an essential element of the offense charged. State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634, cert. denied and appeal dismissed, 295 N.C. 649, 253 S.E.2d 93 (1978), cert. denied, 300 N.C. 559, 270 S.E.2d 111 (1980).

Where defendant was charged with felonious conspiracy to possess stolen property, but defendant was not present at the residence that was searched, and neither alleged nor showed any possessory or proprietary interest in either residence or any of the items seized and listed in the indictment charging him with felonious conspiracy to possess stolen property, defendant was not an aggrieved party for purposes of this section and thus lacked standing to contest a search allegedly violating his rights under U.S. Const., Amend. IV. State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

One of two defendants, who at the very most had previously lived in the house and was at the time of his arrest a frequent visitor, and who was not present at the house when officers arrested the other defendant and seized his shoes, was not an "aggrieved" party as to the seizure of the shoes under this section. State v. Sanders, 317 N.C. 602, 346 S.E.2d 451 (1986).

Motion to Suppress Properly Denied. — Trial court did not err in denying defendant's motion to suppress, as defendant did not challenge its factual findings, and those findings adequately supported the trial court's conclusion of law that the issuance of the search warrant was based on probable cause and adequately stated the premises to be searched and the items to be seized. State v. Adams, 159 N.C. App. 676, 583 S.E.2d 689, 2003 N.C. App. LEXIS 1513 (2003), appeal dismissed, 357 N.C. 659, 590 S.E.2d 272 (2003).

Motion to suppress was properly denied where the evidence showed that defendant was informed of his Miranda rights, that he understood those rights, that he knowingly, intelligently, willfully, and voluntarily waived those rights, and that the statements he made were not the result of threats or coercion. State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738, 2004 N.C. App. LEXIS 300 (2004), appeal dismissed, cert. denied, 358 N.C. 733, 601 S.E.2d 861 (2004).

Despite a juvenile's contention that his aunt was his guardian, his suppression motion was properly denied, as she was not considered a "party listed" under G.S. 7B-2101, and the aunt never lived with the juvenile, did not have custody of him, nor acted on his behalf as a parent or his guardian. State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005), aff'd in part, vacated in part, review improvidently allowed in part, 361 N.C. 550, 648 S.E.2d 819 (2007).

Because Miranda warnings were not required before defendant consented to a search of a vehicle, and because any error in admitting the fruits of the search was harmless, the trial court properly denied defendant's motion to suppress. State v. Cummings, 188 N.C. App. 598, 656 S.E.2d 329, 2008 N.C. App. LEXIS 198 (2008).

Because a reasonable person would have understood from the circumstances and exchanges between the officers and defendant that police intended to conduct a strip search of defendant's person, and she consented to the strip search without withdrawing that consent at any time, the trial court properly denied her motion to suppress the evidence seized. State v. Neal, 190 N.C. App. 453, 660 S.E.2d 586, 2008 N.C. App. LEXIS 835 (2008).

Motion to Dismiss Properly Denied. — Trial court properly denied defendant's motion to suppress drugs obtained during a warrantless search of his car, as the drugs were found during a search incident to a lawful arrest supported by probable cause after verification of an informant's tip as to the vehicle, the perpetrator, and the location and approximate time of the alleged drug activity. State v. Collins, 160 N.C. App. 310, 585 S.E.2d 481 (2003), aff'd, 358 N.C. 135, 591 S.E.2d 518 (2004).

Trial court properly denied defendant's motion to suppress evidence pursuant to G.S. 15A-972 in a prosecution on drug charges, as an anticipatory search warrant under which the evidence in question was seized complied with state requirements for such a warrant, and G.S. 15A-246(4) did not required that the address listed in the warrant be listed in a city directory. State v. Phillips, 160 N.C. App. 549, 586 S.E.2d 540, 2003 N.C. App. LEXIS 1832 (2003).

Where a police officer had probable cause to stop defendant's vehicle and defendant was predisposed to commit the crime, the trial court properly denied defendant's motions to suppress and motion for a jury instruction on entrapment. State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003).

Motion to Suppress Erroneously Denied. — Trial court erred in denying defendant's motion to suppress evidence seized during a warrantless search because the officer lacked reasonable articulable suspicion of criminal activity and therefore the stop and frisk did not fall within Terry; the report that the officer received only indicated that a black male had committed armed robbery, a description that fit a substantial percentage of the population, there was no further description as to age, physical characteristics, or clothing. State v. Cooper, 186 N.C. App. 100, 649 S.E.2d 664, 2007 N.C. App. LEXIS 1984 (2007).

Inevitable Discovery. — Because the truck keys would have been found during a lawful search of defendant's person, the cocaine found in the truck would have been admissible under the inevitable discovery doctrine; thus, the trial court properly denied defendant's motion to suppress the cocaine. State v. Harris, 157 N.C. App. 647, 580 S.E.2d 63 (2003).

Trial Court Erred in Assuming Defendant Had Standing to Contest Search. — Trial court may have applied an erroneous legal standard to the issue of whether defendant could properly challenge the search of a house, where the trial court appeared to assume that, in the absence of evidence requiring a contrary ruling, the default setting would be that the defendant had standing to contest the search. State v. Barnes, 158 N.C. App. 606, 582 S.E.2d 313, 2003 N.C. App. LEXIS 1232 (2003).

Affidavit Must Accompany Motion to Suppress. — A motion to suppress pursuant to this section and G.S. 15A-977, which is not accompanied by an affidavit containing facts supporting it, is not proper in form and may therefore be summarily dismissed. State v. Harris, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

Suppression of Evidence Discovered During Checkpoint Search Erroneously Denied. — Trial court erred in denying defendant's motion to suppress evidence, pursuant to G.S. 15A-972, which was uncovered during a checkpoint stop; the trial court failed to make required findings as to the primary programmatic purpose of the checkpoint, and as to whether the checkpoint was tailored to meet that programmatic purpose. State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336, 2005 N.C. App. LEXIS 1015 (2005).

Applied in State v. Ford, 71 N.C. App. 805, 323 S.E.2d 358 (1984).

Cited in State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980); State v. Johnson, 304 N.C. 680, 285 S.E.2d 792 (1982).

§ 15A-973. Motion to suppress evidence in district court.

In misdemeanor prosecutions in the district court, motions to suppress evidence should ordinarily be made during the course of the trial. A motion to suppress may be made prior to trial. With the consent of the prosecutor and the district court judge, the motion may be heard prior to trial. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The basis for this section has been developed in the general commentary for this Article.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

Article Sets Forth Exclusive Method for Suppressing Evidence. — The exclusive method of challenging evidence on grounds that its exclusion is constitutionally required is a motion to suppress made in compliance with the procedural requirements of this Article. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Burden is on defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of this Article; failure to carry that burden waives the right to challenge evidence on constitutional grounds. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
  a. The importance of the particular interest violated;
  b. The extent of the deviation from lawful conduct;
  c. The extent to which the violation was willful;
  d. The extent to which exclusion will tend to deter future violations of this Chapter. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

An important point to note is that subdivision (1) only requires suppression of evidence if its exclusion is constitutionally required. It is possible then that evidence may be gathered in violation of constitutional rights, but suppression is not the sanction to be applied unless authoritative case law so declares. There are indications that the Burger Court will moderate some of the exclusionary rules, and this section is designed not to freeze North Carolina's statutory law into patterns set solely by current case law.

In addition to constitutionally required exclusions, the Commission believed that the State should not have the benefit of unlawfully obtained evidence when there was a "substantial" violation. The factors for judges to consider in determining whether a violation is "substantial" are set out, but it is clear that this concept will need to be developed by case law over a period of time. It seems likely that case law from other jurisdictions may also be used, as these factors, or similar ones, may be adopted elsewhere. See American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 4, § 8.02(2):

(2) Determination. Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a violation of any of the provisions of this Code shall be granted only if the court finds that such violation was substantial. In determining whether a violation is substantial the court shall consider all the circumstances, including:

"(a) the importance of the particular interest violated;

"(b) the extent of deviation from lawful conduct;

"(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations of this Code;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

One departure made by the Commission from the New York statute and from Tentative Draft No. 4 of the A.L.I.'s Model Code was the decision to speak merely of suppression of "evidence" constitutionally required to be excluded or obtained as a result of a substantial violation of Chapter 15A. The definition of "evidence" set out in G.S. 15A-971 is very broad, but it may not include "fruits of the poisonous tree" unless there is a constitutional requirement that such derivative evidence be excluded. The New York and A.L.I. provisions are more specific on this matter.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

For a survey of 1996 developments in criminal law, see 75 N.C.L. Rev. 2346 (1997).

For article, Hobgood, I-95A/K/A The Drug Trafficker's Freeway, and Its Impact on State Constitutional Law, see 21 Campbell L. Rev. 237 (1999).

CASE NOTES

I. General Consideration.
II. Constitutionally Required Exclusion.
III. Substantial Violation of Chapter.

I. GENERAL CONSIDERATION.

Section More Stringent Than Federal Constitution. — This section sets more stringent standards for arrest than those required by the federal Constitution and requires a wider application of the exclusionary rule to meet these statutory standards relating not only to arrest and to search and seizure, but also "substantial violation" of all other provisions of the Criminal Procedure Act. State v. Williams, 31 N.C. App. 237, 229 S.E.2d 63 (1976).

Former Provision Compared. — See State v. Johnson, 29 N.C. App. 698, 225 S.E.2d 650 (1976).

In determining whether this section requires suppression, the reviewing court must consider the importance of the interest violated, the extent of the deviation from lawful conduct, and whether the violation was willful, as well as the extent to which suppression will deter future violations. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

Requirements of Motion to Dismiss. — A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made. While an affidavit is not required for a motion timely made at trial, the defendant must, however, specify that he is making a motion to suppress and request a voir dire. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Burden of Establishing Procedural Compliance. — A defendant who seeks to suppress evidence upon a ground specified in this section must comply with the procedural requirements outlined in this Article and he has the burden of establishing that his motion to suppress is timely and proper in form. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984).

The defendant has the burden of showing that he has complied with the procedural requirements of this article. State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984).

Failure to Comply Constitutes Waiver. — A defendant's failure to comply with the requirements of this article is a waiver of his right to suppression of evidence obtained in violation of statutory or constitutional law. State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984).

A defendant who fails to file an affidavit to support the general information and belief alleged in his motion waives his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant. State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984).

Motion to suppress was exclusive method of challenging the admissibility of evidence on constitutional or statutory ground; the failure to raise the admissibility question by a motion to suppress constituted a waiver of any objection to admission of the evidence. State v. Howie, 153 N.C. App. 801, 571 S.E.2d 245, 2002 N.C. App. LEXIS 1270 (2002), cert. denied, 357 N.C. 167, 581 S.E.2d 64 (2003).

Untimely Motion Results in Waiver. — When the motion to suppress must be made in limine but the defendant fails to make the motion at the proper time, then he has waived his right to contest the admissibility of the evidence at trial or on appeal on constitutional grounds. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Generally, motions to suppress needed to be made before trial, and a miscalculation of the strength of the State's case was not a sufficient excuse for the failure to make a motion to suppress prior to trial; where defendant failed to bring himself within an exception to general rule, his objection at trial was meritless since the objection, treated as a motion to suppress, was untimely. State v. Jones, 157 N.C. App. 110, 577 S.E.2d 676, 2003 N.C. App. LEXIS 381 (2003).

Trial Court's Change of Decision from Pretrial Grant. — Trial court did not err by changing its decision with regard to defendant's motion to suppress and subsequently allowing drug-related evidence seized from the shrubbery around defendant's mobile home at trial, because a ruling on such a motion was preliminary in nature, which did not automatically cause exclusion pursuant to G.S. 15A-979(a). Since the trial court's ruling on the motion to suppress was not final, it was well within the trial court's authority to reverse its decision at trial. State v. McNeill, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005).

Defendant Held Not to Have Standing. — Where victim's pocketbook was found in defendant's car and searched pursuant to a warrantless probable cause search, the contents of the pocketbook should not have been suppressed at trial since one may not object to a search or seizure of the premises or property of another because immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed; thus, absent ownership or possessory interest in the premises or property, a person has no standing to contest the validity of a search. State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981).

Defendant could not object to the admission of evidence taken as a result of searches conducted in and around an airplane where the record showed neither that defendant was present when the airplane was searched nor that he had any protected interest in the airplane. State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981), aff'd, 305 N.C. 383, 289 S.E.2d 354 (1982).

Exclusion Extends to Indirect Products of Unlawful Search. — Evidence seized during an unlawful search cannot constitute proof against the victim of the search, and the exclusionary prohibition extends as well to the indirect as the direct products of such invasions. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Evidence Obtained Outside Officer's Territorial Jurisdiction. — It is not fundamentally unfair nor prejudicial to a defendant that evidence is obtained by police officers outside of their territorial jurisdiction while conducting an undercover investigation. State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980).

Nontestimonial Identification Order Held Valid. — In a prosecution for first-degree murder, the trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provisions under Chapter 15A, Article 14, G.S. 15A-271 et seq., by not procuring an express waiver from defendant. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Incriminating Statements Held Voluntary. — In a prosecution for armed robbery, defendant's incriminating statements to a bondsman were made knowingly and voluntarily where defendant testified that he was threatened with a shotgun and was struck on the head with the shotgun at the time he was taken into custody by the bondsman, the incriminating statements by defendant occurred a substantial time later during a drive to the county of trial and were made in an atmosphere of casual conversation, defendant testified that he had "shot" some drugs but that he was not under the influence of the drugs when he made the statements, and the trial judge made findings and conclusions to the effect that defendant understood all that was taking place prior to his arrest and during the trip back to the county of trial and that the bail bondsman did not use any tactics or pressure to secure a statement from defendant; thus, the bondsman's testimony could not be suppressed. State v. Perry, 50 N.C. App. 540, 274 S.E.2d 261, appeal dismissed, 302 N.C. 632, 280 S.E.2d 446 (1981).

Voluntary, Noncustodial Incriminating Statements of Mentally Ill Person. — There is no State basis for the exclusion of the noncustodial, self-initiated inculpatory statements of defendant, even though he was a paranoid schizophrenic. State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987).

Subpoena Based on Invalid Search Warrant. — A court order directing defendant to produce and turn over to the State Bureau of Investigation the business and working records of his florist and gift shop was a subpoena, and evidence obtained pursuant to the subpoena order should have been excluded in defendant's arson trial where it was obtained by exploitation of an earlier illegal search and seizure pursuant to a warrant not based on probable cause. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Typographical Error in Affidavit Supporting Search Warrant. — Although affidavit in support of search warrant made a single reference to the "the Schedule II controlled substance marijuana" instead of cocaine, the trial court determined this was a typographical error and the warrant was still valid. State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

Evidence Resulting from Lawful Arrest Subsequent to Unlawful One. — In a prosecution for murder, defendant's incriminating in-custody statement was not inadmissible as the fruit of an original unlawful arrest or pursuant to this section where the statement was not the result of the original unlawful arrest but had its origin in and was the result of a subsequent lawful arrest for a murder to which the statement related. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Motion to Suppress Granted. — Where police broke their promise not to prosecute the defendant as a habitual offender if he confessed, on which defendant detrimentally relied in giving a confession, the defendant was entitled to suppression of his confession and a new trial. State v. Sturgill, 121 N.C. App. 629, 469 S.E.2d 557 (1996).

Motion to Suppress Properly Denied. — Where there were unnecessary delays in taking defendant before a judicial official and in advising him of his right to communicate with counsel and friends, but the defendant did not argue a causal connection between the violations of G.S. 15A-501(2) and (5) and his incriminating statements, the trial court properly denied suppressing the statements under subsection (2) of this section. State v. Jones, 112 N.C. App. 337, 435 S.E.2d 574 (1993).

There was competent evidence to support the trial court's findings of fact that search warrant was on the premises when the police entered defendant's residence and that it was read to his fiancee before any search was undertaken in the house; the trial court did not err in concluding that the execution of the search warrant did not violate any provisions of chapter 15A and in admitting at trial the evidence obtained as a result of the search of defendant's residence. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Where the evidence at issue was not obtained as a consequence of any violations of chapter 15A, and no causal relationship between any such violations and the evidence sought to be suppressed existed, the evidence at issue was not required to be suppressed pursuant to this statute. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Defendant's motion to suppress statements he made to law-enforcement officer was properly denied where nothing in the record suggested that the words or conduct of one of the officers were intended to accomplish anything other than to scrupulously honor defendant's rights, defendant was not in custody when he was interviewed prior to the giving of Miranda warnings, and the trial court was not required to make specific findings on defendant's capacity to waive his Miranda rights since admissibility of defendant's statements was not dependent upon the validity of any waiver of such rights. State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003), cert. denied, 357 N.C. 464, 586 S.E.2d 274 (2003), aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004).

Trial court did not err in denying defendant's motion to suppress the alleged contraband seized during an investigatory stop, as reasonable suspicion justified the police officer's investigatory stop and detention of defendant, and the defendant's actions in "digging" in his glove compartment, and searching other areas in the interior of his vehicle, made the officer's subsequent pat-down search of defendant permissible, which led to the discovery of the alleged contraband. State v. Martinez, 158 N.C. App. 105, 580 S.E.2d 54, 2003 N.C. App. LEXIS 927 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 773 (2003).

Defendant's motion to suppress evidence seized from his home, on the theory that the evidence was seized before a search warrant authorizing its seizure arrived at defendant's house, was properly denied, as the trial court's fact findings as to the time the warrant was issued, the time it arrived at defendant's house, and the time the search of defendant's house began, was supported by the evidence. State v. Crutchfield, 160 N.C. App. 528, 586 S.E.2d 525, 2003 N.C. App. LEXIS 1817 (2003).

Defendant's motion to suppress a statement he made to the police while he was hospitalized and receiving medication, on the theory that he did not knowingly and intelligently waive his Miranda rights, was properly denied as the trial court's factual findings resolving conflicting opinions and testimony presented at a hearing on defendant's suppression motion were supported by the testimony at that hearing, and were conclusive on appeal. State v. Crutchfield, 160 N.C. App. 528, 586 S.E.2d 525, 2003 N.C. App. LEXIS 1817 (2003).

Defendant's motion to suppress his son's in court and prior "identifications" of defendant was properly denied as the son's testimony that he was shot by someone who was the same size and shape as defendant was not an identification, and issues regarding the nine-year-old son's credibility and suggestibility, and the reliability of his statements, were matters of weight for the jury to resolve, rather than issues of admissibility. State v. Crutchfield, 160 N.C. App. 528, 586 S.E.2d 525, 2003 N.C. App. LEXIS 1817 (2003).

Trial court did not err by denying defendant's motion to suppress the drug evidence found inside his leather coat. The police did not violate defendant's constitutional rights by searching his jacket because the owner's general consent to the search of his car reasonably included the search of clothing lying on the seats of the car. State v. Jones, 161 N.C. App. 615, 589 S.E.2d 374, 2003 N.C. App. LEXIS 2264 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003).

Trial court did not err by denying defendant's motion to suppress his oral statement that he put his jacket in the car because it contained drugs was a voluntary spontaneous utterance which was not in response to any question by law enforcement. State v. Jones, 161 N.C. App. 615, 589 S.E.2d 374, 2003 N.C. App. LEXIS 2264 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003).

Trial court did not err by denying defendant's motion to suppress his written statement because defendant's testimony did not suggest that he attempted to read the statement but was unable to do so. Also, the deputy testified that he wrote precisely what defendant said, without paraphrasing, and that he read it aloud as he transcribed defendant's statements. State v. Jones, 161 N.C. App. 615, 589 S.E.2d 374, 2003 N.C. App. LEXIS 2264 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003).

Trial court properly denied defendant's motion to suppress incriminating statements he made to law enforcement, and properly admitted those statements at trial, as none of the tactics that defendant cited that were used by the detectives who questioned him rendered his confession involuntary or made his statements to police subsequently inadmissible. State v. Maniego, 163 N.C. App. 676, 594 S.E.2d 242, 2004 N.C. App. LEXIS 580 (2004).

Because the search pursuant to a warrant was conducted after the forced entry and after defendant was read a copy of the warrant and defendant's Miranda rights, and because the cocaine would have likely been located in the absence of the forced entry, the contraband was not obtained "as a result of" improper entry, in violation of G.S. 15A-251, and thus was not subject to suppression. State v. White, 184 N.C. App. 519, 646 S.E.2d 609, 2007 N.C. App. LEXIS 1475 (2007).

Trial court did not err in denying defendant's motion to suppress based on defendant's claim that there was insufficient cause or suspicion to stop defendant's car because defendant's improper tags, standing alone, gave the deputies sufficient cause to stop defendant. State v. Johnson, 186 N.C. App. 673, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

Denial of Motion to Suppress Improper. — Search of the defendant's person was conducted in violation of the right of the defendant to be free from any unreasonable searches as guaranteed by the Fourth Amendment to the U.S. Constitution, the North Carolina Constitution, and this section. Accordingly, the order denying defendant's motion to suppress was reversed and the judgment entered upon defendant's plea of guilty was vacated. State v. Pittman, 111 N.C. App. 808, 433 S.E.2d 822 (1993).

Use of "Drug Courier Profile" as Basis for Search and Seizure. — See State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

Applied in State v. Armstrong, 33 N.C. App. 52, 234 S.E.2d 197 (1977); State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94 (1977); State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978); State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979); State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981); State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982); State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982); State v. Copeland, 64 N.C. App. 612, 307 S.E.2d 574 (1983); State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984); State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Gwyn, 103 N.C. App. 369, 406 S.E.2d 145 (1991); State v. Austin, 111 N.C. App. 590, 432 S.E.2d 881 (1993); State v. Johnston, 115 N.C. App. 711, 446 S.E.2d 135 (1994); State v. Nance, 149 N.C. App. 734, 562 S.E.2d 557, 2002 N.C. App. LEXIS 315 (2002).

Cited in State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977); State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977); State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Sneed, 36 N.C. App. 341, 243 S.E.2d 908 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980); State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318 (1981); State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981); State v. McNeill, 54 N.C. App. 454, 283 S.E.2d 565 (1981); State v. Johnson, 304 N.C. 680, 285 S.E.2d 792 (1982); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983); State v. Creason, 68 N.C. App. 599, 315 S.E.2d 540 (1984); State v. Martin, 315 N.C. 667, 340 S.E.2d 326 (1986); State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986); State v. Barnhardt, 92 N.C. App. 94, 373 S.E.2d 461 (1988); State v. Beam, 325 N.C. 217, 381 S.E.2d 327 (1989); State v. Davis, 97 N.C. App. 259, 388 S.E.2d 201 (1990); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990); State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992); State v. McLean, 120 N.C. App. 838, 463 S.E.2d 826 (1995); State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

II. CONSTITUTIONALLY REQUIRED EXCLUSION.

Suppression Under Subdivision (1). — Subdivision (1) of this section mandates the suppression of evidence only when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Evidence for which exclusion is required by either the United States or the North Carolina Constitutions is a specified ground for a motion to suppress under this section. State v. Joyner, 54 N.C. App. 129, 282 S.E.2d 520 (1981), cert. denied, 304 N.C. 730, 287 S.E.2d 903 (1982).

Failure to comply with § 15A-223(b) has no constitutional significance within the meaning of subdivision (1) of this section. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Defendant's confession was not required to be suppressed by subdivision (1) despite a delay in bringing the defendant before a judicial officer in violation of G.S. 15A-501, since no constitutionally mandated exclusionary rule barred the defendant's confession. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Where defendant was already in custody, obtaining a sample of his blood pursuant to a nontestimonial identification order under G.S. 15A-271 et seq., absent his consent or a search warrant, violated his rights under N.C. Const., Art. I, § 20 to be free from unreasonable searches and seizures, and the evidence should have been suppressed. State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

Failure to File Warrant with Clerk Did Not Require Suppression. — Although application and search warrant were not filed with clerk as required by statute, such violation did not require that the seized evidence be suppressed; the failure to timely file these documents with the clerk after the warrant was issued did not rise to the level of a constitutional violation that would require suppression under subdivision (1) of this section. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989).

Delay in Setting Bail. — Where defendant was taken before a judicial officer for the setting of bail within a reasonable time, although the magistrate may have erred at that point by referring defendant's case to another judicial officer for the setting of bail rather than setting reasonable bail himself, the error did not make defendant's temporary further confinement an unreasonable seizure or "wrongful confinement" in any constitutional sense so as to necessitate suppression of his confession. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

Suppression Appropriate. — Where seizure was a violation of defendant's Fourth Amendment right against unreasonable searches and seizures, the evidence seized had to be suppressed. State v. Artis, 123 N.C. App. 114, 472 S.E.2d 169, 1996 N.C. App. LEXIS 575 (1996), cert. denied, 344 N.C. 633, 477 S.E.2d 45 (1998).

III. SUBSTANTIAL VIOLATION OF CHAPTER.

The use of the term "result" in subdivision (2) indicates that a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Hunter, 305 N.C. 106, 286 S.E.2d 535 (1982).

If the challenged evidence would have been obtained regardless of violation of this Chapter, such evidence has not been obtained "as a result of" such official illegality and is not, therefore, to be suppressed by reason of subdivision (2) of this section. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Minimum Requirements of Subdivision (2). — Subdivision (2) of this section requires, at a minimum, a "cause in fact" or "but-for" relationship between violations of this Chapter and the evidence objected to if such evidence is to be suppressed. In so holding, it is not decided that a mere "cause in fact" or "but-for" relationship is sufficient ipso facto to require exclusion of evidence obtained as a consequence of substantial violations of this Chapter. In certain cases, intervening circumstances might dissipate the taint of unlawfulness so that such evidence would be admissible at trial. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Search Must Be Unconstitutional unless Statutory Violation Substantial. — The exclusionary rule derived from Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925), and Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954), concerning the inadmissibility for impeachment purposes of evidence unconstitutionally obtained applies, if at all, only where a search and seizure has been declared illegal for constitutional reasons. The rule would not apply in those instances where there has been a violation of the statutory procedures regulating searches and seizures contained in this Chapter, unless there has been a "substantial violation" of the statutory provisions under this section. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

Failure of affidavit to comply with § 15A-244(3) constituted a substantial violation requiring suppression of evidence seized in search, and where, additionally, there was evidence of willfulness on the part of the affiant, demonstrated by a statement in the affidavit that the suspects were under surveillance by officers from 7:15 p.m. to 10:50 p.m., where the evidence disclosed that the suspects disappeared from the view of the officers from 8:15 p.m. to 10:25 p.m. and that the affiant was aware of this break in the surveillance, the trial court erred in denying defendant's motion to suppress. State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989).

Failure of Affidavit to Comply with G.S. 15A-244(2). — Evidence obtained as a result of a search warrant issued based on an insufficient affidavit, one based on the mere conclusion that probable cause existed, was suppressed since, under the circumstances, the warrant was issued in violation of G.S. 15A. State v. McHone, 158 N.C. App. 117, 580 S.E.2d 80, 2003 N.C. App. LEXIS 940 (2003).

Failure of an officer to comply strictly with provisions of G.S. 15A-252 and 15A-254 was not a "substantial" violation of Chapter 15A within the meaning of subdivision (2) of this section. See State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125, cert. denied, 295 N.C. 93, 244 S.E.2d 261 (1978).

Failure of an officer to comply strictly with provisions of G.S. 15A-249 and 15A-974(2) not substantial violation. — Where police officer, in executing search warrant for drugs, simultaneously announced his presence and entered residence, violating the provisions of G.S. 15A-249, under G.S. 15A-974(2), the violation was not substantial and did not require that the evidence be suppressed; no one on the premises objected, the occupants, as drug dealers, were likely to be armed, and entry prevented destruction of drugs. State v. Sumpter, 150 N.C. App. 431, 563 S.E.2d 60, 2002 N.C. App. LEXIS 493 (2002).

Failure to Serve Warrant Properly. — Violation of G.S. 15A-252 did not require suppression of evidence, where officers who found cocaine in the defendant's apartment merely left a copy of the search warrant in the apartment after the search, rather than giving defendant a copy of the warrant application and affidavit before the search, because the evidence was not obtained "as a result" of the officers' failure to strictly comply with the language of the statute. State v. Vick, 130 N.C. App. 207, 502 S.E.2d 871 (1998).

Failure to Execute Search Warrant. — A search warrant served within 48 hours, but not executed within 48 hours, was not invalid where the warrant was issued for the purpose of seizing bank records concerning a suspected securities fraud, and the delay was necessitated by the bank's need to locate and assemble the records. State v. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (1998).

Failure to Remind Defendant of Right to Counsel. — Given advance notice of his right to counsel in a nontestimonial identification order served on defendant three days before the withdrawal of fluid samples from defendant, any failure to remind defendant of his right to counsel prior to the taking of the fluid samples would not likely constitute a "substantial" violation of G.S. 15A-279(d) requiring suppression of the evidence obtained. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Officer's failure to provide defendant with a copy of any test results on the evidence seized from him pursuant to a non-testimonial identification order did not require the suppression of the evidence pursuant to G.S. 15A-974(2); the interest protected was insignificant because the samples had already been taken and the deviation from the statute was an unintentional oversight. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Officer's failure to return to the issuing judge an inventory of the evidence seized pursuant to the judge's order for non-testimonial identification evidence did not require the suppression of the evidence seized pursuant to G.S. 15A-974(2); the collection of the evidence seized was not causally related to the statutory violation, only insignificant interests were violated as defendant was present when the evidence was taken and was aware of what was taken, and defendant did not move for destruction of the evidence after the expiration of the time within which the inventory was to be filed. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002), cert. denied, 537 U.S. 1121, 123 S. Ct. 856, 154 L. Ed. 2d 802 (2003).

Evidence Seized in Stop Outside Sheriff's Jurisdiction. — Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion from the evidence of a pistol seized during the stop. Furthermore, even if the stop were an arrest in terms of G.S. 15A-402(b), this is not a substantial violation of Chapter 15A which would require exclusion of the evidence under this section. State v. Harris, 43 N.C. App. 346, 258 S.E.2d 802 (1979), appeal dismissed, 298 N.C. 808, 261 S.E.2d 920 (1979).

Evidence Obtained Outside Officer's Jurisdiction. — Even if the arresting officer acted outside his territorial jurisdiction in administering a breath test to the defendant, this technical violation did not constitute a substantial violation of the defendant's rights so as to require the suppression of the defendant's breath test results in his DWI prosecution. State v. Pearson, 131 N.C. App. 315, 507 S.E.2d 301 (1998).

Inapplicable to Violation of Provision Outside Chapter. — The evidence could not be suppressed under subdivision (2) of this section on the ground that the arrest was a "substantial violation" of this Chapter because the arrest by the city policeman was in violation of G.S. 160A-286, and not this Chapter. State v. Williams, 31 N.C. App. 237, 229 S.E.2d 63 (1976).

Deterrence of Future Violations. — Evidence obtained in violation of this Chapter is required to be suppressed only if it is obtained as a result of a "substantial" violation of the provisions of this Chapter. One of the critical circumstances to be considered in determining whether the violation is "substantial" is the extent to which exclusion will deter similar violations in the future. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 866 (1978).

Defendant failed to show that his confession had to be suppressed pursuant to this section because police investigators waited nineteen hours to take defendant before a magistrate after his arrest, took him to the Law Enforcement Center (LEC) for questioning prior to his appearance before a magistrate, and waited three and a half hours after questioning began before advising him of his Miranda rights where his confession was not a result of the delay; his confession necessarily took a lot of time because it involved nine murders; the police accommodated his request to sleep, and he was advised of his rights at the outset. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Motion Denied Out of Term and Out of Session. — Since the trial court's ruling and written order denying defendant's motions to suppress were entered out of term and out of session, the ruling and order were null and void, and of no legal effect; accordingly, defendant was entitled to have his judgment of conviction vacated and to a new trial, and that conclusion was true even though he had not objected and might not be able to show he was prejudiced. State v. Trent, 359 N.C. 583, 614 S.E.2d 498, 2005 N.C. LEXIS 641 (2005).

Search of Military Base. — Any violation of this Chapter occasioned by searches on military bases pursuant to proper military authority will not be deemed "substantial" within the meaning of this section since the exclusion of evidence seized in such circumstances would not in any way deter similar searches and seizures in the future. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 866 (1978).

Construction of this section in such a manner as to hold the actions of members of the United States Air Force not to constitute "substantial" violations of the statutes, if they constitute violations of any type, has the added benefit of avoiding undue conflicts among the components of our federalism. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 866 (1978).

Denial of Bail in Violation of § 15A-511(e). — Assuming, arguendo, that magistrate denied bail in violation of G.S. 15A-511(e), trial court was not required to suppress a voluntary confession given thereafter by defendant. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

(a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

(1) Evidence of a statement made by a defendant;

(2) Evidence obtained by virtue of a search without a search warrant; or

(3) Evidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial.

When a misdemeanor is appealed by the defendant for trial de novo in superior court, the State need not give the notice required by this section. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the general rule that motions to suppress must be made before trial. Exceptions are allowed:

(1) When the defendant did not have a reasonable opportunity to make the motion before trial.

(2) In the case of statements of the defendant and evidence from certain types of searches if the State fails to give approximately a month's advance notice (20 working days).

(3) After a motion to suppress has been denied, upon the discovery of additional facts bearing upon the issue which could not have been discovered with reasonable diligence prior to trial.

Under subsection (c), if the new evidence is discovered prior to trial, the defendant must reopen his motion to suppress before the trial begins.

The final sentence of the section was somewhat misplaced in the course of amendment in the General Assembly. It indicates that the advance notice in search and confession cases is not required when misdemeanors are tried de novo in superior court. Presumably the State would have already utilized, or have attempted to utilize, the evidence in the trial in district court, and notice would be unnecessary. Therefore, the general rule would apply: Any motion to suppress would have to be made before trial unless some other exception pertained in that case.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

I. General Consideration.
II. Motions First Made at Trial.
III. Additional Pertinent Facts.

I. GENERAL CONSIDERATION.

Failure to comply with this section can result in summary denial of the motion. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

As a general rule, motions to suppress must be made before trial. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Effect of Failure to Make Pretrial Motion. — When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984).

When none of the exceptions to making the pretrial motion to suppress applies, failure to make the pretrial motion pursuant to statute constitutes a waiver by defendant of his objections to the admission of the evidence. State v. Harris, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

Untimely Motion Results in Waiver. — When the motion to suppress must be made in limine but the defendant fails to make the motion at the proper time, then he has waived his right to contest the admissibility of the evidence at trial or on appeal on constitutional grounds. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

As Do General Objections. — This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

To challenge the admissibility of in-court identification testimony defendant is required to interpose at least a general objection when such evidence is offered, in addition to filing a pretrial motion to suppress evidence. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

A pretrial motion to suppress identification evidence which the trial judge has not heard and ordinarily will not hear until it is offered at trial will not suffice to challenge the admissibility of in-court identification testimony. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Voir Dire Not Required Absent Objection When Such Evidence Offered. — Absent an objection to in-court identification testimony when such evidence is offered, or a request for a voir dire to probe the competency of the proffered evidence, the trial judge is not required to conduct a voir dire, make findings of fact and determine whether the proffered testimony meets the test of admissibility. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

When Failure to Hold Voir Dire Is Harmless. — The general rule in this State is that the failure of the trial court to hold a voir dire examination and make findings of fact upon objection by a defendant to an in-court identification, while not approved, will be deemed harmless error where the record shows that the pretrial identification was proper or that the in-court identification of defendant had an origin independent from the pretrial identification. State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980).

Trial court's failure to conduct a voir dire in order to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photographic line-up was error; however, assuming, arguendo, that the photographic line-up was impermissibly suggestive, the presence of clear and convincing evidence of the independent origin of the identification, rendered the trial court's failure to conduct a voir dire harmless. State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992).

Confessions. — When there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence. State v. Hunter, 305 N.C. 106, 286 S.E.2d 535 (1982).

Failure of Trial Judge to Rule Formally. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Where, following voir dire hearing on defendant's motion at trial to suppress victim's in-court identification, the court recalled the jury while the witness was on the stand and allowed the State to proceed, the record clearly reflected the court's decision to deny defendant's motion, and the court's subsequent filing of written order out of session did not so prejudice defendant as to require a new trial. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Failure of Trial Judge to Allow Motion to Suppress. — Where the trial court barely allowed defendant to state his motion to suppress and denied defendant any opportunity to state his grounds or present evidence in support of his motion, defendant was not only denied his constitutional rights, but also his statutory right to make a motion to suppress under this section. State v. Battle, 136 N.C. App. 781, 525 S.E.2d 850, 2000 N.C. App. LEXIS 142 (2000).

Waiver of Challenge to Admissibility Not Shown. — Where although defendant's attorney received copies of laboratory reports on samples, and therefore had notice that the State had such evidence, he never received any notice that the State intended to use the evidence, one of the exceptions to the general rule set forth in this section applied, and defendant did not waive his right to contest the admissibility of the test results in question. State v. Fisher, 321 N.C. 19, 361 S.E.2d 551 (1987).

Motion Properly Denied. — Trial court did not err in denying defendant's motion to suppress a statement made to police where the trial court's findings of fact, that defendant failed to timely file such a motion, was supported by the evidence. State v. Ford, — N.C. App. —, 669 S.E.2d 832, 2008 N.C. App. LEXIS 2228 (2008).

Denial of Motion Upheld. — Denial of defendant's motion to suppress evidence was upheld after the appellate court concluded that the officer had a reasonable, articulable suspicion to believe that defendant was committing an implied consent offense based on the facts that defendant's car was weaving combined with the unusual hour and the location, in an area near bars, and the search of defendant's car was lawful based on the fact that it was admittedly consensual and not tainted by an unlawful detention. State v. Jacobs, 162 N.C. App. 251, 590 S.E.2d 437, 2004 N.C. App. LEXIS 119 (2004).

Applied in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979); State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984); State v. Edwards, 89 N.C. App. 529, 366 S.E.2d 520 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Lynch, 94 N.C. App. 330, 380 S.E.2d 397 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Williams, 98 N.C. App. 405, 390 S.E.2d 729 (1990); State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991); State v. Austin, 111 N.C. App. 590, 432 S.E.2d 881 (1993); State v. Howie, 153 N.C. App. 801, 571 S.E.2d 245, 2002 N.C. App. LEXIS 1270 (2002).

Cited in State v. Raines, 30 N.C. App. 176, 226 S.E.2d 546 (1976); State v. Bates, 37 N.C. App. 276, 245 S.E.2d 827 (1978); State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859 (1982); State v. King, 64 N.C. App. 574, 307 S.E.2d 805 (1983); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Summers, 105 N.C. App. 420, 413 S.E.2d 299 (1992); State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992); State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (1994).

II. MOTIONS FIRST MADE AT TRIAL.

Requirements for Motion Made at Trial. — Statement of the Court of Appeals in State v. Simmons, 59 N.C.App. 287, 290, 296 S.E.2d 805, 808 (1982), cert. denied, 307 N.C. 701, 301 S.E.2d 395 (1983) in interpreting State v. Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980), that a motion without such a supporting affidavit may be summarily denied, is overruled. State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991).

A defendant may move to suppress evidence at trial only if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (20 working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Motion to suppress evidence must be made before trial unless (1) defendant did not have a reasonable opportunity to make the motion before trial; or (2) defendant is allowed to make the motion during the trial because he did not receive timely notice of the State's intention to use such evidence; or (3) defendant is allowed to make the motion during the trial after a pretrial determination and denial of the motion and a later showing that additional facts pertinent to the motion have been discovered by defendant which he could not have reasonably discovered before pretrial denial of the motion. State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981).

The Court of Appeals, in interpreting State v. Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) stated: "A motion without such a supporting affidavit may be summarily denied." State v. Simmons, 59 N.C.App. 287, 290, 296 S.E.2d 805, 808 (1982), cert. denied, 307 N.C. 701, 301 S.E.2d 395 (1983). This aspect of Simmons is overruled. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

To the extent that State v. Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) suggests a requirement for an affidavit when the motion to suppress is made at trial, it is hereby disapproved. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made. While an affidavit is not required for a motion timely made at trial, the defendant must, however, specify that he is making a motion to suppress and request a voir dire. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Standard of Appellate Review. — In superior court, a defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless the motion to suppress is allowed during trial under G.S. 15A-975(b) or (c). G.S. 15A-975(a). Where the record is silent as to the trial court's basis for permitting a defendant to make a motion to suppress evidence for the first time at trial, the Court of Appeals of North Carolina presumes that the trial court acted correctly. State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830, 2003 N.C. App. LEXIS 1767 (2003).

III. ADDITIONAL PERTINENT FACTS.

Subsection (c) of this section clearly requires a showing of previously undiscovered facts to renew a motion to suppress evidence. State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990), discretionary review denied, 328 N.C. 575, 403 S.E.2d 519 (1991).

Corroborative Evidence Not Additional Pertinent Fact. — Where defendant testified at a hearing on a motion to suppress his confession that he was under the influence of drugs and was drowsy at the time he confessed, an officer testified defendant was alert when he confessed, and the trial judge found that defendant was not under the influence of drugs when he made his confession, the trial court did not err in refusing to conduct a new suppression hearing because of newly discovered evidence when one of the robbery victims testified at trial that he saw defendant at the police station and he appeared sleepy, since such testimony only corroborated evidence already before the court and was not an "additional pertinent fact" within the meaning of subsection (c) of this section. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Two Paragraphs from Supplemental Report Not Additional Pertinent Facts. — Trial court did not err in refusing to hear a renewed motion to suppress evidence found in search, where defendant asserted that he was entitled to another hearing because of newly discovered evidence and where the "new evidence" was a two paragraph excerpt from the arresting officer's "Supplemental Report" that had been withheld from defendant; the two paragraphs were not "additional pertinent facts" that had any bearing on defendant's motion to suppress, since all of the information in these paragraphs was brought out through testimony of the officers at the pre-trial suppression hearing. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Fabricated "Anonymous Tip." — Where the original determination and denial of defendant's motion to suppress in the North Carolina Supreme Court relied upon the assumption that tip to police was anonymous, but in his supplemental motion, defendant presented evidence that the "anonymous tip" was fabricated by police, defendant's new evidence was pertinent; thus, denial of his motion to suppress was overruled. State v. Watkins, 120 N.C. App. 804, 463 S.E.2d 802 (1995), cert. granted, 343 N.C. 127, 467 S.E.2d 898 (1995).

Alleged Inconsistencies Did Not Amount to Additional Pertinent Information. — With regard to a defendant's convictions for felonious possession of cocaine and possession of drug paraphernalia, the trial court did not abuse its discretion by denying his renewed motion to suppress the cocaine and glass smoking pipe seized from his person after his vehicle was stopped as the alleged inconsistencies of the two testifying officers at trial did not constitute additional pertinent information under G.S. 15A-975(c) that necessitated a reopening of the record or a reconsideration of the trial court's initial decision to deny his suppression motion. State v. Wade, — N.C. App. —, 679 S.E.2d 484, 2009 N.C. App. LEXIS 1170 (July 21, 2009).

§ 15A-976. Timing of pretrial suppression motion and hearing.

(a) A motion to suppress evidence in superior court may be made at any time prior to trial except as provided in subsection (b).

(b) If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State.

(c) When the motion is made before trial, the judge in his discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial. He may rule on the motion before trial or reserve judgment until trial. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) indicates that a motion which is required to be made prior to trial may be made at any time beforehand unless the special provisions of subsection (b) apply. The Article does not define when a trial "begins," but it is clear that the motion must be made before the jury is empaneled, as that is when jeopardy attaches.

Subsection (b) keys in with G.S. 15A-975(b). If a prosecutor is alert enough to give the notice under that section at least 20 working days in advance of the trial, he can then compel the defendant to make his motion to suppress well before the trial date. This would allow careful handling of complex constitutional issues that may be present in search and confession cases.

Subsection (c) gives the judge complete discretion as to when he will hear a motion. Presumably in a close case involving a crucial evidence he would not wait until after the trial has commenced to hear the motion or rule upon it, as this would have the effect of denying the State's right to appeal an adverse ruling.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

CASE NOTES

Motion to Suppress Held Timely. — Defendant's second motion to suppress, filed on the day defendant's case was calendared for trial, but prior to jury selection, was timely. State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Discretion of Court. — The trial court did not err in failing to rule on the defendant's motion to suppress before trial, where the court later ruled in the defendant's favor, and, had the court ruled on the motion before trial, it could have summarily dismissed it for the defendant's failure to file an affidavit or written motion. State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999).

Applied in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979); State v. Davis, 97 N.C. App. 259, 388 S.E.2d 201 (1990).

Cited in State v. Seagle, 96 N.C. App. 318, 385 S.E.2d 532 (1989).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

(a) A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated. The State may file an answer denying or admitting any of the allegations. A copy of the answer must be served on the defendant's counsel, or on the defendant if he has no counsel.

(b) The judge must summarily grant the motion to suppress evidence if:

(1) The motion complies with the requirements of subsection (a), it states grounds which require exclusion of the evidence, and the State concedes the truth of allegations of fact which support the motion; or

(2) The State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

(c) The judge may summarily deny the motion to suppress evidence if:

(1) The motion does not allege a legal basis for the motion; or

(2) The affidavit does not as a matter of law support the ground alleged.

(d) If the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. Testimony at the hearing must be under oath.

(e) A motion to suppress made during trial may be made in writing or orally and may be determined in the same manner as when made before trial. The hearing, if held, must be out of the presence of the jury.

(f) The judge must set forth in the record his findings of facts and conclusions of law. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is structured to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion, and the State may file an answer denying or admitting facts alleged in the affidavit. If the motion cannot be otherwise disposed of, subsection (d) provides for a hearing at which testimony under oath will be given. Section 15A-976(c) would allow the hearing to be set for the day of the trial if this would be the time most convenient for the witnesses.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

I. General Consideration.
II. Findings of Fact.

I. GENERAL CONSIDERATION.

Constitutionality. — This section does no more than shift to the defendant the burden of going forward with evidence when the State's warrants appear to be regular. The State still has the burden of proving that the evidence was lawfully obtained. Accordingly, this section is constitutional. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Rule Structured to Encourage Summary Decisions. — The official commentary to this section states that the rule "is structured to produce in as many cases as possible a summary granting or denial of the motion to suppress." The rule as such was intended to facilitate the work of trial courts, expediting decision of motions to suppress and framing the evidentiary questions in the event of a hearing. Holloway v. Woodard, 655 F. Supp. 1245 (W.D.N.C. 1987).

Affidavit Must Accompany Motion to Suppress. — A motion to suppress pursuant to G.S. 15A-972 and this section, which is not accompanied by an affidavit containing facts supporting it, is not proper in form and may therefore be summarily dismissed. State v. Harris, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

This section requires that the affidavit be filed with the motion to suppress before trial. Defendant's motion to amend, made during the trial, was not timely. There was no abuse of discretion in the court's denial of the motion. State v. Harris, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

Where defendant failed to include an affidavit containing facts to support his motion to suppress, defendant waived the right to seek suppression of evidence seized pursuant to a search warrant. State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996), aff'd, 346 N.C. 165, 484 S.E.2d 525 (1997).

In order for the defendant to suppress breath test results in his prosecution for DWI, his motion to suppress was required to be accompanied by an affidavit. State v. Pearson, 131 N.C. App. 315, 507 S.E.2d 301 (1998).

Affidavit Requirement Does Not Constitute Self-Incrimination. — Subsection (a) of this section requires an affidavit, but requiring the affidavit does not amount to compelling defendant to be a witness against himself in a criminal case in violation of U.S. Const., Amend. V and N.C. Const., Art. I, § 23. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Requirement of Attachment of Affidavit to Motion Upheld. — The North Carolina rule, under which a motion to suppress wrongfully seized evidence must be filed with an attached affidavit stating the facts upon which that motion is based, is legitimate on its face. Holloway v. Woodard, 655 F. Supp. 1245 (W.D.N.C. 1987).

Subsection (a) does not violate former Canon 4 of the Code of Professional Responsibility; it does not require an attorney to reveal information told to him in confidence by his client. The decision to file the affidavit and attempt to suppress the evidence remains with the defendant. If he consents to disclosure, Canon 4 is not violated. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Requirements for Filing Affidavit. — A defendant moving to suppress evidence is not compelled to file her own affidavit, but can stand silent if he or she so desires. State v. Chance, 130 N.C. App. 107, 502 S.E.2d 22 (1998), cert. denied, 349 N.C. 366, 525 S.E.2d 180 (1998).

Affidavit in support of a motion to suppress evidence was sufficient to meet the requirements of this section, where the affidavit was attested to by the attorney upon information and belief rather than by the defendant personally. State v. Chance, 130 N.C. App. 107, 502 S.E.2d 22 (1998), cert. denied, 349 N.C. 366, 525 S.E.2d 180 (1998).

And does not conflict with § 8-54, which says that a defendant is a competent witness in a criminal trial only if he takes the stand "at his own request." State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Requirements of a Motion to Suppress Made at Trial. — A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion and if the motion fails to allege a legal or factual basis for suppressing the evidence, it may be summarily dismissed by the trial judge. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

General Objections Are Insufficient. — This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Discretion to Summarily Deny Motion. — The decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court. The alternative is to hold a hearing on the motion, despite the facial insufficiency of the motion itself. State v. Harvey, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

Where pretrial motion to suppress meets the procedural requirements of this Article, it is not subject to summary determination. State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983).

When a pretrial motion to suppress is not subject to summary determination under subsections (b) and (c) of this section, the trial judge must conduct a hearing, make findings of fact and conclusions of law and set forth his findings and conclusions in the record. At this hearing, held in the absence of the jury, the burden is upon the State to demonstrate the admissibility of the challenged evidence; and, in the case of a confession, the State must affirmatively show (1) the confession was voluntarily made, (2) the defendant was fully informed of his rights and (3) the defendant voluntarily waived his rights. To do this the State must persuade the trial judge, sitting as the trier of fact, by a preponderance of the evidence that the facts upon which it relies to sustain admissibility and which are at issue are true. State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983).

A motion to suppress is not subject to a summary denial where the defendant has alleged a legal basis for the motion and has provided a supporting affidavit; if the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. State v. Kirkland, 119 N.C. App. 185, 457 S.E.2d 766 (1995), cert. denied, 341 N.C. 654, 462 S.E.2d 521 (1995), aff'd per curiam, 342 N.C. 891, 467 S.E.2d 242 (1996), cert. denied, 519 U.S. 875, 117 S. Ct. 195, 136 L. Ed. 2d 132 (1996).

Motions Held Not Subject to Summary Denial. — Defendant's motions to suppress in-court identification were not subject to summary denial, where they alleged a legal basis for the motions (competency of the evidence), were supported by proper affidavits which support the basis, and were uncontradicted by answer or denial of the State, and even in the absence of a request for the same, defendant was entitled to a voir dire hearing to determine the admissibility of the identification testimony. State v. Breeden, 306 N.C. 533, 293 S.E.2d 788 (1982).

Hearing Held Where Motion Not Summarily Denied. — Once the discretionary decision is made not to deny summarily a motion which fails to set forth adequate legal grounds, a hearing must be held at which the burden will be on the State to demonstrate the admissibility of the challenged evidence. State v. Harvey, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

Evidence concerning the administration of a polygraph test may be admissible in the absence of the jury on a voir dire hearing to determine the admissibility of a confession. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

A search warrant is presumed to be valid unless irregularity appears on its face. If defendants have evidence to rebut the presumption of validity of the warrant, it is their obligation to go forward with their evidence. That evidence must be presented at a hearing. State v. Dorsey, 60 N.C. App. 595, 299 S.E.2d 282, appeal dismissed, 308 N.C. 192, 302 S.E.2d 245 (1983).

Defendant's mere denial of the existence

of the State's confidential informant failed to rebut the presumed validity of search warrant. Therefore, the trial judge was correct in summarily denying defendant's motion to suppress the evidence seized pursuant to the warrant and in denying defendant's request for an evidentiary hearing as to the good faith of the officer's affidavit in support of the warrant. State v. Locklear, 84 N.C. App. 637, 353 S.E.2d 666 (1987).

Hearing with Informant Not Required. — Motion that court adopt a rule requiring a trial judge, upon a defendant's motion, to conduct an in-camera hearing with the informant when a defendant challenges the good faith of an affiant to a search warrant would be denied. State v. Locklear, 84 N.C. App. 637, 353 S.E.2d 666 (1987).

Failure of Trial Judge to Rule Formally. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Where, following voir dire hearing on defendant's motion at trial to suppress victim's in-court identification, the court recalled the jury while the witness was on the stand and allowed the State to proceed, the record clearly reflected the court's decision to deny defendant's motion, and the court's subsequent filing of written order out of session did not so prejudice defendant as to require a new trial. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Timing of Court's Written Findings and Conclusions. — Although the trial court's findings of fact and conclusions of law regarding its denial of defendant's suppression motion were entered during jury deliberations, the delay in entering the findings and conclusions did not amount to prejudicial error, as G.S. 15A-977 did not require the findings and conclusions to have been made in writing at the time of the ruling and defendant failed to show any prejudice from the delay. State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Suppression of Statements Made by Defendant. — Summary denial of defendant's motion under G.S. 15A-977 to suppress the admission of statements he had made to police, was proper where the statements had been revealed to the defense by the prosecutor as soon as the prosecutor knew of them and it was not required that defendant receive Miranda warnings prior to making them, as they were made in a conversation initiated by defendant. State v. Parks, 148 N.C. App. 600, 560 S.E.2d 179, 2002 N.C. App. LEXIS 53 (2002).

Defendant did not waive his right to contest admissibility of statements by him by failing to comply with procedural requirements of this section that motion to suppress evidence must contain legal basis where trial judge exercised his discretion not to summarily deny motion and immediately proceeded to conduct voir dire relating to the admissibility of the defendant's statements. State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988), cert. denied, 328 N.C. 273, 400 S.E.2d 459 (1991).

Where defendant's initial motion to suppress was unverified and not accompanied by an affidavit as required by statute, the motion was subject to being summarily denied, and the trial court did not abuse its discretion in denying such motion. State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Unsupported Allegation of Bad Faith. — Where defendant's second motion to suppress questioned affiant's good faith but her affidavit in support of the motion merely attempted to point out factual inaccuracies in officers' application for search warrant, defendant's affidavit failed to support the additional allegation contained in her motion, and the motion was subject to being denied under subsection (c) of this section. State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Unsupported Allegation of Reasonable Expectation of Privacy. — Where defendant's motion alleged, as a basis for suppressing matchbox and its contents, that law-enforcement officers had, without his consent, made a warrantless search of an area outside his house, but in his affidavit, defendant stated that he did not exercise dominion over the area in which the matchbox was found, defendant's affidavit did not support the alleged ground for suppression, as defendant did not have a reasonable expectation of privacy in the area searched. State v. Williams, 98 N.C. App. 405, 390 S.E.2d 729 (1990), overruled on other grounds, State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994).

Applied in State v. Philyaw, 291 N.C. 312, 230 S.E.2d 370 (1976); State v. Montgomery, 33 N.C. App. 225, 234 S.E.2d 434 (1977); State v. Martin, 38 N.C. App. 115, 247 S.E.2d 303 (1978); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979); State v. Cass, 55 N.C. App. 291, 285 S.E.2d 337 (1982); State v. Boone, 59 N.C. App. 730, 297 S.E.2d 920 (1982); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Holloway, 66 N.C. App. 491, 311 S.E.2d 707 (1984); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984); State v. Burch, 70 N.C. App. 444, 320 S.E.2d 28 (1984); State v. Suggs, 86 N.C. App. 613, 359 S.E.2d 24 (1987); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604

(1993); State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995); State v. Minor, 132 N.C. App. 478, 512 S.E.2d 483 (1999); State v. Johnson, 143 N.C. App. 307, 547 S.E.2d 445 (2001); Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004).

Cited in State v. Johnson, 29 N.C. App. 698, 225 S.E.2d 650 (1976); State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634 (1978); State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318 (1981); State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981); State v. Williams, 303 N.C. 142, 277 S.E.2d 434 (1981); State v. Joyner, 54 N.C. App. 129, 282 S.E.2d 520 (1981); State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859 (1982); State v. Johnson, 304 N.C. 680, 285 S.E.2d 792 (1982); State v. Warren, 61 N.C. App. 549, 301 S.E.2d 126 (1983); State v. Rutledge, 62 N.C. App. 124, 302 S.E.2d 12 (1983); State v. Darack, 66 N.C. App. 608, 312 S.E.2d 202 (1984); State v. Bruce, 314 N.C. 273, 337 S.E.2d 510 (1985); State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986); Stevens v. North Carolina, 638 F. Supp. 1255 (W.D.N.C. 1986); Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986); State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987); State v. Russell, 84 N.C. App. 383, 352 S.E.2d 922 (1987); State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654 (1988); State v. McQueen, 324 N.C. 18, 377 S.E.2d 38 (1989); State v. Jones, 197 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990); State v. Green, 103 N.C. App. 38, 404 S.E.2d 363 (1991); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Phillips, 132 N.C. App. 765, 513 S.E.2d 568 (1999); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Shelly, 181 N.C. App. 196, 638 S.E.2d 516, 2007 N.C. App. LEXIS 71 (2007); State v. Parker, 183 N.C. App. 1, 644 S.E.2d 235, 2007 N.C. App. LEXIS 835 (2007).

II. FINDINGS OF FACT.

Judge is the finder of fact at the hearing on a motion to suppress evidence and must make written findings of fact and conclusions of law. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Where the trial judge makes his determination on a motion to suppress after a hearing, he must set forth in the record his findings of fact and conclusions of law. Such findings and conclusions are required in order that there may be a meaningful appellate review of the decision. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

When Findings of Fact Required. — When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

If there is a material conflict on the evidence on voir dire conducted pursuant to this section, the trial judge must make findings of fact to show the basis of his ruling in order to resolve the conflict. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

When Findings of Fact Not Required. — Where defendant's affidavit failed to support the motion to suppress, the court properly denied the motion summarily, without making findings of fact; additionally, findings of fact are not required where there is no conflict in the evidence at the suppression hearing. State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

As a general rule, after a hearing on a motion to suppress the evidence the trial court must make written findings of fact and conclusions of law. Specific findings of fact are not required, however, where there is no material conflict in the evidence presented at the suppression hearing. State v. Parks, 77 N.C. App. 778, 336 S.E.2d 424 (1985), appeal dismissed and cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Where there is no material conflict in the evidence, findings and conclusions are not necessary, even though the better practice is to find facts. State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344, cert. denied, 320 N.C. 172, 358 S.E.2d 58 (1987).

When there is no material conflict in the evidence presented on a motion to suppress evidence, the trial judge may admit the challenged evidence without specific findings of fact, although findings of fact are preferred. In that event, the necessary findings are implied from the admission of the challenged evidence. State v. Norman, 100 N.C. App. 660, 397 S.E.2d 647 (1990).

Since probable cause existed to search defendant's vehicle for narcotics, evidence as to his consent was not relevant, and the trial court's failure to make findings and conclusion on defendant's motion to suppress was not prejudicial error. State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883, 1999 N.C. App. LEXIS 668 (1999), appeal dismissed, 351 N.C. 112, 540 S.E.2d 372 (1999).

Although the general rule is that the trial court must make findings of fact and conclusions of law after hearing a motion to suppress, findings are not required if there is no material conflict in the evidence at the suppression hearing; thus, where the only conflict was in the interpretation of the scope of a search warrant and not a conflict in evidence, the trial court was not required to make findings of fact. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Although it is a good practice to make findings of fact, if there is no material conflict in the evidence, it is not error to admit the evidence without making specific findings of fact. State v. Wilhelm, 59 N.C. App. 298, 296 S.E.2d 664 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 395 (1983).

While both subsections (d) and (f) of this section require the trial judge to make findings of fact after conducting a hearing on a motion to suppress evidence, there is an exception to the general rule where there is no material conflict in the evidence on voir dire, and it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence. State v. Tate, 58 N.C. App. 494, 294 S.E.2d 16, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982), aff'd, 307 N.C. 464, 298 S.E.2d 386 (1983).

Second interrogation of a defendant was not unconstitutional under the facts of the case, and the trial court did not err by admitting the statement obtained by law-enforcement officials during that second interrogation because uncontradicted evidence introduced during the suppression hearing supported the conclusion that the law-enforcement officials involved in the investigation of one incident honored the defendant's invocation of his right to remain silent regarding another incident, and thereafter no questioning touched on that other incident and fresh Miranda warnings were given. State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005), vacated in part, rev'd in part, on other grounds, 361 N.C. 565, 648 S.E.2d 841 (2007).

What Findings of Fact Must Include. — Subsection (f) of this section requires a judge to make findings of fact and conclusions of law when there is a motion to suppress. Such findings of fact must include findings on the issue of voluntariness. When the evidence is conflicting, the findings of fact must be sufficient to provide a basis for the judge's ruling. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

Findings of fact by the trial court judge are conclusive if they are supported by competent evidence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

The trial court must determine whether the state has borne its burden of showing by a preponderance of the evidence that defendant's confession was voluntary. The preponderance of the evidence test is not, however, to be applied by the appellate court in reviewing the findings of the trial court. The findings of the trial court are conclusive and binding upon the appellate court if supported by substantial competent evidence. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Where the waiver of rights form was read to defendant both in English and in Vietnamese, defendant was asked if he understood his rights and answered "yes" in English and at no time did defendant indicate that he did not understand the questions, was the findings of fact that defendant's statement was voluntary were supported by competent evidence and were conclusive. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Findings of fact made by the trial court are conclusive and binding upon appellate courts if supported by competent evidence. State v. Jordan, 120 N.C. App. 364, 462 S.E.2d 234, appeal dismissed and cert. denied, 342 N.C. 416, 465 S.E.2d 546 (1995).

Oral Findings of Fact Held Sufficient. — Trial judge's failure to make written findings of fact did not violate G.S. 15A-977(f), because there was no material conflict of evidence, and thus, oral findings were sufficient. State v. Toney, 187 N.C. App. 465, 653 S.E.2d 187, 2007 N.C. App. LEXIS 2448 (2007).

Findings Binding on Appellate Courts. — Subsection (f) requires that the trial court make findings of fact and conclusions of law when ruling upon a motion to suppress; these findings of fact are conclusive and binding upon appellate courts if supported by competent evidence. State v. Rogers, 124 N.C. App. 364, 477 S.E.2d 221 (1996).

Trial court's finding of fact that defendant was not coerced into a confession due to threats made against his wife or suggested by law-enforcement officials was supported by competent evidence and, thus, binding on appeal; defendant was aware of his constitutional right to remain silent when he chose to speak and both police officers testified that at no point did they indicate to defendant that his wife would be charged if he did not confess, nor did they promise defendant anything if he offered a confession. State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

This section does not require that find-

ings be made in writing at the time of the ruling. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

Findings Sufficient to Support Denial of Motion to Suppress. — Although the trial court's findings in support of its denial of defendant's motion to suppress an officer's identification of defendant were cursory, the findings were sufficient to support the order because the trial court saw and observed the witnesses, found the identification was not suggestive, and indicated that any doubts went to credibility and weight not to admissibility. State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Where defendant did not show prejudice from the failure of the trial court to make findings at the time that the rulings on motion to suppress were made his assignment of error is meritless. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

Trial judge complied with G.S. 15A-977(f) when the judge announced his ruling in open court and later filed a written order setting forth his findings of fact and conclusions of law. State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003), cert. denied, 357 N.C. 464, 586 S.E.2d 274 (2003), aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004).

Failure to File Written Findings Not Error. — Although trial court failed to enter written order with the clerk regarding its decision on defendant's motion to suppress identification testimony, no error was found because there was no conflict in the evidence, as the witness was the only voir dire witness on the issue of the admissibility of her identification. State v. Thompson, 187 N.C. App. 341, 654 S.E.2d 486, 2007 N.C. App. LEXIS 2432 (2007).

Since a trial court provided from the bench its rationale for denying defendant's motion to suppress and there were no material conflicts in the evidence, the court inferred, pursuant to G.S. 15A-977(f), that the trial court made the findings necessary to support the denial of the motion to suppress. State v. Williams, — N.C. App. —, 673 S.E.2d 394, 2009 N.C. App. LEXIS 215 (2009).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

(a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

(b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

(1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or

(2) There is corroboration of the informant's existence independent of the testimony in question.

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

(c) This section does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a search made without a warrant. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is derived from American Law Institute, Model Code of Pre-Arraignment Procedure — Tentative Draft No. 4 § 8.03 (1971).

The basic question presented is this: Suppose an informer supplies false information to a law-enforcement officer; the officer believes the information and uses it in good faith to obtain a search warrant; the magistrate believes the officer and finds probable cause; the information if true, along with other facts available to the officer, would indeed constitute probable cause and the warrant is valid on its face; a search is made under the authority of the warrant, and by chance evidence of a crime is discovered despite the underlying falsity of the informer's information — should the evidence obtained with the warrant be excluded? The answer provided by subsection (a) is "no." The A.L.I. commentary to § 8.03 states the following:

"The draft embodies the conclusion that the testimony given in support of probable cause should be subject to challenge on the ground that it was untruthful in the sense that it was not given in good faith, but not on the ground that it was objectively inaccurate due to honest mistake. When the witness (usually an officer) has given hearsay evidence by reporting what he had been told by an informant, the Council's conclusion, reached by a vote of 18 to 6, was that the truth of the hearsay evidence so reported should not be open to challenge, as long as the officer's report of the hearsay evidence was an honest report.

"The Reporters are not in agreement with the last conclusion. It has the result of immunizing the hearsay from, while subjecting the direct testimony to, contradiction, and under such a rule the police have everything to lose and nothing to gain from producing the informants directly to the magistrate, whereas the thrust of policy should be the other way. . . ."

One important factor in the Commission's determination to go along with the Council of the American Law Institute is its belief that the use of a warrant is to be encouraged. Subsection (c) is intended to make it clear that attacks upon the validity of probable cause for a search without a warrant are left to case law development. If for example, an officer made an emergency search without a warrant in good-faith reliance upon a false report from an informer, but inadvertently uncovered evidence of a crime, the rule laid down in subsection (a) should not be treated as giving even analogous guidance to the courts in deciding whether such a search is valid.

Subsection (b) treats the thorny problem of revealing the identity of an informer. Subdivision (1) embodies the Commission's preference for actions taken under a warrant. Subdivision (2) is intended to state the general trend of the case law on this point. It should be noted that as introduced subdivision (2) required substantial corroboration of the informant's existence and reliability. The General Assembly was persuaded to amend primarily upon the argument that the minimum standard will be set by case law construing constitutional requirements and that the Commission's wording possibly sets a higher standard than is absolutely required — or may later be required under rulings of the Burger Court.

Cross References. — As to search warrants, see G.S. 15A-241 et seq.

Legal Periodicals. — For survey of 1980 criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For a note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

I. General Consideration.
II. Identity of Informant.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided under former law.*

Challenge to Good Faith of Affiant. — Subsection (a) of this section permits a defendant to challenge the validity of a search warrant by attacking the good faith of the affiant in providing information relied upon to establish probable cause. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Hearing Required. — When a defendant makes allegations that an affidavit to support the issuance of a search warrant contains deliberate falsehood or reckless disregard for the truth and the affidavit would not be sufficient to support the issuance of a search warrant without the false or reckless statements, the defendant is entitled to a hearing on his allegations. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993), cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

Bad Faith Required. — A claim is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements; rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Unsupported Allegation of Bad Faith. — Where defendant's second motion to suppress questioned affiant's good faith but her affidavit in support of the motion merely attempted to point out factual inaccuracies in officers' application for search warrant, defendant's affidavit failed to support the additional allegation contained in her motion, and the motion was subject to being denied under G.S. 15A-977(c). State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Variance Between Affidavit and Report. — Variance between affidavit, which stated that informant had been inside house, and officers' supplemental report, did not show that the officers were acting in bad faith when they provided sworn information to the magistrate. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Question Presented by Motion. — When a defendant moves to suppress evidence obtained by a search warrant upon the ground that there was no probable cause for issuance of the search warrant, the inquiry before the court is whether the issuance of the warrant comports with the statute and whether the issuing officer was justified in finding probable cause. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973), appeal dismissed, 285 N.C. 666, 207 S.E.2d 752 (1974), overruled on other grounds, State v. Harris, 25 N.C. App. 404, 213 S.E.2d 414 (1975).

No Probable Cause Where Statements False. — False statements in a search warrant affidavit required suppression of the evidence obtained in a search, because probable cause was not supported once the false statements were stricken from the affidavit. State v. Severn, 130 N.C. App. 319, 502 S.E.2d 882 (1998).

Good Faith And Probable Cause Found. — The officers applying for the search warrant acted in good faith and it was issued based on a sufficient showing of probable cause. They did not overly rely on the fact that victim's bloody body was discovered on the same day that defendant was arrested on a different charge wearing blood-stained clothing or on the finding of glass particles on defendant's clothing which could have, but did not, come from the victim's door, nor did they misrepresent those facts to the magistrate. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

Denial of Motion Where Information Sufficient to Establish Probable Cause. — Where there was sufficient information in the affidavit, upon which search warrant issued, to establish probable cause that illegal drug activity and drug paraphernalia would be found on the premises to be searched, the trial court properly denied defendant's motion to suppress the evidence. State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994), cert. denied and appeal dismissed, 336 N.C. 75, 445 S.E.2d 39 (1994).

Scope of Challenge Under Subsection (a). — Subsection (a) of this section permits a defendant to challenge only whether the affiant acted in good faith in including the information used to establish probable cause; it does not permit a defendant to attack the factual accuracy of the information supplied by an informant to the affiant. In re Caver, 40 N.C. App. 264, 252 S.E.2d 284 (1979).

Subsection (a) of this section permits a defendant to contest the validity of a search warrant by attacking the good faith of the affiant in providing the information, and not by attacking the factual accuracy of the information relied upon to establish probable cause. State v. Kramer, 45 N.C. App. 291, 262 S.E.2d 693, cert. denied, 300 N.C. 200, 269 S.E.2d 627 (1980).

Standing to Move for Suppression. — Where the search and seizure was directed to a rifle in a friend's residence, defendant came within the class who can only claim prejudice through the use of evidence gathered as a consequence of a search or seizure directed to someone else. This class is not one for whose sake the constitutional protection is given. Thus defendant was not the victim of an invasion of privacy and had no standing to object to the introduction of the evidence. State v. Nickerson, 13 N.C. App. 125, 185 S.E.2d 326 (1971), cert. denied, 280 N.C. 304, 186 S.E.2d 179; 408 U.S. 925, 92 S. Ct. 2503, 33 L. Ed. 2d 336 (1972).

Trespassers Have No Standing to Challenge Search of Premises. — Defendants had no standing to challenge the lawfulness of a search of a premises occupied by defendants where defendants were trespassers on the property, notwithstanding the State relied on the doctrine of recent possession of stolen property found in the premises in prosecuting defendants for breaking and entering and larceny. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Defendants were not prejudiced by the trial court's denial of their motion for a voir dire examination on the question of the legality of a search of the premises occupied by defendants, where the evidence showed that defendants were trespassers on the premises and had no standing to contest the validity of the search. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Findings of Fact. — Upon voir dire hearing, the court should receive evidence and make findings of fact. In this respect there is no distinction between the admissibility of a confession and the admissibility of evidence obtained by a search without a warrant. The determining fact in each of these instances is whether the confession or the consent to the search was given voluntarily and without compulsion by the officers. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

Applied in State v. Sneed, 36 N.C. App. 341, 243 S.E.2d 908 (1978); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979); State v. Reddick, 55 N.C. App. 646, 286 S.E.2d 654 (1982); State v. Creason, 68 N.C. App. 599, 315 S.E.2d 540 (1984); State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Walker, 70 N.C. App. 403, 320 S.E.2d 31 (1984); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Monserrate, 125 N.C. App. 22, 479 S.E.2d 494 (1997).

Cited in State v. Louchheim, 296 N.C. 314, 250 S.E.2d 630 (1979); State v. Caldwell, 53 N.C. App. 1, 279 S.E.2d 852 (1981); State v. Hodges, 51 N.C. App. 229, 275 S.E.2d 533 (1981); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997); State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

II. IDENTITY OF INFORMANT.

The privilege of allowing the identity of an informant to remain confidential is not absolute. When an accused can show that disclosure is essential to a fair determination of defendant's rights under the Fourth and Fifth Amendments, nondisclosure is rendered erroneous. State v. Craver, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

When Disclosure of Informant's Identity Required. — Ordinarily, a defendant is not necessarily entitled to elicit the name of a confidential informant. But when the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause, disclosure is required. State v. Cherry, 55 N.C. App. 603, 286 S.E.2d 368, cert. denied, 305 N.C. 589, 292 S.E.2d 572 (1982).

Reliability of Informant Not Relevant to Disclosure of Identity. — The reliability of the informant is not relevant on the question of whether subdivision (b)(2) of this section requires that his identity be disclosed. The statute only requires corroboration of the informant's existence at the time he is supposed to have given the confidential information. State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Failure to Show Need. — Defendant failed to meet defendant's burden of showing a need for the confidential informant's identity where the confidential informant's only role was to make a controlled buy of cocaine as part of the initial police investigation into drug sales at defendant's address. State v. Stokley, 184 N.C. App. 336, 646 S.E.2d 640, 2007 N.C. App. LEXIS 1464 (2007).

Corroboration Held Sufficient. — Corroboration of the existence of an informant was sufficient under subdivision (b)(2) of this section where a second officer testified that he knew of the informant's existence on the day of the arrest and was well acquainted with the informant, and that the first officer correctly predicted the defendant's future behavior based upon information he said came from the informant. State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

The trial court did not err in refusing to allow defendant, who was charged with possession of marijuana and methaqualane, to ask questions concerning the identity of a confidential informant whose tip led to defendant's arrest where an officer's testimony that he listened to telephone conversations between the informant and another officer provided sufficient corroboration of the informant's existence independent of the testimony in question. State v. Ellis, 50 N.C. App. 181, 272 S.E.2d 774 (1980).

Where there was independent corroboration of the testimony of the chief witness, defendant was not entitled to know the identity of the informant. State v. Willis, 67 N.C. App. 320, 313 S.E.2d 173, cert. denied, 311 N.C. 407, 319 S.E.2d 280 (1984).

Defendant's mere denial of the existence of the State's confidential informant failed to rebut the presumed validity of the search warrant. Therefore, the trial judge was correct in summarily denying defendant's motion to suppress the evidence seized pursuant to the warrant and in denying defendant's request for an evidentiary hearing as to the good faith of the officer's affidavit in support of the warrant. State v. Locklear, 84 N.C. App. 637, 353 S.E.2d 666 (1987).

Hearing with Informant Not Required. — Motion that court adopt a rule requiring a trial judge, upon a defendant's motion, to conduct an in-camera hearing with the informant when a defendant challenges the good faith of an affiant to a search warrant denied. State v. Locklear, 84 N.C. App. 637, 353 S.E.2d 666 (1987).

Disclosure of Identity Not Required. — Where there was no indication that informant participated in any way in stealing of car or robbery-murder, defendant's motion to compel disclosure of informant's identity was properly denied. State v. Williams, 319 N.C. 73, 352 S.E.2d 428 (1987).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

(a) Upon granting a motion to suppress evidence the judge must order that the evidence in question be excluded in the criminal action pending against the defendant. When the order is based upon the ground of an unlawful search and seizure and excludes tangible property unlawfully taken from the defendant's possession, and when the property is not contraband or otherwise subject to lawful retention by the State or another, the judge must order that the property be restored to the defendant at the conclusion of the trial including all appeals.

(b) An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

(d) A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 723.)

OFFICIAL COMMENTARY

This section contains two important new sections.

The first, in subsection (b), permits a defendant whose motion to suppress was denied to plead guilty and then appeal the ruling of the judge on the motion. If the appellate court sustains the ruling on the motion, the conviction stands; if the ruling on the motion is overturned, then the defendant is entitled to a new trial at which the evidence would be suppressed. This provision is intended to prevent a defendant whose only real defense is the motion to suppress from going through a trial simply to preserve his right of appeal. This section on its face would apply whether the appeal is from district court or superior court, though the right of trial de novo already guarantees the defendant the right to renew motions in superior court — even after a plea of guilty. If the superior court judge reaffirms the ruling denying the motion to suppress, however, the Constitution of North Carolina may force the defendant either to plead guilty in superior court or go to trial; the judge apparently would not be empowered to "affirm" the district court judgment.

The second important provision in the section is subsection (c). It allows the State to take an interlocutory appeal from superior court to the appellate division of the General Court of Justice if the judge grants a motion to suppress prior to trial. The phrase "prior to trial" unquestionably will be interpreted to mean prior to the attachment of jeopardy. The only requirement for staying the proceedings so the State may appeal is for the solicitor to make an appeal motion before the superior court judge accompanied by a certificate that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

Legal Periodicals. — For article discussing impeachment of the defendant-witness and use of the motion in limine as a measure of protection, see 13 N.C. Cent. L.J. 35 (1981).

For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For comment discussing search and seizure in North Carolina in light of State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), see 19 Wake

Forest L. Rev. 675 (1983).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

I. General Consideration.
II. Appeal From Denial of Motion.
III. Appeal From Grant of Motion.

I. GENERAL CONSIDERATION.

General Objection Insufficient to Challenge Evidence. — This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

The clear implication of subsection (d) of this section is that motions to suppress evidence which are not based on the two grounds specified in G.S. 15A-974 may or may not be made in limine. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Review of Judgment on Motion Made In Limine. — When the motion to suppress must be and is made in limine or can be and is made in limine, then the defendant can appeal if the motion is denied and he enters a plea guilty; and the State can appeal if the motion is granted. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Trial Court's Change of Decision from Pretrial Grant. — Trial court did not err by changing its decision with regard to defendant's motion to suppress and subsequently allowing drug-related evidence seized from the shrubbery around defendant's mobile home at trial, because a ruling on such a motion was preliminary in nature, which did not automatically cause exclusion pursuant to G.S. 15A-979(a). Since the trial court's ruling on the motion to suppress was not final, it was well within the trial court's authority to reverse its decision at trial. State v. McNeill, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005).

Appeal from Imposition of Death Penalty or Life Imprisonment. — When this section and G.S. 7A-27(a) are considered together, it is proper to appeal directly to the Supreme Court if the punishment for the charge(s) is either death or life imprisonment. State v. Silhan, 295 N.C. 636, 247 S.E.2d 902 (1978).

Defendant who entered a plea of guilty to 10 misdemeanors was not entitled to appeal as a matter of right, since none of the exceptions in G.S. 15A-979 or G.S. 15A-1444 applied. State v. Noll, 88 N.C. App. 753, 364 S.E.2d 726 (1988).

Admission of Statements Given to Police. — Although the appellate court stated that the better practice was to give defendants their Miranda rights orally and in writing, it found that a police officer who interviewed defendant did not violate her rights because he asked her to read the warnings, or because he questioned her even though he knew she had appointed counsel on a different charge that arose out of the same course of conduct, and the appellate court found that defendant understood her rights and voluntarily waived them. State v. Strobel, 164 N.C. App. 310, 596 S.E.2d 249, 2004 N.C. App. LEXIS 826 (2004), appeal dismissed, cert. denied, 359 N.C. 286, 610 S.E.2d 712 (2005), cert. denied, — U.S. —, 125 S. Ct. 2977, 162 L. Ed. 2d 889 (2005).

Defendant's first degree murder conviction was affirmed because the trial court did not err by denying defendant's motion to suppress defendant's written confession as defendant's written waiver of defendant's Miranda rights and defendant's written confession were made understandingly, knowingly, and voluntarily with the assistance of a police officer who acted as defendant's interpreter. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Physical Evidence Did Not Have to Be Suppressed. — Physical evidence obtained due to defendant's statements to police as to the location of the victim's body, obtained in violation of defendant's Miranda and Edwards rights, was not fruit of the poisonous tree and did not have to be suppressed under the exclusionary rule. State v. Goodman, 165 N.C. App. 865, 600 S.E.2d 28, 2004 N.C. App. LEXIS 1521 (2004), cert. denied, 359 N.C. 193, 607 S.E.2d 655 (2004).

Because the search pursuant to a warrant was conducted after the forced entry and after defendant was read a copy of the warrant and defendant's Miranda rights, and because the cocaine would have likely been located in the absence of the forced entry, the contraband was not obtained "as a result of" an improper entry, in violation of G.S. 15A-251, and thus was not subject to suppression. State v. White, 184 N.C.

App. 519, 646 S.E.2d 609, 2007 N.C. App. LEXIS 1475 (2007).

Certification Lacking. — The Court of Appeals was without jurisdiction where the state did not follow the mandate of subsection (c) as there was no indication in the record that the prosecutor certified to the trial court (which granted the motion to suppress) that the appeal was not taken to cause delay and the suppressed evidence was essential to the State's case. State v. Judd, 128 N.C. App. 328, 494 S.E.2d 605 (1998).

Detention of Passenger of Vehicle at a Traffic Stop Was Justified. — Defendant's motion to suppress was properly denied where defendant was a passenger in a car that was stopped for a valid traffic infraction and defendant's suspicious behavior and the discovery of drugs in the car gave officers a reasonable articulable suspicion to detain defendant. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Applied in State v. Johnson, 29 N.C. App. 698, 225 S.E.2d 650 (1976); State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186 (1976); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976); State v. Downing, 31 N.C. App. 743, 230 S.E.2d 581 (1976); State v. Montgomery, 33 N.C. App. 225, 234 S.E.2d 434 (1977); State v. Jordan, 40 N.C. App. 412, 252 S.E.2d 857 (1979); State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979); State v. McDonald, 55 N.C. App. 393, 285 S.E.2d 282 (1982); State v. Mack, 57 N.C. App. 163, 290 S.E.2d 741 (1982); State v. Rivard, 57 N.C. App. 672, 292 S.E.2d 174 (1982); State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982); State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983); State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985); State v. Turner, 94 N.C. App. 584, 380 S.E.2d 619 (1989); State v. Christie, 96 N.C. App. 178, 385 S.E.2d 181 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Tew, 326 N.C. 732, 392 S.E.2d 603 (1990); State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (1993); State v. Wooding, 117 N.C. App. 109, 449 S.E.2d 760 (1994); State v. Howie, 153 N.C. App. 801, 571 S.E.2d 245, 2002 N.C. App. LEXIS 1270 (2002); State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004); State v. Parker, 183 N.C. App. 1, 644 S.E.2d 235, 2007 N.C. App. LEXIS 835 (2007); State v. Evans, 184 N.C. App. 736, 646 S.E.2d 859, 2007 N.C. App. LEXIS 1600 (2007); State v. Rollins, 189 N.C. App. 248, 658 S.E.2d 43, 2008 N.C. App. LEXIS 547 (2008); State v. Hatley, 190 N.C. App. 639, 661 S.E.2d 43, 2008 N.C. App. LEXIS 1013 (2008).

Cited in State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437; State v. Brown, 29 N.C. App. 180, 223 S.E.2d 572 (1976); State v. Williams, 32 N.C. App. 204, 231 S.E.2d 282 (1977); State v. Flynn, 33 N.C. App. 492, 235 S.E.2d 424 (1977); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917 (1977); State v. Thomas, 34 N.C. App. 534, 239 S.E.2d 281 (1977); State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978); State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978); State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189 (1978); State v. McLeod, 36 N.C. App. 469, 244 S.E.2d 716 (1978); State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634 (1978); State v. Phifer, 297 N.C. 216, 256 S.E.2d 586 (1979); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Stinson, 39 N.C. App. 313, 249 S.E.2d 891 (1979); State v. Prevette, 39 N.C. App. 470, 250 S.E.2d 682 (1979); State v. Forrest, 41 N.C. App. 160, 254 S.E.2d 194 (1979); State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979); State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979); State v. Whitt, 299 N.C. 393, 261 S.E.2d 914 (1980); State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980); State v. Wynn, 45 N.C. App. 267, 262 S.E.2d 689 (1980); State v. Cooper, 52 N.C. App. 349, 278 S.E.2d 532 (1981); State v. Murrell, 54 N.C. App. 342, 283 S.E.2d 173 (1981); State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981); State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982); State v. Cooper, 304 N.C. 701, 286 S.E.2d 102 (1982); State v. Mavrogianis, 57 N.C. App. 178, 291 S.E.2d 163 (1982); State v. Weatherford, 60 N.C. App. 196, 298 S.E.2d 168 (1982); State v. Schneider, 60 N.C. App. 185, 298 S.E.2d 432 (1982); State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983); State v. Byrd, 60 N.C. App. 740, 300 S.E.2d 16 (1983); State v. Sugg, 61 N.C. App. 106, 300 S.E.2d 248 (1983); State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Holloway, 66 N.C. App. 491, 311 S.E.2d 707 (1984); State v. Darack, 66 N.C. App. 608, 312 S.E.2d 202 (1984); State v. Ford, 71 N.C. App. 748, 323 S.E.2d 358 (1984); State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985); State v. Thomas, 81 N.C. App. 200, 343 S.E.2d 588 (1986); State v. Tarantino, 83 N.C. App. 473, 350 S.E.2d 864 (1986); State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987); State v. White, 84 N.C. App. 111, 351 S.E.2d 828 (1987); Holloway v. Woodard, 655 F. Supp. 1245 (W.D.N.C. 1987); State v. Bolinger, 320 N.C. 596, 359 S.E.2d 459 (1987); State v. Braxton, 90 N.C. App. 204, 368 S.E.2d 56 (1988); State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988); State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989); Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990); State v. Green, 103 N.C. App. 38, 404 S.E.2d 363 (1991); State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991); State v. Hudson, 103 N.C. App. 708, 407 S.E.2d 583 (1991); State v. Battle, 109 N.C.

App. 367, 427 S.E.2d 156 (1993); State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (1993); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Shannon, 117 N.C. App. 718, 452 S.E.2d 825 (1995); State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995); State v. Munsey, 342 N.C. 882, 467 S.E.2d 425 (1996); State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996); State v. Hamilton, 125 N.C. App. 396, 481 S.E.2d 98 (1997); State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998); State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998); State v. Fisher, 141 N.C. App. 448, 539 S.E.2d 677, 2000 N.C. App. LEXIS 1409 (2000); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Castellon, 151 N.C. App. 675, 566 S.E.2d 696, 2002 N.C. App. LEXIS 860 (2002); State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002); State v. McRae, 154 N.C. App. 624, 573 S.E.2d 214, 2002 N.C. App. LEXIS 1523 (2002); State v. Bivens, 155 N.C. App. 645, 573 S.E.2d 259, 2002 N.C. App. LEXIS 1611 (2002); State v. McHone, 158 N.C. App. 117, 580 S.E.2d 80, 2003 N.C. App. LEXIS 940 (2003); State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003); State v. Wolfe, 158 N.C. App. 539, 581 S.E.2d 117, 2003 N.C. App. LEXIS 1182 (2003); State v. McArn, 159 N.C. App. 209, 582 S.E.2d 371, 2003 N.C. App. LEXIS 1428 (2003); State v. Johnson, 177 N.C. App. 122, 627 S.E.2d 488, 2006 N.C. App. LEXIS 695 (2006); State v. Branch, 177 N.C. App. 104, 627 S.E.2d 506, 2006 N.C. App. LEXIS 713 (2006); State v. McLamb, 186 N.C. App. 124, 649 S.E.2d 902, 2007 N.C. App. LEXIS 1981 (2007); State v. Styles, 362 N.C. 412, 665 S.E.2d 438, 2008 N.C. LEXIS 685 (2008); State v. Smith, — N.C. App. —, 668 S.E.2d 612, 2008 N.C. App. LEXIS 2021 (2008).

II. APPEAL FROM DENIAL OF MOTION.

Review of Granted Motion Compared. — Unlike an order granting a motion to suppress evidence in a criminal case, which is appealable prior to trial, an order denying a defendant's motion to suppress may be reviewed only after a judgment of conviction. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Implied Prohibition Against Appeal from Other Orders. — When the General Assembly granted the right to appeal orders finally denying motions to suppress upon an appeal from a judgment of conviction, it impliedly prohibited appeals from such orders at any other time. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Notice of Intention to Appeal Required. — When a defendant intends to appeal from a suppression motion denial pursuant to subsection (b) of this section, he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2164, 64 L. Ed. 2d 795 (1980); State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980); State v. Peck, 54 N.C. App. 302, 283 S.E.2d 383 (1981), aff'd, 305 N.C. 734, 291 S.E.2d 637 (1982); State v. Atwell, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

The defendant must notify the district attorney and the trial court of his intention to appeal the denial of the suppression motion at the sentencing hearing. State v. Walden, 52 N.C. App. 125, 278 S.E.2d 265 (1981).

Defendant waived his G.S. 15A-979(b) right to appeal an order denying defendant's suppression motion after he pleaded guilty where defendant failed to notify the State and the trial court during plea negotiations of defendant's intention to appeal the denial of his motion to suppress. State v. Stevens, 151 N.C. App. 561, 566 S.E.2d 149, 2002 N.C. App. LEXIS 771 (2002).

Although defendant pled guilty to a driving while impaired charge, defendant properly preserved the issue of whether the trial court erred in denying defendant's motion to suppress by notifying both the State and the trial court that she intended to appeal. State v. Hatley, 190 N.C. App. 639, 661 S.E.2d 43, 2008 N.C. App. LEXIS 1013 (2008).

Failure to Comply Results in Dismissal of Appeal. — The defendant's failure to present on appeal that he had notified the court and the prosecution of his intent to appeal, in compliance with this section, resulted in the dismissal of his appeal, even though the State acknowledged having notice. State v. Brown, 142 N.C. App. 491, 543 S.E.2d 192, 2001 N.C. App. LEXIS 144 (2001).

Defendant's appeal was dismissed as he waived his right to appeal issues relating to the denial of his motion to suppress by failing to specifically reserve his right of appeal on the transcript of plea; the dismissal was without prejudice to defendant's right to seek an evidentiary hearing in superior court to determine whether the guilty plea was in fact entered reserving defendant's right to appeal the denial of the motions to suppress. State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Defendant was found guilty on one charge, and pled guilty to two additional charges, but he did not preserve his appeal on the order denying his motion to suppress when he pled guilty thus waiving his appeal on the denial of the motion with respect to the two guilty pleas under G.S. 15A-979(b). State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App.

LEXIS 90 (2007), rev'd, in part, remanded 362 N.C. 224, 657 S.E.2d 351 (2008).

Time for Appealing Denial of Motion Made for First Time at Trial. — When the motion to suppress can be and is made for the first time at trial, then, if the motion is denied, an order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Denial of Motion Prior to Trial Ending in Mistrial. — An order denying a defendant's motion to suppress prior to the first trial which ended in a mistrial was an order finally denying a motion to suppress evidence which could be brought forward as a part of an appeal from the later judgment of conviction in the second trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Right to Appeal Conditional. — Subsection (b) allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea; however, this right to appeal is conditional, not absolute. State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995).

While G.S. 15A-979(b) allows appellate review of the denial of a motion to suppress upon appeal from a judgment entered on a guilty plea, this statutory right to appeal is conditional, not absolute; a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty, and such notice must be specifically given. State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Burden on Defendant. — Pursuant to the statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty. State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995).

Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Even though defendant entered a plea of guilty to the charges against him, he preserved his right of appeal pursuant to this section from the denial of his motion to suppress the evidence seized in the search. State v. Rhyne, 124 N.C. App. 84, 478 S.E.2d 789 (1996).

Review Was Allowed as the Habitual Felony Indictment was Inextricably Linked to the Underlying Felony. — Although defendant's motion to suppress related to the underlying felony, since the habitual felon indictment was inextricably linked to the felony by the fact that defendant pled guilty to both in the same plea agreement and the fact that the charge would have subjected defendant to an increased punishment, the jurisdiction of the trial court could be addressed over either indictment pursuant to G.S. 15A-979(b). State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5, cert. granted, 357 N.C. 660, 589 S.E.2d 882 (2003).

Defendant Properly Notified Prosecution in Text of Motion to Suppress. — Where defendant entered a guilty plea to the offense, defendant was permitted to appeal the denial of the motion to suppress pursuant to G.S. 15A-979(b), as defendant, in the text of the motion to suppress, notified the prosecution of defendant's reservation of the right to appeal the issue. State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

Motion Properly Denied. — Motion to suppress evidence phone calls that were recorded while defendant was a pre-trial detainee was denied because there was no violation of 18 U.S.C.S. § 2511 or G.S. 15A-287; defendant gave consent by continuing to talk after a message gave notice of a possible recordation. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Defendant's arrest and subsequent search conducted by a police officer were permissible under U.S. Const. amend. IV because the officer had sufficient probable cause, pursuant to G.S. 15A-401(b)(1) and (b)(2)(a), to believe that defendant was committing, or had committed, a felony in light of information provided by a confidential informant, to the effect that a black male matching defendant's description was selling drugs outside a local store in violation of G.S 90-95(a)(1) and (b)(1); the informant's 14 years of personal dealings with the officer resulting in over 100 arrests and numerous convictions allowed the conclusion that the informant was reliable. State v. Stanley, 175 N.C. App. 171, 622 S.E.2d 680, 2005 N.C. App. LEXIS 2707 (2005).

Where an officer observed defendant drive over a curb, back away from the officer, and reach into a pocket, in a location known for drug activity, defendant's motion to suppress was properly denied because the officer had reasonable suspicion to make an investigatory stop and had probable cause to seize a film canister from defendant's pocket during a patdown for weapons based on, inter alia, defendant's actions, the area's reputation, and the officer's prior experiences. State v. Robinson, 189 N.C. App. 454, 658 S.E.2d 501, 2008 N.C. App. LEXIS 648 (2008).

III. APPEAL FROM GRANT OF MOTION.

Right to Appeal. — Because a superior court must remand a matter heard pursuant to G.S. 20-38.7(a) to a district court for a final entry of judgment on a defendant's pretrial motion, the State will not be able to appeal to the appellate division pursuant to G.S. 15A-979(c) if the superior court determines that a defendant's pretrial motion to suppress should be granted. State v. Fowler, — N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

Scope of Appellate Review. — Generally, an appellate court's review of a trial court's order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion; where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Motion to suppress evidence following a stop of a driver was properly granted because the driver's 8-second delay before proceeding through a traffic light did not create a sufficiently reasonable articulation of suspicion of criminal activity to justify stopping the driver for driving while ability impaired, especially where there was nothing suspicious about driving once she passed into the intersection. State v. Roberson, 163 N.C. App. 129, 592 S.E.2d 733, 2004 N.C. App. LEXIS 295 (2004), cert. denied, 358 N.C. 240, 594 S.E.2d 199 (2004).

On appeal by the State of an order against the State suppressing evidence seized from defendant's suitcase, the scope of appellate review is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

Subsection (c) Procedure Prerequisite to Appeal. — The language of subsection (c) of this section making orders of the superior court granting motions to suppress evidence appealable to the appellate division prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case, constitutes a statutory prerequisite which must be met in order for the State to have the right to appeal, prior to trial, an order granting a motion to suppress. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

To give the State the right to file the certificate required by subsection (c) of this section, after the case has already been docketed in the appellate court would be to reduce the requirement of the certificate to a nullity. State v. Blandin, 60 N.C. App. 271, 298 S.E.2d 759 (1983).

The State has no right to appeal an order granting defendant's motion to suppress evidence where the record fails to show that the prosecutor certified to the judge who granted the motion that the appeal was not being taken for the purpose of delay and that the suppressed evidence was essential to the case as required by subsection (c) of this section. State v. Blandin, 60 N.C. App. 271, 298 S.E.2d 759 (1983).

When Subsection (c) Certificate Must Be Filed. — The certificate envisioned by subsection (c) of this section is timely filed if it is filed prior to the certification of the record on appeal to the appellate division. The State is not required to pursue its right of appeal by submitting to the trial judge the certificate required by subsection (c) within the 10-day time period the case remains viable for appeal under G.S. 15A-1448(a)(1). State v. Turner, 305 N.C. 356, 289 S.E.2d 368 (1982).

Section 15A-1448(a)(1) and subsection (c) of this section need not be construed together to require that the prosecutor's certificate also be filed within 10 days of judgment. State v. Lay, 56 N.C. App. 796, 290 S.E.2d 405, cert. denied and appeal dismissed, 306 N.C. 390, 294 S.E.2d 216 (1982).

The certificate envisioned by subsection (c) of this section is timely filed if it is filed prior to the certification of the record on appeal to the appellate division. State v. Blandin, 60 N.C. App. 271, 298 S.E.2d 759 (1983).

Burden of Showing Compliance Is on State. — Subsection (c) of this section not only requires the State to raise its right to appeal according to the statutory mandate, but also places the burden on the State to demonstrate that it had done so. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

(a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:

(1) Increase the degree of crime of which the defendant would be guilty; or

(2) Result in a sentence of imprisonment that otherwise would not be imposed; or

(3) Result in a lengthened sentence of imprisonment.

(b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.

(c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a). (1983, c. 513, s. 1.)

Legal Periodicals. — For a note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

Under subsection (c), defendant has the burden of proving, by a preponderance of the evidence, that at the time of his conviction he was indigent, had no counsel, and had not waived his right to counsel. Defendant must meet his burden on all three facts. State v. Brown, 87 N.C. App. 13, 359 S.E.2d 265 (1987).

Where court ruled that defendant's waiver of counsel was knowing and voluntary, but its findings of fact ignored defendant's youth, low educational attainments, and the time defendant spent in jail before signing the waiver, defendant successfully carried the burden of showing by a preponderance of the evidence, as required by G.S. 15A-980(c), that there had not been a knowing waiver by defendant to the right of counsel; thus, the habitual felon conviction, which was predicated on the challenged conviction, had to be vacated. State v. Fulp, 144 N.C. App. 428, 548 S.E.2d 785, 2001 N.C. App. LEXIS 436 (2001), cert. granted, 354 N.C. 71, 553 S.E.2d 205 (2001).

Prior Convictions Obtained in Violation of Right to Counsel. — Admission of prior convictions obtained in violation of the right to counsel for purposes of impeachment or to affect the length of sentence violates this section. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Silence at Trial Precludes Raising Issue on Appeal. — Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Where defendant neither objected nor moved to suppress evidence of prior conviction, he was precluded from raising the issue of his indigency and lack of counsel on appeal. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

Denial of Motion Upheld. — The trial court did not err in denying second-degree murder defendant's motion to suppress evidence of three prior convictions, later relied upon by the court as aggravating factors to support sentencing defendant to a term greater than the presumptive. State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (1993).

Where the trial court relied in part on two prior convictions to calculate defendant's prior record level for sentencing purposes, suppression of those convictions under G.S. 15A-980(c) for violation of the right to counsel was not required; defendant did not sustain his burden of proof, as he did not provide a supporting affidavit with the motion. State v. Frady, 175

N.C. App. 393, 623 S.E.2d 346, 2006 N.C. App. LEXIS 53 (2006).

Defendant failed to prove that his prior convictions were obtained in violation of his right to counsel and thus, suppression under G.S. 15A-980 was properly denied. State v. Jordan, 174 N.C. App. 479, 621 S.E.2d 229, 2005 N.C. App. LEXIS 2481 (2005), cert. denied, — U.S. —, 126 S. Ct. 2900, 165 L. Ed. 2d 926 (2006).

Applied in State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757 (1991); State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657, 2002 N.C. App. LEXIS 1126 (2002); State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

Cited in State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); State v. Moore, 64 N.C. App. 686, 308 S.E.2d 358 (1983); State v. Braswell, 78 N.C. App. 498, 337 S.E.2d 637 (1985); State v. Haislip, 79 N.C. App. 656, 339 S.E.2d 832 (1986); State v. Smith, 96 N.C. App. 235, 385 S.E.2d 349 (1989); State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

ARTICLE 54.

§§ 15A-981 through 15A-990: Reserved for future codification purposes.

ARTICLE 55.

§§ 15A-991 through 15A-1000: Reserved for future codification purposes.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

OFFICIAL COMMENTARY

This Article has two major objectives. The first is to codify the rule of law which provides that a defendant may not be tried (or punished) when he lacks mental capacity to proceed, and to provide adequate procedures for determining when that situation exists. See State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968). The second is to provide appropriate procedures for the commitment and care of a defendant who is not capable of being tried, and to provide for his return for trial in the event that he does gain capacity. A number of sources were consulted for ideas for this draft, including North Carolina case and statutory law, the New York Criminal Procedure Law, the Model Penal Code, and proposed rules for the State of Arizona, but the result is not a wholesale copy of any of these.

The definition of incapacity is intended to be inclusive, and would appear to be both self-explanatory and flexible enough to cover appropriate situations. The proceeding prior to trial required by the Propst case is provided. In addition to existing provisions for temporary commitment to a State hospital, the court is given additional sources of information by the provisions permitting the appointment of medical experts.

A provision not found in the former law is that in G.S. 15A-1501(b) which permits the court to go forward in matters which may be handled by counsel without the assistance of the defendant. If, for example, the pleadings charge facts which do not amount to a crime, there is no reason to delay that determination.

The second major objective requires consideration of the case of Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). In that case the Supreme Court of the United States said,

"We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

In order to accomplish these requirements, this Article provides that when the trial court determines that the defendant does not have capacity to proceed, it will direct the initiation of civil commitment proceedings. This will eliminate the possibility that a defendant suffers extended commitment simply because he has been accused of a crime. Thus the defendant who is not dangerous, but who lacks capacity for trial, can be released. That result is required by the Jackson case. What the criminal court can do is to enter appropriate orders to provide for the return of the defendant for trial, as it can do for any other defendant. Ample authority for such orders is provided here.

In recent years there have been reported some rather striking instances when defendants were committed to a State institution and apparently forgotten. After many years they were "discovered" and a question arose as to how to dispose of the pending case. The Commission has devised a requirement for periodic reporting to the clerk (G.S. 15A-1004(d)) to prevent this from happening. In addition, authority for dismissal of the pending case is provided in three appropriate instances, as set out in G.S. 15A-1008.

The question of the determination of mental capacity is a much broader question than the provisions proposed here. Revision of the civil commitment provisions is beyond the assignment of the Criminal Code Commission, and there are problems that must be faced. The case of In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972), held unconstitutional certain portions of G.S. 122-86, dealing with the disposition of persons acquitted by reason of insanity. If the Commission is to work with that section, it necessarily must be done in connection with drafting for the trial stages of criminal procedure, a task remaining to be done when these sections were drafted. Codification or modification of the rules with regard to the capacity to commit crime is another area which is outside the scope of the present procedural codification.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant. (1973, c. 1286, s. 1.)

Legal Periodicals. — For article, "Review of the Presentence Diagnostic Study Procedure in North Carolina," see 8 N.C. Cent. L.J. 17 (1976).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For note, "State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina?," see 69 N.C.L. Rev. 1484 (1991).

For comment, "Criminal Defendants Deemed Incapable to Proceed to Trial: An Evaluation of North Carolina's Statutory Scheme," see 26 Campbell L. Rev. 41 (2004).

CASE NOTES

Relationship Between Mental Retardation, Competency to Stand Trial, and Forming Requisite Intent to Kill. — Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined State v. Ruof jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

Competency Evaluation Does Not Implicate Confrontation Rights. — The competency determination does not implicate defendant's state constitutional confrontation rights and does not have a substantial relation to his opportunity to defend; in fact, the competency evaluation is to ensure that a defendant is able to understand the nature and object of the proceedings against him before he is tried, convicted, sentenced, or punished for a crime. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Competency hearings do not implicate a defendant's confrontation rights and they do not have a substantial relation to his opportunity to defend. Therefore, whether or not defendant was competent at a retrospective competency hearing did not implicate his constitutional or statutory rights and it was proper to conduct the hearing without determining his competency. State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71, 2004 N.C. App. LEXIS 413 (2004), appeal dismissed, cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Purpose of Subsection (a). — Subsection (a) of this section expresses a legislative intent to alter the existing case law governing the determination of whether a defendant is mentally incapable of proceeding to trial. State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

This section is only concerned with defendant's mental capacity to proceed, rather than physical illness. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The objective of this section and G.S. 15A-1002 is to ensure that a defendant will not be tried or punished while mentally incapacitated. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

No Minimum Observation Period Required. — G.S. 15A-1002 did not set a minimum observation period in connection with a competency determination, and there was no error in finding defendant competent to stand trial based on a psychiatrist's examination of defendant which lasted only one hour and 40 minutes. State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902, 2003 N.C. App. LEXIS 2049 (2003).

Test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

As set out in this section, the test of a defendant's mental capacity to stand trial is whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985) and State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975), establish the proposition that a defendant does not have to be at the highest stage of mental alertness to be competent to be tried; so long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

No Constitutional Right to Have Counsel Present. — A capital murder defendant had no constitutional right to have counsel present during his competency evaluation. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Specific Finding of Ability to Cooperate with Counsel Not Required. — Subsection (a) of this section clearly sets forth in the disjunctive three tests of mental incapacity to proceed, and the failure to meet any one would suffice to bar criminal proceedings against a defendant. The statute does not, however, require the trial judge to make a specific finding that defendant is able to cooperate with his counsel to the end that any available defense may be interposed. State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

Lay Witness May Testify on Capacity to Proceed. — Where, in support of her motion before arraignment to determine her capacity to proceed to trial, defendant called two witnesses who had opportunity to observe defendant during her incarceration, one witness would have testified that after close and repeated observations of defendant she held opinion that defendant was unable to comprehend what was "going on" and could not assist in her own defense, and another witness testified for record that after observing defendant "most every day" after her incarceration his opinion was that defendant was "not capable" of assisting in her defense, testimony should have been admitted and considered by trial judge on the issue of defendant's capacity to proceed to trial and his failure to consider it constituted error. State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989).

Incapacity to Enter Guilty Plea. — If a defendant is incompetent to stand trial, he is also incompetent to enter a voluntary, knowledgeable guilty plea. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Burden of Persuasion. — Defendant had the burden of persuasion on his motion under this section. State v. Jacobs, 51 N.C. App. 324, 276 S.E.2d 482 (1981); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

Question of defendant's capacity is within the trial judge's discretion and his determination thereof, if supported by the evidence, is conclusive on appeal. State v. Reid, 38 N.C. App. 547, 248 S.E.2d 390 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 31 (1979).

Appellate court was bound by trial court's findings of fact as to defendant's competency to stand trial pursuant to G.S. 15A-1001, where the findings were supported by the evidence; although the record revealed that defendant had contracted bacterial meningitis as a baby, and had a subnormal mental capacity, expert testimony indicated that he could comprehend his situation and provide meaningful assistance to his defense. State v. Mahatha, 157 N.C. App. 183, 578 S.E.2d 617, 2003 N.C. App. LEXIS 539 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 773 (2003).

As Is Necessity for Formal Inquiry. — Ordinarily, it is within the trial court's discretion to determine whether circumstances brought to its attention require a formal inquiry as to whether a defendant has sufficient mental capacity to plead to the indictment and to conduct a rational defense. State v. McGee, 56 N.C. App. 614, 289 S.E.2d 616 (1982).

Conclusiveness of Findings on Appeal. — When the trial judge determines the question of a defendant's capacity without a jury, the court's findings of fact, if supported by the evidence, are conclusive on appeal. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

The court's findings of fact as to defendant's mental capacity are conclusive on appeal if supported by the evidence. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

Where there was nothing in the record to suggest that defendant suffered from any "mental illness or defect" as specified in subsection (a) of this section, the trial court had no obligation, ex mero motu, to conduct any inquiry on the subject. State v. Carroll, 317 N.C. 136, 343 S.E.2d 869 (1986).

Defendant Found Competent. — Trial court did not err in finding defendant competent to stand trial, as the record contained evidence that defendant possessed the capacity to comprehend defendant's position, understand the nature of the proceedings against defendant, conduct defendant's defense in a rational manner, and cooperate with counsel. State v. Coley, — N.C. App. —, 668 S.E.2d 46, 2008 N.C. App. LEXIS 2012 (2008).

Juvenile Found Competent to Stand Trial. — Determination that defendant, a juvenile, was competent to stand trial was proper where the trial court considered two expert opinions and determined that defendant was able to assist in defendant's own defense, did not demonstrate symptoms of any mental disorder that could interfere with defendant's ability to participate in court proceedings, and had the ability to understand legal terms and procedures that were explained in concrete terms. In re I.R.T., 184 N.C. App. 579, 647 S.E.2d 129, 2007 N.C. App. LEXIS 1624 (2007).

Defendant, who had undergone brain surgery to remove a self-inflicted bullet, which surgery necessitated the removal of the entire left frontal lobe of his brain and a small portion of the right frontal lobe, was competent to stand trial and to assist in his defense, notwithstanding a memory impairment resulting from organic brain damage or repression. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Defendant, who as a result of a self-inflicted gunshot wound to the head and resulting surgery, had suffered damage to her brain which impaired her emotional response to situations in which she found herself, was competent to make a valid confession and stand trial where there was evidence that defendant had an I.Q. within the normal range and that she knew what the charges were and what could happen to her if she was convicted; if this did not worry or upset her because of her altered mental condition, it did not mean she did not understand these facts, and the court could find from this and other evidence that the defendant understood the nature and object of the proceedings against her and could comprehend her own situation in reference to the proceedings. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Mentally Ill Defendant Competent to Stand Trial. — Defendant was competent to stand trial despite his mental illness where three experts testified that defendant understood the nature of the proceedings against him; one expert opined that defendant was capable of assisting in his own defense, one testified that defendant's delusions impaired his ability to assist in his defense, in that defendant was "reluctant" and "emotionally unable" to provide his counsel with the names of potential witnesses, and the third offered no opinion as to defendant's ability to assist in his defense. State v. Pratt, 152 N.C. App. 694, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

Defendant on Medication Held Competent. — A capital murder defendant held competent to proceed to trial, where the court-appointed forensic psychologist testified that, although the defendant initially was not competent to proceed, he appeared to be doing well on his medications about one month later, that he understood the difference between competency and insanity, he understood the nature and extent of the charges against him, and he could assist his attorneys in his defense. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Appellate court rejected defendant's argument that defendant's failure to take his Prozac, an antidepressant, for two weeks prior to the entry of plea, would "nullify" the expert opinion that defendant was competent to stand trial and understood the proceedings. State v. Ager, 152 N.C. App. 577, 568 S.E.2d 328, 2002 N.C. App. LEXIS 969 (2002), appeal dismissed, 356 N.C. 616, 575 S.E.2d 29 (2002).

Defendant's voluntary use of drugs during her trial did not warrant the order of a new trial where the record otherwise showed her to have been competent. State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993).

Defendant's Attitude. — The trial court could properly find that defendant did not suffer from a mental incapacity where his attitude, rather than a mental illness or defect, prevented him from assisting in his own defense. State v. Brown, 339 N.C. 426, 451 S.E.2d 181 (1994), cert. denied, 516 U.S. 825, 116 S. Ct. 90, 133 L. Ed. 2d 46 (1995).

Retrospective Determination of Competency. — Once a convicted defendant is remanded under the remedy of a retrospective determination of his competency, competency is determined under the appropriate standards in G.S. 15A-1001(a), and it is the defendant's burden of proof to show that he lacked the capacity to proceed; there was sufficient competent evidence that defendant was properly adjudicated in a retrospective competency hearing to have been to have been competent to stand trial on a conviction for murder where: (1) his psychiatric evaluations indicated he was competent as long as he was on medication; (2) he was on medication during the trial; and (3) defendant's counsel raised no question of his competency during the trial, thus presenting defendant as competent. State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71, 2004 N.C. App. LEXIS 413 (2004), appeal dismissed, cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Trial court did not err by not holding a competency hearing sua sponte where defendant had voluntarily withdrawn his motion for a competency hearing, and had otherwise presented no evidence calling his psychological condition into question so as to have required the trial court to act on its own initiative. State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381, 2005 N.C. App. LEXIS 334 (2005).

Defendant's conviction of first-degree felony murder was affirmed; the trial court was not required by G.S. 15A-1001(a) and G.S. 15A-1002(a) to sua sponte order a competency hearing for defendant, as the trial court conducted a colloquy, and defendant's replies were lucid and displayed his understanding of the consequences of testifying. State v. Staten, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005), cert. denied, — U.S. —, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Trial court, under G.S. 15A-1001(a) and G.S. 15A-1002, did not have to conduct a competency hearing sua sponte on defendant's mental competence as defendant did not request a hearing, even though defendant's wife made statements regarding defendant's mental health. Furthermore, there was no substantial evidence that defendant was incompetent and any evidence of incompetence was outweighed by evidence of defendant's competence. State v. Bowman, — N.C. App. —, 666 S.E.2d 831, 2008 N.C. App. LEXIS 1752 (2008).

Waiver of Hearing Right. — Defendant waived the right to a competency hearing under G.S. 15A-1002(b), by failing to request one or make a motion detailing the conduct resulting in a question as to defendant's capacity to proceed after defendant was not given anti-anxiety medication on one day of trial. State v. Goode, — N.C. App. —, 677 S.E.2d 507, 2009 N.C. App. LEXIS 728 (2009).

Instruction on Mitigating Circumstances Not Necessary. — Refusal to submit certain mitigating circumstances to the jury was not erroneous, as there was no evidence defendant suffered from any mental or emotional disturbance at the time of the crime. State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

Applied in State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976); State v. Grainger, 29 N.C. App. 694, 225 S.E.2d 595 (1976); State v. McRae, 32 N.C. App. 243, 231 S.E.2d 915 (1977); State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983); State v. Smith, 310 N.C. 108, 310 S.E.2d 320 (1984).

Cited in State v. Buie, 297 N.C. 159, 254 S.E.2d 26 (1979); State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981); State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997); State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000); State v. King, 353 N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001); In re Robinson, 151 N.C. App. 733, 567 S.E.2d 227, 2002 N.C. App. LEXIS 855 (2002).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence. The court:

(1) May appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, to examine the defendant and return a written report describing the present state of the defendant's mental health; reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing; any expert so appointed may be called to testify at the hearing by the court at the request of either party; or

(2) In the case of a defendant charged with a misdemeanor only after the examination pursuant to subsection (b)(1) of this section or at any time in the case of a defendant charged with a felony, may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed; in the case of a defendant charged with a felony, if a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity; the sheriff shall return the defendant to the county when notified that the evaluation has been completed; the director of the facility shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court; the report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1.

(b1) If the report pursuant to subdivision (1) or (2) of subsection (b) of this section indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel provided, if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14.)

Legal Periodicals. — For article, "Review of the Presentence Diagnostic Study Procedure in North Carolina," see 8 N.C. Cent. L.J. 17 (1976).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Hearing.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the cases cited below were decided under former law.*

Constitutionality. — This State's statutory scheme for determining a defendant's capacity to proceed is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

This section is not an absolute confidentiality rule, so trial counsel was not ineffective by failing to use it to exclude competency examination reports from the record on the grounds that the reports had been sent to the district attorney unlawfully or that they remained confidential where the prosecution lawfully possessed the reports. McCarver v. Lee, 221 F.3d 583, 2000 U.S. App. LEXIS 12222 (4th Cir. 2000), cert. denied, 531 U.S. 1089, 121 S. Ct. 809, 148 L. Ed. 2d 694 (2001).

The trial court has the power on its own motion to make inquiry at any time during trial regarding defendant's capacity to proceed. Indeed, circumstances could exist where the trial court has a constitutional duty to make such an inquiry. State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983).

Purpose. — The objective of G.S. 15A-1001 and this section is to ensure that a defendant will not be tried or punished while mentally incapacitated. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

No Minimum Observation Period Required. — G.S. 15A-1002 did not set a minimum observation period in connection with a competency determination, and there was no error in finding defendant competent to stand trial based on a psychiatrist's examination of defendant which lasted only one hour and 40 minutes. State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902, 2003 N.C. App. LEXIS 2049 (2003).

Decision to Have Capacity Evaluated in Court's Discretion. — Although this section now requires a hearing, the decision to grant a motion for an evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

The trial court did not err in failing to order an independent psychiatric evaluation pursuant to this section where the defendant was adamant and unequivocal about not wanting a mental-health examination; he fully understood the proceedings and his rights; he assisted in his own defense throughout trial by directing the filing of motions, the questioning of witnesses, and the presentation of evidence; he fully understood the ramifications of his decision not to present mitigating evidence during the sentencing proceeding; and his outbursts during trial, occurring during the voir dire of the five witnesses, suggested his deliberate intent to intimidate them. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Duty of Trial Court. — Under some circumstances a trial court may have a constitutional duty to make an inquiry into a defendant's capacity to proceed. State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997).

It was not error for the judge to deny a motion asking that the defendant be examined to determine whether he was competent to stand trial when nothing was shown to the court as to why the motion should have been granted. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995), cert denied, 516 U.S. 994, 116 S. Ct. 529, 113 L.E.2d 435 (1995).

Notice to Defendant. — While this section expressly permits the prosecutor to question a defendant's capacity to proceed and contains no express provision for notice of the motion, the requirement that the question of capacity to proceed may only be raised by a motion, setting forth the reasons for questioning capacity, implies that some notice must be given. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Test of Capacity to Stand Trial. — In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend this position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978).

Competency to Stand Trial and Mental Responsibility in Commission of a Crime Compared. — See State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968); State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163, appeal dismissed, 279 N.C. 350, 182 S.E.2d 583 (1971).

Ability to Plead and Conduct Defense Should Be Determined Prior to Trial. — Whether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971); State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

Capacity Determined by Trial Judge. — The preliminary question of a defendant's mental capacity to plead to a bill of indictment and to aid in the preparation and conduct of his defense is properly a question to be decided by the trial judge. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

Capacity May Be Determined with or Without Jury. — In an inquiry into a defendant's capacity to proceed, the issue may be resolved by the trial court with or without the aid of a jury. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial, the court must conduct a thorough inquiry before it allows a defendant to be tried or to plead guilty. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

It is proper for defendant's counsel to request the court to conduct an inquiry to determine whether the defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense. State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163, appeal dismissed, 279 N.C. 350, 182 S.E.2d 583 (1971).

Prosecution May Be Permitted to Obtain Examination of Defendant. — Where a defendant gives notice of his intent to pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

In cases where a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Order of Commitment Is Discretionary. — A defendant is not entitled to an order of commitment to a State hospital for a period of not exceeding 60 days for observation and treatment as a matter of right; he must show that the failure to grant his belated motion is an abuse of discretion. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973), cert. denied, 414 U.S. 1132, 94 S. Ct. 873, 38 L. Ed. 2d 757 (1974).

Section Does Not Authorize Physical Exam. — Subdivision (b)(1) authorizes a court to appoint medical experts to examine the state of defendant's mental health; however, it does not authorize the court to appoint a medical examiner for a general physical exam or to see if certain physical problems exist. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

Psychiatric Examination Is in Court's Discretion. — This section contains no provision making the granting of a motion mandatory for commitment for psychiatric examination to determine competency, and the decision remains within the sound judicial discretion of the trial court. State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

A defendant does not have an automatic right to a pretrial psychiatric examination and the resolution of this matter is within the trial court's discretion. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

The established rule in North Carolina, unchanged by statutory enactments, is that the decision whether to grant a motion for commitment for psychiatric examination to determine competency to stand trial lies within the sound discretion of the trial judge. State v. Williams, 38 N.C. App. 183, 247 S.E.2d 620 (1978).

Although a defendant has the right to a hearing on his capacity to proceed when that question is properly raised, whether to have a defendant examined by a medical expert is within the trial court's discretion. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 100 S. Ct. 300, 62 L. Ed. 2d 310 (1979).

The question of whether the defendant is to be examined by a psychiatric expert is within the sole discretion of the trial court. State v. O'Neal, 116 N.C. App. 390, 448 S.E.2d 306, cert. denied, 338 N.C. 522, 452 S.E.2d 821 (1994).

State may not consume an unreasonable amount of time in conducting mental and physical examinations and filing reports thereon. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

And the legislature intended to declare that 60 days or less is a reasonable time to conduct this kind of mental examination. It has said that "in no event" may more time be consumed. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Court Not Required to Adopt Either Party's Report on Capacity. — There was no merit to defendant's argument that because the court did not adopt the report by the State on defendant's capacity to stand trial, any finding that defendant suffered some sort of mental disease was unsupported by the evidence, nor was there merit to his argument that the trial court was required to adopt the psychiatric report of either the State or the defense but could not arrive at an independent conclusion. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Failure to Determine Competency. — In a criminal prosecution where there was a reasonable doubt as to the defendant's sanity, and where neither the court nor counsel sought to utilize the procedures provided by the State for determining competency, the defendant was not afforded full protection of the law. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Better practice requires the trial court to make findings of fact in its order on a motion suggesting incapacity to proceed under this section. State v. Jacobs, 51 N.C. App. 324, 276 S.E.2d 482 (1981).

Lack of Findings and Conclusions Not Error Where Evidence Compels Ruling. — Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under subsection (b) of this section, it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Judge's Findings of Fact Conclusive on Appeal. — When the trial judge conducts the inquiry under this section without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980); State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary. State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983).

Abuse of Discretion Must Be Shown for Reversal of Motion's Denial. — Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Competence Only as Result of Medication. — Where there was competent, uncontradicted expert opinion that the defendant was capable of standing trial based on personal observation of defendant and sufficient to support the trial court's conclusion that defendant was capable of proceeding, the additional fact that defendant was competent only as a result of receiving medication did not require a different result. State v. Buie, 297 N.C. 159, 254 S.E.2d 26, cert. denied, 444 U.S. 971, 100 S. Ct. 464, 62 L. Ed. 2d 386 (1979).

No Equal Protection Issue Presented by Denial of Indigent's Request for Commitment. — Since the fact that the defendant was indigent was irrelevant to the applicability of this section, there was no equal protection issue presented where the trial court denied the defendant's request for a commitment and psychiatric examination to determine his capacity to stand trial. State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

Order Declaring Defendant Incapacitated as Evidence at Subsequent Trial. — An order entered by a trial judge declaring defendant mentally incapacitated and unable to proceed to trial was some evidence of defendant's mental condition and was admissible at trial on the question of his insanity. When such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978).

Applicability of Physician-Patient Privilege. — Where the mental capacity of the accused to proceed to trial is questioned on motion of defense counsel and the trial court commits the defendant to a State mental health facility for examination to determine the defendant's capacity to proceed, the physician-patient privilege does not preclude the examining psychiatrist from testifying at trial on the insanity issue. State v. Hodgen, 47 N.C. App. 329, 267 S.E.2d 32, cert. denied, 301 N.C. 100, 273 S.E.2d 305 (1980), 305 N.C. 397, 289 S.E.2d 839 (1982).

A psychiatrist appointed by the court for a sanity examination of the defendant is a witness for the court, not the prosecution, and the statements made by the defendant to the psychiatrist are not privileged under the doctor-patient relationship. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), rehearing denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398; 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

No psychologist-client privilege is created when a defendant is examined by a psychologist appointed by the trial court, at the request of defendant, for purposes of evaluating defendant's mental status. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Findings Sufficient to Show Defendant Mentally Ill at Time of Arraignment. — The findings by the judge that the defendant was unable to plead to the bill "for . . . he does not have the capacity at this time to stand trial or to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, or to cooperate understandingly with his counsel with respect to his defense" in the context of the order were sufficient findings that the defendant was mentally ill at the time of arraignment and for that reason could not plead. State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163, appeal dismissed, 279 N.C. 350, 182 S.E.2d 583 (1971).

Suicide Attempt by Defendant. — Where defendant's own expert witness had previously testified that he was competent to stand trial and the only additional evidence before the court at the time it denied the request for a psychological examination was a suicide attempt, or suicide gesture, that one incident did not require as a matter of law that the trial court appoint an expert to evaluate defendant's mental health. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Rebuttal by Prosecution's Psychiatrist. — Where a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of the examination without violating defendant's rights under U.S. Const., Amend. V. The trial court must, however, limit the jury's consideration of such statements made during the examination to the issue of insanity and not to the issue of guilt. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Effect of Hospital Stay on Speedy Trial Right. — Where a defendant was held in a hospital for examination a mere seven days longer than this section permits, the practice did not result in a violation of the former Speedy Trial Act. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Where defendant has negotiated a plea, his fair trial rights are no longer involved. State v. Hunt, 64 N.C. App. 81, 306 S.E.2d 846, cert. denied, 309 N.C. 824, 310 S.E.2d 354 (1983).

Claim for Damages Denied. — Doctor at Dorothea Dix Hospital completely fulfilled his duty under the law to evaluate defendant and submit an evaluation to the district court, and did not violate any legal duty of care by thereafter releasing her, and the Industrial Commission correctly denied plaintiff's claim for damages due to an attack subsequently committed against him. Paschall v. North Carolina Dep't of Correction, 88 N.C. App. 520, 364 S.E.2d 144, cert. denied, 322 N.C. 326, 368 S.E.2d 868 (1988).

Trial court properly held a retrospective competency hearing after defendant's robbery trial and before his habitual felon trial; where an evaluation found defendant competent and noted that he had not been hearing voices nor had suicidal thoughts as stated in the original motion, and where defense counsel testified that defendant was competent during the robbery trial, the trial court's finding that defendant had the capacity to proceed was supported by competent evidence. State v. Blancher, 170 N.C. App. 171, 611 S.E.2d 445, 2005 N.C. App. LEXIS 909 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 880 (2005).

Applied in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979); State v. Potts, 42 N.C. App. 357, 256 S.E.2d 497 (1979); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Womble, 44 N.C. App. 503, 261 S.E.2d 263 (1980); State v. Hoyle, 49 N.C. App. 98, 270 S.E.2d 582 (1980); Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); State v. Nobles, 99 N.C. App. 473, 393 S.E.2d 328 (1990).

Cited in State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978); State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981); State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983); State v. Martin, 68 N.C. App. 272, 314 S.E.2d 805 (1984); State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Hope, 96 N.C. App. 498, 386 S.E.2d 224 (1989); State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993); State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997); State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71, 2004 N.C. App. LEXIS 413 (2004); State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

II. HEARING.

Finding that the court's failure to conduct a competency hearing violated the defendant's federal due process rights, the court decided to forego an analysis under this statutory provision and, instead, remanded so that the trial court might determine the defendant's competency at the time of his murder trial. State v. McRae, 139 N.C. App. 387, 533 S.E.2d 557, 2000 N.C. App. LEXIS 891 (2000).

Trial court did not err by not holding a competency hearing sua sponte where defendant had voluntarily withdrawn his motion for a competency hearing, and had otherwise presented no evidence calling his psychological condition into question so as to have required the trial court to act on its own initiative. State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381, 2005 N.C. App. LEXIS 334 (2005).

Defendant's conviction of first-degree felony murder was affirmed; the trial court was not required by G.S. 15A-1001(a) and G.S. 15A-1002(a) to sua sponte order a competency hearing for defendant, as the trial court conducted a colloquy, and defendant's replies were lucid and displayed his understanding of the consequences of testifying. State v. Staten, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005), cert. denied, — U.S. —, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Trial court did not err by failing to conduct a hearing on defendant's capacity to stand trial because there was no bona fide doubt as to defendant's competency when his actions and courtroom behavior did not indicate that he was incompetent, and the only examination conducted as to defendant's capacity resulted in a determination that he was fit to stand trial; defendant participated in the proceedings, his demeanor was appropriate, and his trial counsel represented that defendant was competent. State v. Johnson, — N.C. App. —, 661 S.E.2d 287, 2008 N.C. App. LEXIS 1081 (2008).

Trial court, under G.S. 15A-1001(a) and G.S. 15A-1002, did not have to conduct a competency hearing sua sponte on defendant's mental competence as defendant did not request a hearing, even though defendant's wife made statements regarding defendant's mental health. Furthermore, there was no substantial evidence that defendant was incompetent and any evidence of incompetence was outweighed by evidence of defendant's competence. State v. Bowman, — N.C. App. —, 666 S.E.2d 831, 2008 N.C. App. LEXIS 1752 (2008).

Hearing Requirement Satisfied by Opportunity to Present Evidence. — The hearing requirement of former subdivision (b)(3) of this section appears to be satisfied along as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

No Particular Hearing Procedure Mandated. — Although this section requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Notice of Hearing. — Trial court conducted a proper hearing as required by G.S. 15A-1002 as to defendant's claim of incompetency; considering that counsel for defendant could have gotten access to a doctor's report earlier and had a chance to look it over before the hearing, the notice defendant received was reasonable. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

While the better practice is for the trial court to make specific findings and conclusions when ruling on a motion under subsection (b), failure to do so is not error where the evidence compels the ruling made. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

Rules as to Competency of Evidence Relaxed in Hearing. — In a hearing before the judge on a motion under this section, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found. State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977).

Defendant has the burden of persuasion with respect to establishing his incapacity. State v. Gates, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Waiver of Hearing Right. — While this section requires the court to hold a hearing to determine defendant's capacity to proceed if the question is raised, a defendant may waive the benefit of this section's provisions by express consent, failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it. State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977).

Where neither defendant nor defense counsel questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney, neither objected to the failure to hold the hearing, and when arraigned, defendant entered a plea of not guilty and did not raise the defense of insanity, defendant's statutory right, under former subdivision (b)(3) of this section, to a hearing subsequent to his commitment, was waived by his failure to assert that right. State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977).

Where the record showed that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial and nothing in the record indicated that before going to trial the defendant requested a hearing or otherwise indicated any adherence to his initial contention of lack of mental capacity, defendant waived his right to a hearing under former subdivision (b)(3) of this section. State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

The defendant waived his statutory right to a competency hearing where (1) prior to trial, the trial court directly asked defense counsel whether there had been a competency screening and informed defense counsel that if there was a question about the defendant's competency, then he wanted to hear whatever evidence was to be presented and make that determination before going forward, and (2) defense counsel responded that the defendant had received treatment for depression in connection with a suicide attempt but did not thereafter request a competency hearing. State v. King, 353 N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001).

By his failure to challenge the trial court's ruling that he was competent to stand trial, defendant waived his right to a competency hearing under G.S. 15A-1002(b). State v. Hoover, 174 N.C. App. 596, 621 S.E.2d 303, 2005 N.C. App. LEXIS 2467 (2005), cert. denied, 360 N.C. 488, 632 S.E.2d 766 (2006), appeal dismissed, 360 N.C. 540, 634 S.E.2d 543 (2006).

Defendant waived the right to a competency hearing under G.S. 15A-1002(b), by failing to request one or make a motion detailing the conduct resulting in a question as to defendant's capacity to proceed after defendant was not given anti-anxiety medication on one day of trial. State v. Goode, — N.C. App. —, 677 S.E.2d 507, 2009 N.C. App. LEXIS 728 (2009).

Collateral Relief Where Hearing Waived. — Where a defendant fails to assert his alleged incompetence at a hearing, he is not barred from seeking collateral relief, for an incompetent cannot waive the right to be exempt from trial, nor can his attorney's failure to raise the issue be construed as waiver. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

(a) When a defendant is found to be incapable of proceeding, the presiding judge, upon such additional hearing, if any, as he determines to be necessary, shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes. If the presiding judge finds reasonable grounds to believe that the defendant meets the criteria, he shall make findings of fact and issue a custody order in the same manner, upon the same grounds and with the same effect as an order issued by a clerk or magistrate pursuant to G.S. 122C-261. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge's custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found incapable of proceeding.

(b) The court may make appropriate orders for the temporary detention of the defendant pending that proceeding.

(c) Evidence used at the hearing with regard to capacity to proceed is admissible in the involuntary civil commitment proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 1; 1985, c. 589, s. 10; 1987, c. 596, s. 5.)

CASE NOTES

Cited in State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976); In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980); Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981); Davis v. North

Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

OPINIONS OF ATTORNEY GENERAL

Examination by Physician Is Required. — When a defendant is found incapable of proceeding with a criminal trial and the trial court takes the action directed by subsection (a) of this section, the examination by a qualified physician as described in G.S. 122-58.4 (see now G.S. 122C-263) is required. See opinion of Attorney General to Dr. William Thomas, Chief of Adult Services, Division of Mental Health and Mental Retardation Services, 48 N.C.A.G. 53 (1978).

§ 15A-1004. Orders for safeguarding of defendant and return for trial.

(a) When a defendant is found to be incapable of proceeding, the trial court must make appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he subsequently becomes capable of proceeding.

(b) If the defendant is not placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, appropriate orders may include any of the procedures, orders, and conditions provided in Article 26 of this Chapter, Bail, specifically including the power to place the defendant in the custody of a designated person or organization agreeing to supervise him.

(c) If the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk if the defendant is to be released from the custody of the hospital or institution. The original or supplemental orders may make provisions as in subsection (b) in the event that the defendant is released. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, and that charge has not been dismissed, the order must require that if the defendant is to be released from the custody of the hospital or other institution, he is to be released only to the custody of a specified law enforcement agency. If the original or supplemental orders do not specify to whom the respondent shall be released, the hospital or other institution may release the defendant to whomever it thinks appropriate.

(d) If the defendant is placed in the custody of a hospital or institution pursuant to proceedings for involuntary civil commitment, or if the defendant is placed in the custody of another person pursuant to subsection (b), the orders of the trial court must require that the hospital, institution, or individual report the condition of the defendant to the clerk at the same times that reports on the condition of the defendant-respondent are required under Part 7 of Article 5 of Chapter 122C of the General Statutes, or more frequently if the court requires, and immediately if the defendant gains capacity to proceed. The order must also require the report to state the likelihood of the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or individual is capable of making such a judgment.

(e) The orders must require and provide for the return of the defendant to stand trial in the event that he gains capacity to proceed, unless the charges have been dismissed pursuant to G.S. 15A-1008, and may also provide for the confinement or pretrial release of the defendant in that event.

(f) The orders of the court may be amended or supplemented from time to time as changed conditions require. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 2; c. 460, s. 2; 1985, c. 589, s. 11.)

CASE NOTES

Court Had No Authority to Order Supervision of Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant, who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

§ 15A-1005. Reporting to court with regard to defendants incapable of proceeding.

The clerk of the court in which the criminal proceeding is pending must keep a docket of defendants who have been determined to be incapable of proceeding. The clerk must submit the docket to the senior resident superior court judge in his district at least semiannually. (1973, c. 1286, s. 1.)

§ 15A-1006. Return of defendant for trial upon gaining capacity.

If a defendant who has been determined to be incapable of proceeding, and who is in the custody of an institution or an individual, gains capacity to proceed, the individual or institution must notify the clerk in the county in which the criminal proceeding is pending. The clerk must notify the sheriff to return the defendant to the county for trial, and to hold him for trial, subject to the orders of the court entered pursuant to G.S. 15A-1004. (1973, c. 1286, s. 1.)

§ 15A-1007. Supplemental hearings.

(a) When it has been reported to the court that a defendant has gained capacity to proceed, or when the defendant has been determined by the individual or institution having custody of him to have gained capacity and has been returned for trial, the court may hold a supplemental hearing to determine whether the defendant has capacity to proceed. The court may take any action at the supplemental hearing that it could have taken at an original hearing to determine the capacity of the defendant to proceed.

(b) The court may hold a supplemental hearing any time upon its own determination that a hearing is appropriate or necessary to inquire into the condition of the defendant.

(c) The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met. (1973, c. 1286, s. 1.)

§ 15A-1008. Dismissal of charges.

When a defendant lacks capacity to proceed, the court may dismiss the charges:

(1) When it appears to the satisfaction of the court that the defendant will not gain capacity to proceed; or

(2) When the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum permissible period of confinement for the crime or crimes charged; or

(3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges. (1973, c. 1286, s. 1.)

CASE NOTES

Cited in State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

§ 15A-1009. Dismissal with leave when defendant is found incapable of proceeding.

(a) If a defendant is found by the court to be incapable of proceeding and the charges have not been dismissed pursuant to G.S. 15A-1008, a prosecutor may enter a dismissal with leave under this section.

(b) Dismissal with leave results in removal of the case from the docket of the court, but all process outstanding, with the exception of any appearance bond, retains its validity, and all necessary actions in the case may be taken.

(c) The prosecutor may enter the dismissal with leave orally in open court or by filing the dismissal in writing with the clerk. If the dismissal is entered orally, the clerk must note the nature of the dismissal in the case records.

(d) Upon the defendant becoming capable of proceeding, or in the discretion of the prosecutor when he believes the defendant may soon become capable of proceeding, the prosecutor may reinstitute the proceedings by filing written notice with the clerk, with the defendant and with the defendant's attorney of record.

(e) A dismissal with leave entered under this section is no longer in effect if the court later dismisses the charges pursuant to G.S. 15A-1008.

(f) Nothing in this section shall limit or prohibit the court from dismissing criminal charges pursuant to G.S. 15A-1008 upon motion by the defendant or upon the court's own motion. (1983, c. 460, s. 1.)

§ 15A-1010: Reserved for future codification purposes.

ARTICLE 57.

Pleas.

OFFICIAL COMMENTARY

This Article states rules concerning pleas in both district and superior court. A primary model utilized in drafting was American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 5, Article 350 (1972). This Article, in turn, was based substantially upon A.B.A. Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty (1968).

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-1011. Pleas in district and superior courts; waiver of appearance.

(a) A defendant may plead not guilty, guilty, or no contest "(nolo contendere)." A plea may be received only from the defendant himself in open court except when:

(1) The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer; or

(2) There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945; or

(3) In misdemeanor cases there is a written waiver of appearance submitted with the approval of the presiding judge; or

(4) Written pleas in traffic cases, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A are authorized under G.S. 7A-146(8); or

(5) The defendant executes a waiver and plea of not guilty as provided in G.S. 15A-1011(d).

(6) The defendant, before a magistrate or clerk of court, enters a written appearance, waiver of trial and plea of guilty and at the same time makes restitution in a case wherein the sole allegation is a violation of G.S. 14-107, the check is in an amount provided in G.S. 7A-273(8), and the warrant does not charge a fourth or subsequent violation of this statute.

(b) A defendant may plead no contest only with the consent of the prosecutor and the presiding judge.

(c) Upon entry of a plea of guilty or no contest or after conviction on a plea of not guilty, the defendant may request permission to enter a plea of guilty or no contest as to other crimes with which he is charged in the same or another prosecutorial district as defined in G.S. 7A-60. A defendant may not enter any plea to crimes charged in another prosecutorial district as defined in G.S. 7A-60 unless the district attorney of that district consents in writing to the entry of such plea. The prosecutor or his representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. Entry of a plea under this subsection constitutes a waiver of venue. A superior court is granted jurisdiction to accept the plea, upon an appropriate indictment or information, even though the case may otherwise be within the exclusive original jurisdiction of the district court. A district court may accept pleas under this section only in cases within the original jurisdiction of the district court and in cases within the concurrent jurisdiction of the district and superior courts pursuant to G.S. 7A-272(c).

(d) A defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf in the following circumstances:

(1) The defendant agrees in writing to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and

(2) The defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and

(3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

(e) In the event the judge shall permit the procedure set forth in the foregoing subsection (d), the State may offer evidence and the defendant may offer evidence, with right of cross-examination of witnesses, and the other procedures, including the right of the prosecutor to dismiss the charges, shall be the same as in any other criminal case, except for the absence of defendant. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 626, s. 1; 1983, c. 586, s. 3; 1987, c. 355, s. 4; 1987 (Reg. Sess., 1988), c. 1037, s. 64; 1995 (Reg. Sess., 1996), c. 725, s. 5.)

OFFICIAL COMMENTARY

Although a number of commentators have recommended that the plea of nolo contendere should be abolished, the Commission decided to follow the draft of the American Law Institute and retain this plea. The A.B.A. standards merely made retention optional. In line with its policy of eliminating Latin and Law French phraseology from the code, the Commission renamed the plea of nolo contendere as a plea of no contest. The Commission did not intend to change the legal effect of the plea as developed by North Carolina's common law. See Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C.L. Rev. 280 (1956).

Although cases have suggested that only the approval of the presiding judge is necessary to the acceptance of the plea of nolo contendere, and this is the approach adopted by the A.B.A. and A.L.I. proposals, the Commission determined that the customary practice in North Carolina is to require the solicitor's approval also. It therefore added this to subsection (b). With this change, it became unnecessary for the Commission to retain the A.B.A.-A.L.I. admonition that the nolo plea should "be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." If the solicitor's consent is required, it becomes superfluous for the judge to take his views into account; the Commission thought the precatory language concerning the interest of the public was well understood to be a governing legal principle, and that it was futile to restate the matter in the text of a procedural statute.

Subsection (a) sets out the general requirement that the defendant be present in person before the judge at the time he pleads. The exception in subdivision (1) is suggested in the A.B.A.-A.L.I. provisions. The others were added by the Commission. Subdivision (2) creates an exception to harmonize with the new provisions on arraignment, and specifically authorizes waiver of arraignment and the submission of a written plea of not guilty signed by defendant and his counsel. Subdivision (4) acknowledges the written appearance, waiver of trial, and plea of guilty in traffic cases authorized in G.S. 7A-146(8).

Subdivision (3) caused the Commission more of a problem. It understood that under common law a defendant represented by counsel at trial may waive his appearance in certain misdemeanors. There was some dispute within the Commission as to what the best policy on this matter should be, but it found the general question beyond the scope of its 1973 proposal. It left the matter open, however, so far as trial is concerned, and limited subdivision (3) to the plea stage. It allows a written waiver of appearance upon entering pleas in misdemeanor cases — with the approval of the presiding judge. The subdivision is silent as to waiver of appearance at trial. The Commission believed the question at both stages could well be handled by court rule or guidelines adopted by conferences of judges in the absence of authoritative case law.

Subdivision (5) and its companion provision, subsection (d), were added in committee while the code was being considered by the General Assembly. These provisions go far beyond what the Commission was willing to recommend at the pretrial stage, and indeed provides clearly for trials in both felony and misdemeanor cases in which the defendant may waive his appearance. As the procedure requires consent of the presiding judge, it can be presumed that the judge will allow this procedure in few felony cases — though it might be possible to imagine tax evasion cases in which defendants are hospitalized in which it might be feasible to allow waiver.

Subsection (c) is a new provision based on A.B.A. and A.L.I. proposals. The economy to the State in wrapping up all charges against a defendant at once is obvious. To cut down on factors of judge- or solicitor-shopping, the consent of the solicitor in any other district in which other charges are pending is necessary before the procedure of subsection (c) may be utilized.

Editor's Note. — Subdivision (8) of G.S. 7A-146, referred to in the text of this section and in the Official Commentary, has been repealed.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Changing Plea. — Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or vice versa, is a matter for the sound legal discretion of the trial court. State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908), decided under former law.

Plea by Deaf Mute. — Where the court, upon finding that defendant was a deaf mute, subpoenaed an interpreter, who, after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant, and after defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's (now prosecutor's) question of whether defendant was guilty or not guilty, and upon a negative reply given through the interpleader, a plea of not guilty was entered, it was held that there was no error on the arraignment of defendant or in the acceptance of his negative answer as a plea of not guilty. State v. Early, 211 N.C. 189, 189 S.E. 668 (1937), decided under former law.

Plea of Not Guilty By Reason of Insanity. — Where the prosecuting attorney by his argument implied that the defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime, this was an incorrect statement of the law. A criminal defendant may only plead not guilty, guilty or no contest; if a defendant pleads not guilty he may raise the defense of insanity by filing a pretrial motion that he intends to rely on that defense. State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993).

Motion to Waive Presence Needed to be in Writing. — Oral motion to waive presence at trial was insufficient because motion needed to be written. State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241, 2005 N.C. App. LEXIS 392 (2005).

Cited in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985); State v. Rodriquez, 111 N.C. App. 141, 431 S.E.2d 788 (1993); State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

§ 15A-1012. Aid of counsel; time for deliberation.

(a) A defendant may not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for assignment of counsel, until counsel has been assigned or waived in accordance with Article 36 of Chapter 7A of the General Statutes.

(b) In cases in the original jurisdiction of the superior court a defendant who has waived counsel may not plead within less than seven days following the date he was arrested or was otherwise informed of the charge. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) states the salutary rule that a defendant may not be arraigned, or otherwise called upon to plead, whether in district or superior court, without first being afforded his right to counsel. The wording is taken from the A.L.I. draft.

Subsection (b) is also based in part upon the A.L.I. draft, but has been limited to cases first tried in superior court. The Commission felt the procedure in district court misdemeanors could not accommodate the mandated seven-day delay in cases, even as to defendants without counsel. The purpose of the delay period is to give a "cooling-off" time to the defendant who may during a period of emotional stress decide both to waive counsel and plead guilty. The original draft of subsection (b) within the Commission followed the language of the A.B.A.-A.L.I. proposal and stated that the defendant may not be "called upon" to plead within the seven-day period. After one member raised a question as to language, subsection (b) was changed to say that a defendant may not be "required" to plead sooner than in seven days; a parallel change was not suggested for subsection (a). This change was for the apparent purpose of allowing an uncounseled defendant who affirmatively wanted to plead to do so immediately. For example, the mandated seven-day delay for a defendant without counsel might in a rural county mean waiting several months in county jail (if conditions of pretrial release could not be met or unless there was a waiver of venue) until the next session of court. The General Assembly, however, amended to the present language stating a one-week flat ban on pleas. The answer apparently is that if the defendant wants to enter an earlier plea, he must retain or accept appointment of counsel.

Legal Periodicals. — For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

Defendant Not Prejudiced Where Right to Counsel Not Asserted. — Defendant was not prejudiced by the fact that he may not have been informed of his right to be represented by counsel before he entered a guilty plea where defendant has not argued that he was indigent and therefore entitled to appointed counsel at the time he entered his guilty plea or that he lacked the opportunity to retain counsel between the time of his arrest and trial. State v. Grimes, 47 N.C. App. 476, 267 S.E.2d 387 (1980).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

§§ 15A-1013 through 15A-1020: Reserved for future codification purposes.

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

OFFICIAL COMMENTARY

Since the mid-1960's a number of commentators have urged that the criminal justice system be examined realistically. They indicate that the rules postulate an adversary "due-process" mode of proceeding but in fact about 90 percent of the criminal convictions obtained come through the entry or negotiation of a guilty plea. They have called this the "administrative" mode of proceeding within the criminal justice system. Most of the recent proposals have been to legitimate the administrative handling of cases — to bring plea negotiations out of the back room and put them on the record. It is thought that making the procedure public should have a number of benefits.

These benefits include:

(1) Making the basis for negotiations more rational. If the process is legitimate but carries its approved guidelines, it becomes more difficult to make plea bargains on factors such as the particular mood of the prosecutor when approached, the political power exercised by the defendant or his lawyer, peculiar conditions of the local docket, etc.

(2) Allowing defendants to tell the truth in plea proceedings. They should not be expected to go before judges after plea negotiations and lie by saying no promises or agreements were made.

(3) The possibility of clear rules setting out exactly to what extent the judge should or should not get involved at various stages of the plea negotiations.

(4) The likelihood of fewer successful attacks on guilty pleas in post-conviction hearings. If the procedures of plea negotiation are on the record and accurately reflect the things (legitimately) done, the basis for later challenge is effectively minimized.

One of the first major proposals on plea negotiation was in the Report of the President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society, pp. 134-137 (1967). This was soon followed by A.B.A. Project on Standards for Criminal Justice, Standards Relating to Guilty Pleas (1968). The model utilized in drafting this article is American Law Institute, A Model Code of Pre-Arraignment Procedure — Tentative Draft No. 5, Article 350 (1972).

Although the Commission proposed no statute as to plea negotiations in district court, it assumes that these negotiations will be utilized in that court. The provisions of a normative nature in this Article should apply in district court also, though it is clearly expected the process should be less formal and not subject to the procedural restrictions placed upon pleas of guilty or no contest in superior court.

Note on Official Commentary. — The "Official Commentary" under this Article appears as originally drafted by the Criminal Code Commission and does not reflect amendments or changes in the law since the enactment of Session Laws 1973, c. 1286.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may recommend that the defendant make restitution or reparation out of any earnings gained by the defendant if he is granted work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order or recommendation providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d) and Article 81C of this Chapter.

If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and the plea agreement may include a provision that the defendant will be ordered to pay for such treatment.

When restitution or reparation is recommended as part of a plea arrangement that results in an active sentence, the sentencing court shall enter as a part of the commitment that restitution or reparation is recommended as part of the plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation recommendations incident to commitments. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4; 1977, 2nd Sess., c. 1147, s. 1; 1979, c. 760, s. 3; 1985, c. 474, s. 2; 1987, c. 598, s. 3; 1997-80, s. 2; 1998-212, s. 19.4(e).)

OFFICIAL COMMENTARY

Subsection (a) is basic. It legitimates plea negotiations, prohibits the judge from taking an active role in the actual striking of any bargain, and indicates that counsel may represent a defendant's interests and that the defendant need not be present. The Commission's proposal went one important step farther and only authorized plea negotiations in superior court with defendants represented by counsel. This provision was deleted in the General Assembly.

Subsection (b) prohibits use of "improper pressure" to induce the defendant to enter a plea of guilty or no contest. The original draft followed an adaptation of the wording of A.L.I. Code of Pre-Arraignment Procedure § 350.3(3), but the Commission decided the concept was sufficiently well understood that it need not be spelled out in detail. Indeed, some thought that a specific definition of "improper pressure" might restrict the meaning of the phrase, though the primary impetus for deleting the definition came from those who felt that inserting such a detailed prohibition on use of improper pressure might by implication indicate a Commission belief that the prohibited acts have been widely practiced in the past. The Commission specifically directed, however, that the A.L.I. language be quoted in the commentary. It is:

"(3) Improper Pressure. The prosecutor shall not seek to induce a plea of guilty or nolo contendere by

"(a) charging or threatening to charge the defendant with a crime not supported by the facts believed by the prosecutor to be provable;

"(b) charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him; or

"(c) threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty."

The basis for subsection (c) is in the A.L.I. proposal, but the Commission has made two changes. First, upon objection to the term "plea agreement" used in the A.L.I. proposal, the Commission adopted the term "plea arrangement." The objection to "agreement" was that it may imply a binding contract on the parties.

Second, the Commission decided to handle plea arrangements differently depending on whether it involved a sentence recommendation or a decision relating to the charge. The final word on sentencing must come from the judge; the Commission (unlike the A.L.I. proposal) gave the final decision as to charge reduction or dismissal to the prosecutor. The judge cannot veto that. Therefore, it is significant that subsection (c) refers to "a proposed plea arrangement in which the solicitor has agreed to recommend a particular sentence. . . ."

One other point needs to be made concerning subsection (c). No one may discuss a plea arrangement with a judge except with his permission. Some judges do not wish to commit themselves even tentatively as to sentence. The purpose of the subsection, of course, is to find out the judge's reaction to a proposed sentence; if the judge reacts negatively, the parties may resume negotiations and try again. One important aspect of this section is that it requires negotiation with full knowledge of the facts of the case and the defendant's prior criminal history, as the judge's tentative approval may be withdrawn "if he learns of information not consistent with the representations made to him."

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

Legal Periodicals. — For article, "Plea Bargaining in North Carolina," see 54 N.C.L. Rev. 823 (1976).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For a survey of 1996 developments in criminal law, see 75 N.C.L. Rev. 2346 (1997).

CASE NOTES

Purpose of Article. — Procedures under this Article serve (1) to prevent the occurrence of constitutional errors in the arraignment process, and (2) to discourage the filing of baseless petitions for habeas corpus and facilitate speedy but fair disposition of those that are filed. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

The safeguards associated with "plea bargaining" and contained in this Article are designed to insure that defendant is fully aware of the ramifications of the plea of guilty. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

The Fair Sentencing Act, as codified in Article 81A of this Chapter, G.S. 15A-1340.1 et seq., resulted in revisions to other portions of the general statutes. See, e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the "Fair Sentencing Act," G.S. 15A-1340.1 et seq., see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Evidence of Plea Agreement. — Where a codefendant, who never had a plea agreement with the State, entered an open plea of guilty and the court consolidated her sentences on the condition that she testify truthfully if called upon by the State, the defendant's assertion that the State and court falsely presented to the jury, in violation of his due process rights, that the sentencing condition was enforceable was without merit; even assuming the condition was not enforceable, there was no evidence that the State or court knew it was not and purposefully implied to the jury that it was. State v. Frink, 158 N.C. App. 581, 582 S.E.2d 617, 2003 N.C. App. LEXIS 1280 (2003).

There is no absolute right to have a guilty plea accepted. State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980); State v. Wallace, 345 N.C. 462, 480 S.E.2d 673 (1997).

Defendant could not have his allegation that the trial court refused to allow him to approach the bench to inform the court that a plea agreement had been arrived at considered on appeal because there was no evidence in the record that such an agreement had been arrived at or that the trial court was aware of such an agreement, and under G.S. 15A-1021(c), the parties to a plea agreement were only allowed to advise the trial court of the terms of a proposed agreement if an agreement had been reached. State v. Williams, 154 N.C. App. 466, 572 S.E.2d 213, 2002 N.C. App. LEXIS 1439 (2002), aff'd, 357 N.C. 503, 586 S.E.2d 89 (2003).

Prosecution is bound by the terms and conditions utilized to obtain the guilty plea. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980).

Judicial Approval for Agreement Re-

quired. — A plea agreement involving a sentence recommendation by the State must first have judicial approval before it can be effective; it is merely an executory agreement until approved by the court. State v. Wallace, 345 N.C. 462, 480 S.E.2d 673 (1997).

Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Appeal to Superior Court for Trial de Novo. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Plea Invalid Where Defendant Not Informed of Parole Conditions Attached to It. — Where, following guilty pleas to drug offenses pursuant to a plea bargain, the trial court ordered as a condition of parole that defendants reimburse the Bureau of Investigation Drug Division for the expenses it had incurred in investigating the charges and obtaining the proof, imposition of the condition without having advised defendants of it before acceptance of their pleas made their pleas both involuntary and unintelligent, since the condition was probably illegal under G.S. 15A-1343(d) and quite unanticipated in connection with the plea bargains, and since it clearly was a special limitation on parole eligibility. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Attorney's Misunderstanding of Terms of Plea Bargain Held Prejudicial. — Defendant was prejudiced by the failure of his attorney to inform him of a plea bargain offer, where the attorney had mistakenly interpreted the offer as being conditional upon acceptance of it by his codefendant and therefore did not communicate the offer to defendant when the codefendant did not accept. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Guilty Pleas Held Involuntary. — Guilty pleas made by defendant when, upon his counsel undertaking to plead not guilty for him, the judge became visibly agitated, said in what appeared to be an angry voice that he was tired of "frivolous pleas," and directed counsel to confer with defendant and return with an "honest plea," were involuntary and coerced by the trial judge in violation of defendant's constitutional rights. State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

Defendant did not have to expressly admit guilt as to his status of being a habitual felon in order for the guilty plea to be valid. State v. Davis, 163 N.C. App. 587, 594 S.E.2d 57, 2004 N.C. App. LEXIS 408 (2004), cert. denied, 358 N.C. 547, 599 S.E.2d 564 (2004).

Applied in State v. Puckett, 43 N.C. App. 153, 258 S.E.2d 393 (1979); State v. Sweigart, 71 N.C. App. 383, 322 S.E.2d 188 (1984); State v. King, 158 N.C. App. 60, 580 S.E.2d 89, 2003 N.C. App. LEXIS 939 (2003).

Cited in State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976); Warren v. Marion, 465 F. Supp. 303 (E.D.N.C. 1978); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980); State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Simmons, 64 N.C. App. 727, 308 S.E.2d 95 (1983); State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986); In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003); State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731, 2004 N.C. App. LEXIS 297 (2004); State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381, 2005 N.C. App. LEXIS 334 (2005); State v. Foster, — N.C. App. —, 668 S.E.2d 630, 2008 N.C. App. LEXIS 2022 (2008).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

(2) Determining that he understands the nature of the charge;

(3) Informing him that he has a right to plead not guilty;

(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

(5) Determining that the defendant, if represented by counsel, is satisfied with his representation;

(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and

(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1989, c. 280; 1993, c. 538, s. 10; 1994, Ex. Sess., c. 24, s. 14(b).)

OFFICIAL COMMENTARY

Subsection (a) is based upon the requirements imposed by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The "catechism" here required of the judge is similar to, though varying in particulars from, those in the A.B.A. and A.L.I. proposals. (A.L.I. Code § 350.4(1); A.B.A. Standards § 1.4.)

The terminology "informed choice" in subsection (1) comes from the A.L.I. proposal. The A.B.A. standards used the word "voluntary."

In subsection (c), on the other hand, the Commission adopted the wording of the A.B.A. standards: "factual basis for the plea." The A.L.I. draft would go slightly farther and require the judge to make sure that reasonable cause for the charge made exists.

The Commission thought it would help clarify matters to insert in subsection (c) a description of the type of evidence that the judge may entertain in ruling on a plea. The Commission avoided, however, the thorny problem of the extent to which the defendant must be apprised of adverse information in the presentence report. This issue is subject to consideration when the Commission tackles the entire question of sentencing procedure.

Subsection (d) departs somewhat from the wording of the A.L.I. proposal, but like it, is based upon the decision in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Editor's Note. — Session Laws 2009-86, ss. 1 through 3, provide: "SECTION 1. The Administrative Office of the Courts shall revise the 'Transcript of Plea' form that is provided to a defendant who enters a plea of guilty or no contest to a criminal offense so that the form more clearly informs the defendant that G.S. 15A-1444 imposes limitations on the right of appeal when a defendant pleads guilty or no contest to a criminal offense with which the defendant is charged, and that also assists a judge in determining whether the defendant's plea is a product of informed choice as required by G.S. 15A-1022(b). In revising the form, the Administrative Office of the Courts shall insert to the list of items that currently appear on the form a new item that reads as follows: 'Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?'.

"SECTION 2. The Administrative Office of the Courts shall revise the 'Transcript of Plea' form that is provided to a defendant who decides to enter a plea of guilty to a criminal offense so that the form more clearly informs the defendant that under G.S. 15A-268 there may be a shorter preservation period for biological evidence when a defendant pleads guilty to a criminal offense than if the defendant had been tried and convicted by a jury for the same offense, and that also assists a judge in determining whether a defendant's plea is a product of informed choice as required by G.S. 15A-1022(b). In revising the form, the Administrative Office of the Courts shall insert to the list of items that currently appear on the form a new item that reads as follows: 'Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?'.

"SECTION 3. The Administrative Office of the Courts shall revise the form pursuant to this act by September 1, 2009, and the revised form shall be made available for pleas of guilty or no contest that are entered on or after October 1, 2009."

Legal Periodicals. — For article, "The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power," see 84 N.C. L. Rev. 1935 (2006).

CASE NOTES

Court Must Find Factual Basis for Plea. — When plea of no contest is now entered there must be a finding by the court that there is a factual basis for the plea. This finding and entry of judgment thereon constitute an adjudication of guilt. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

A judge may not accept a defendant's guilty plea without first determining that there is a factual basis for the plea; thus, where there was no factual basis for defendant's guilty plea to the charge of failure to appear for trial it was error for the trial court to accept defendant's plea. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Subsection (c) of this section provides that before the court may accept a no contest plea it must determine that there is a factual basis for the plea. This changes the rule that the court must impose a sentence based on the no contest plea and may not adjudicate the guilt of defendant upon such a plea. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Defendant Must Be Aware of Direct Consequences. — A guilty plea is not considered voluntary and intelligent unless it is entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel. Bryant v. Cherry, 687 F.2d 48 (4th Cir. 1982), cert. denied, 459 U.S. 1073, 103 S. Ct. 497, 74 L. Ed. 2d 637 (1982).

Even though it is error under this statute and constitution for the court to fail to personally inquire of the defendant about his plea and to determine that the plea was voluntary and the informed choice of the defendant, under the total facts and circumstances of a case the error may be harmless beyond a reasonable doubt. Such as where the defendant fails to allege any facts to show that the pleas of guilty were involuntary, only that the judge did not ask him personally if they were voluntary. State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

"Direct consequences" are broadly defined as those having a definite, immediate and largely automatic effect on the range of the defendant's punishment. This definition is not to be applied in a technical, ritualistic manner. Bryant v. Cherry, 687 F.2d 48 (4th Cir.), cert. denied, 459 U.S. 1073, 103 S. Ct. 497, 74 L. Ed. 2d 637 (1982).

A mandatory minimum sentence constitutes a "direct consequence" of a guilty plea, therefore, a court must apply the review required by G.S. 15A-1443(b). State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

This section does not require trial judge to elicit evidence from each, any or all of the enumerated sources. The trial judge may consider any information properly brought to his attention, but that which he considers must appear in the record. State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

Requirement That Trial Court Personally Examine Defendant. — There was no violation of defendant's right to due process or any statutory violation in revoking defendant's probation as: (1) defendant received notice of defendant's alleged probation violations, and a hearing was held; (2) defendant admitted to the first two violations contained in the probation violation report; and (3) unlike when a defendant pleads guilty, there was no requirement such as that imposed under G.S. 15A-1022 that the trial court personally examine defendant regarding defendant's admission that defendant violated defendant's probation. State v. Sellers, 185 N.C. App. 726, 649 S.E.2d 656, 2007 N.C. App. LEXIS 1939 (2007).

Nor Is the Court Required to Warn That the Guilty Plea Establishes Aggravating Circumstances or Forecloses Certain Arguments on Appeal. — The court was not required to tell the defendant that, as he was pleading guilty to murder in the first degree based on theories of premeditation and deliberation and of felony murder, his pleas to the felonies other than the murder would establish four aggravating circumstances and foreclose the argument of certain issues on appeal. Where the court otherwise examined defendant strictly in accordance with the statutory requirements of this section, it had no duty to expound further on direct consequences, absent an indication by the defendant that he required such instruction. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

This statute does not contain a requirement that the trial court attempt to discuss or explain to defendant any aspect of law pertaining to parole; thus, the court was under no duty to do so. State v. Daniels, 114 N.C. App. 501, 442 S.E.2d 161 (1994).

Court Not Required to Ask If Defendant Is Guilty. — The court's acceptance of defendant's plea was not in error, despite the court's failure to inquire whether defendant was in fact guilty. Nothing in this section requires the court to make such an inquiry. State v. Bolinger, 320 N.C. 596, 359 S.E.2d 459 (1987).

Adjudication as Habitual Felon. — Defendant's adjudication as an habitual felon was proper because the trial court conducted the inquiry required by G.S. 15A-1022(a), resulting in defendant's guilt as an habitual felon being duly stipulated, which stipulation was approved by the trial court, and defendant's sentence clearly suggested he was adjudicated an habitual felon as the sentence was within the presumptive range for someone with a prior record level I convicted of a class C felony with a prior record level I and not a class H felony, under G.S. 15A-1340.17(c), (e). State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

Where there was no evidence that defendant did not understand that each offense was subject to an enhanced sentence, the trial court did not err in accepting defendant's G.S. 15A-1022(a)(6) guilty plea to the status of habitual felon. State v. McNeill, 158 N.C. App. 96, 580 S.E.2d 27, 2003 N.C. App. LEXIS 929 (2003).

Trial court erred in finding defendant to have the status of a habitual felon, as the trial court did not inform defendant of the nature of the charges and consequences of pleading guilty to such a status, as required by G.S. 15A-1022(a)(1)-(4), and defendant could raise the failure to so inform him on appeal even though he had not objected at trial and had apparently pled guilty to habitual felon status. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

In practice it is generally counsel for the state and the defendant who furnish the court sentencing information on transcript of plea forms. As officers of the court, these individuals also have a responsibility to ensure the forms are complete and accurate when submitted to the trial judge. State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

Potential Fines. — Subsection (a) contains no provision requiring a defendant to be informed of any potential fines prior to acceptance of a guilty plea. State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

A violation of subsection (b) of this section is error. State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

When Lack of Strict Compliance Not Prejudicial. — Where the defendants' attorney had obtained information from the trial judge that the likely sentence imposed upon their pleas of no contest would be 30 to 40 years, the attorney had told the defendants of that probability, trial judge questioned each defendant regarding the voluntariness of their pleas, and each understood that he could be imprisoned for life, the trial judge's failure to comply strictly to subdivision (a)(6) of this section was not prejudicial error. State v. Richardson, 61 N.C. App. 284, 300 S.E.2d 826 (1983).

Failure of the trial judge to comply with this section did not require reversal where the defendant failed to demonstrate prejudice by the court's lapse. The transcript of plea entered into between defendant and the prosecutor covered all the areas omitted by the trial judge. State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896, 2000 N.C. App. LEXIS 794 (2000).

Trial court did not violate G.S. 15A-1022 when it failed to inform defendant that imposition of satellite-based monitoring would be a direct consequence of defendant's guilty plea, because the monitoring provisions were not punitive and thus, G.S. 15A-1022 was not implicated. State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

No Technical, Ritualistic Application of Rule. — The trial court's failure to inform the defendant of the maximum or minimum sentence for a Class C offense did not invalidate her guilty plea to an habitual felon charge, where the trial court questioned her as to whether she understood the sentencing consequences, and the defendant responded that she did understand, that she had no questions, and she admitted committing each of the applicable felonies. State v. Williams, 133 N.C. App. 326, 515 S.E.2d 80 (1999).

Record Must Tend to Show Guilt. — This section, if it is to be given any meaning at all, must contemplate that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty. State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980).

Although the trial court had to determine that there was a "factual basis" that the killing was committed without malice in order to accept the defendant's guilty plea to voluntary manslaughter, there was other evidence before the court, including the fact that the defendant used a deadly weapon to accomplish the killing, to support the finding of the aggravating factor that the killing was committed with malice. State v. Heidmous, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Sources of Information in Subsection (c) Not Exclusive. — Subsection (c) of this section does not require the trial judge to elicit evidence from each, any or all of the enumerated sources. Those sources are not exclusive because the statute specifically so provides. The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest. State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

This section does not require the trial judge to elicit evidence from each, any or all of the enumerated sources. The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest. State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980).

There was no error by the trial court in permitting the State to orally provide evidence necessary to support defendant's guilty plea to possession of cocaine and being an habitual felon, where the prosecutor recited defendant's prior convictions in order to support the habitual felon status because the information upon which a judge was to rely as a factual basis for accepting a guilty plea was not limited by G.S. 15A-1022(c). State v. Bivens, 155 N.C. App. 645, 573 S.E.2d 259, 2002 N.C. App. LEXIS 1611 (2002), cert. denied, 356 N.C. 680, 577 S.E.2d 895 (2003).

Information in Plea Transcript. — Defendant knew or should have known that she did not have a plea agreement with the State where the defendant signed a plea transcript which detailed the charge to which she was pleading guilty but contained no plea agreement. State v. Wilkins, 131 N.C. App. 220, 506 S.E.2d 274 (1998).

Written statement of the defendant as a source of information under subsection (c) of this section ordinarily consists of defendant's written answers to the questions contained in a document entitled "Transcript of Plea." State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

A presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Basis for Presentence Motion Held Sufficient. — For case holding defendant proffered a fair and just reason for his presentence motion to withdraw his plea of guilty. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

A no contest plea may be used to aggravate a crime so as to sustain a death sentence under G.S. 15A-2000(e). State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

No Contest Plea as Conviction for Evidentiary Purposes in Other Proceedings. — Under subsection (c) of this section, when a plea of no contest is now entered there must be a finding by the court that there is a factual basis for the plea. This finding and the entry of a judgment thereon constitute an adjudication of guilt. This adjudication would be a conviction within the meaning of G.S. 8C-1, Rule 609(a), and as a conviction it may then be used in another case to attack the credibility of a witness. State v. Outlaw, 326 N.C. 647, 390 S.E.2d 336 (1990).

Subsection (c) of this section has changed the rule that a court may not adjudicate the defendant's guilt on a plea of no contest. Before a court may now accept a plea of no contest it must make a finding that there is a factual basis for the plea. This amounts to an adjudication of guilt, and the rationale of former cases that there is no adjudication on a no contest plea so that it may not be used in another case no longer applies. Davis v. Hiatt, 326 N.C. 462, 390 S.E.2d 338 (1990).

Use of No Contest Plea for Impeachment. — A no contest plea can properly be admitted under G.S. 8C-1, Rule 609(a) for purposes of impeachment. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Use of No Contest Plea Entered Prior to July 1, 1975 to Support Habitual Felon Charge Not Proper. — Where defendant was convicted on a plea of no contest to a charge of felony escape, and judgment was entered on April 2, 1973, before the effective date of Chapter 15A (July 1, 1975), and where the rule at that time was that a conviction resulting from a nolo contendere plea could not be used against defendant in any case other than the one in which it was entered because it was neither an admission nor an adjudication of guilt, use of this conviction as one of three prior felony convictions required by G.S. 14-7.1 to support a charge of being a habitual felon was improper. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

No Contest Plea. — "Conviction" within the context of G.S. 14-7.6 includes a judgment entered upon a no contest plea, as long as the statutory procedures in this section for entering a no contest plea are followed by the trial court in entering the plea. State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

No Contest Plea Upheld. — Trial court did not err in accepting defendant's no contest plea where a factual basis for the plea existed and the exchange between defendant and the judge tracked the applicable statutory language and sufficiently explained the consequences of the no contest plea. State v. May, 159 N.C. App. 159, 583 S.E.2d 302, 2003 N.C. App. LEXIS 1430 (2003).

Modification of Involuntary Plea Would Not Make It Acceptable. — Where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. State v. Martin, 77 N.C. App. 61, 334 S.E.2d 459 (1985), cert. denied, 317 N.C. 711, 347 S.E.2d 47 (1986).

Factual Basis Shown by Prosecutor's Statement. — Statement of facts given by prosecutor at sentencing hearing held sufficient to support the determination of the sentencing judge that there was a factual basis for the guilty plea. State v. Shea, 80 N.C. App. 705, 343 S.E.2d 437, cert. denied, 317 N.C. 713, 347 S.E.2d 452 (1986).

Arresting officer's testimony established a sufficient factual basis to support defendant's guilty plea to breaking and entering; the officer testified that he found defendant's truck near a burglarized residence, that he saw jewelry and boxes in the truck, that footprints in the snow led up to the residence where a window was broken, and that, during a search of the residence, the officer found defendant underneath a bed with a stolen rifle laying next to him. State v. Poore, 172 N.C. App. 839, 616 S.E.2d 639, 2005 N.C. App. LEXIS 1774 (2005).

Guilty Plea Upheld. — Where the trial judge relied on the prosecution's summary of the evidence, to which defendant stipulated, and this summary provided a sufficient factual showing to support defendant's plea of guilty to premeditated murder, the trial judge was not in error in accepting defendant's guilty plea to murder in the first degree. State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

Where the trial judge adequately explained the two theories of murder in the first degree and defendant's responses indicate that he understood the nature of the plea and the possible consequences, the record did not support defendant's claim that his plea was not an informed choice as to both theories. State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

The evidence provided a sufficient factual basis to support the defendant's plea of guilty to the premeditated murder of his infant son. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Defendant's guilty plea was upheld where the trial court informed the defendant of the maximum sentence before accepting the plea in accordance with G.S. 15A-1022(a)(6). State v. Russell, 153 N.C. App. 508, 570 S.E.2d 245, 2002 N.C. App. LEXIS 1182 (2002).

Larceny defendant's guilty pleas were knowing and voluntary because the trial court conducted the inquiry set out in G.S. 15A-1022 and defendant signed a transcript of the plea under oath; defendant's asserted inability to understand the judge's inquiries merely related to a brief misunderstanding. State v. Carter, 167 N.C. App. 582, 605 S.E.2d 676, 2004 N.C. App. LEXIS 2338 (2004).

Guilty Plea Reversed. — Where there was no court record indicating defendant's plea, nor the court's allocution to her, with respect to her guilty plea to a charge of failing to notify the Department of Motor Vehicles of a change of address pursuant to G.S. 20-17, such was more than a technical non-compliance with the reporting requirements of G.S. 15A-1022 and G.S. 15A-1026, but instead was sufficient to establish prejudice, requiring that the conviction thereunder be vacated and the matter remanded. State v. Glover, 156 N.C. App. 139, 575 S.E.2d 835, 2003 N.C. App. LEXIS 78 (2003).

Guilty Pleas Held Involuntary. — Guilty pleas made by defendant when, upon his counsel undertaking to plead not guilty for him, the judge became visibly agitated, said in what appeared to be an angry voice that he was tired of "frivolous pleas," and directed counsel to confer with defendant and return with an "honest plea," were involuntary and coerced by the trial judge in violation of defendant's constitutional rights. State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

Concession of Guilt Upheld. — An acceptable consent as to a concession of guilt does not require the same formalities as mandated by the provisions concerning guilty pleas, and the evidence supported a proper consent where the defendant testified under oath that he understood the consequences of the concession, had discussed it with his attorney, and believed that the strategy was in his best interest. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102, 1999 N.C. App. LEXIS 1181 (1999).

Juvenile Admission. — Where a juvenile's court supervision was revoked for probation violations, it was not error to fail to make the specific inquiries enumerated in G.S. 7B-2407, because G.S. 7B-2407 did not apply to the juvenile's admission, or admission by the juvenile through the juvenile's attorney, that the juvenile violated conditions of court supervision. In re D.J.M., 181 N.C. App. 126, 638 S.E.2d 610, 2007 N.C. App. LEXIS 68 (2007).

Factual Basis for Plea Not Shown. — There was no factual basis for defendant's guilty plea, as required by G.S. 15A-1022(c); the transcript of the plea, defense counsel's stipulation to a factual basis, and the indictment taken together did not contain enough information for an independent judicial determination of defendant's actual guilt. State v. Agnew, 361 N.C. 333, 643 S.E.2d 581, 2007 N.C. LEXIS 409 (2007).

Factual basis for nolo contendere pleas to charges of sexual activity by a substitute parent and crime against nature held adequate. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Submission of Charge to Jury. — Where, at the start of trial, defendant informed the court, before the jury, that he wished to plead guilty to two counts of incest, the trial court noted this for the record, and defendant neither asked to execute a transcript of plea, nor requested the court to limit or exclude any evidence on the basis of his offer to plead guilty; no plea of guilty was accepted or entered by the court on the two offenses to which defendant pleaded guilty, therefore, the charges were properly submitted to the jury. State v. Shelton, 167 N.C. App. 225, 605 S.E.2d 228, 2004 N.C. App. LEXIS 2178 (2004).

Applied in State v. Puckett, 43 N.C. App. 153, 258 S.E.2d 393 (1979); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980); State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Blandford, 66 N.C. App. 348, 311 S.E.2d 338 (1984); State v. Deal, 99 N.C. App. 456, 393 S.E.2d 317 (1990); State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991); State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001).

Cited in State v. Stevens, 305 N.C. 712, 291 S.E.2d 585 (1982); State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); Burrow v. Randolph County Bd. of Educ., 61 N.C. App. 619, 301 S.E.2d 704 (1983); State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992); State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993); State v. Suites, 109 N.C. App. 373, 427 S.E.2d 318 (1993); State v. Stafford, 114 N.C. App. 101, 440 S.E.2d 846 (1994); State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (1994); State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996); State v. Edwards, 150 N.C. App. 544, 563 S.E.2d 288, 2002 N.C. App. LEXIS 589 (2002); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003); State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731, 2004 N.C. App. LEXIS 297 (2004); In re T.E.F., 167 N.C. App. 1, 604 S.E.2d 348, 2004 N.C. App. LEXIS 2060 (2004); In re D.C., 191 N.C. App. 246, 662 S.E.2d 570, 2008 N.C. App. LEXIS 1189 (2008).

§ 15A-1022.1. Procedure in accepting admissions of the existence of aggravating factors in felonies.

(a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). The court shall also determine whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.

(b) In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of G.S. 15A-1022(a). In addition, the court shall address the defendant personally and advise the defendant that:

(1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and

(2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

(c) Before accepting an admission to the existence of an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7), the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant. The court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.

(d) A defendant may admit to the existence of an aggravating factor or to the existence of a prior record level point under G.S. 15A-1340.14(b)(7) before or after the trial of the underlying felony.

(e) The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate. (2005-145, s. 4.)

Editor's Note. — Session Laws 2005-145, s. 5, made this section effective June 30, 2005, and provides, in part: "Prosecutions for offenses committed before June 30, 2005, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Applicability. — Because defendant admitted, through counsel, that defendant committed an offense while on pretrial release on another charge for purposes of the aggravating factor under G.S. 15A-1340.16(d)(12) in sentencing defendant, no Blakely right to a jury trial under U.S. Const., Amend. VI was invoked, as such was within the exception to Blakely; the trial court had authority to impose an aggravated sentence on defendant's convictions based on that finding, as the North Carolina Blakely Act, G.S. 15A-1022.1, was inapplicable where defendant's offenses were committed prior to June 30, 2005. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Cited in State v. Hurt, 361 N.C. 325, 643 S.E.2d 915, 2007 N.C. LEXIS 407 (2007).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

(a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the prosecutor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal. If a judge rejects a plea arrangement disclosed, in open court, pursuant to subsection (a) of this section, then the judge shall order that the rejection be noted on the plea transcript and shall order that the plea transcript with the notation of the rejection be made a part of the record.

(c) If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 186; 2009-179, s. 1.)

OFFICIAL COMMENTARY

This section merely spells out procedures that follow through on policies discussed in the commentary to prior sections.

Subsection (1) requires the judge in open court, presumably after going through the "catechism" required by G.S. 15A-1022, to tell the defendant whether he will abide by the recommendation as to sentence. If the judge refuses to go along, the parties can either renegotiate or the defendant may withdraw his plea and secure a continuance as a matter of right. See G.S. 15A-1024.

Effect of Amendments. — Session Laws 2009-179, s. 1, effective December 1, 2009, and applicable to pleas accepted on or after that date, added the last sentence of subsection (b).

Legal Periodicals. — For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For comment discussing the North Carolina Fair Sentencing Act, G.S. 15A-1340.1 et seq., see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

There is no absolute right to have a guilty plea accepted. The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980).

Plea Bargain Agreement Must Have Judicial Approval. — A plea bargain agreement involving a sentence recommendation by the State must first have judicial approval pursuant to subsection (b) of this section before it is enforceable; it is merely an executory agreement until approved by the court. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

It is of No Effect if it Does Not. — Alleged plea agreement involved a sentence recommendation that defendant enter pleas of guilty to the felonies of second-degree murder, first-degree burglary, robbery with a dangerous weapon, and conspiracy to commit second-degree burglary and that defendant receive two concurrent life sentences. However, the proposed agreement between the defendant and the State had no effect as a matter of law because it had not been approved by the trial judge. State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993).

A lack of judicial approval renders a proposed plea agreement null and void. State v. Johnson, 126 N.C. App. 271, 485 S.E.2d 315 (1997).

Court's Refusal to Consider Held Prejudicial. — The trial court's refusal to consider plea bargain arrangement was prejudicial error entitling defendant to a new trial. State v. Lineberger, 342 N.C. 599, 467 S.E.2d 24 (1996).

Modification of Involuntary Plea Would Not Make It Acceptable. — Where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. State v. Martin, 77 N.C. App. 61, 334 S.E.2d 459 (1985), cert. denied, 317 N.C. 711, 347 S.E.2d 47 (1986).

Judge required to consider aggravating, etc., factors during sentencing. — Unless a sentence has been agreed to during plea bargaining, a sentencing judge is required to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense. Such circumstances might include facts concerning both a dismissed charge as well as the admitted offense. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

The mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Trial Court's Rejection of Plea Agreement Not Appealable. — Trial court's rejection of defendant's plea arrangement with the prosecution, which included a sentencing range, was not appealable. State v. Santiago, 148 N.C. App. 62, 557 S.E.2d 601, 2001 N.C. App. LEXIS 1281 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 499 (2002).

Applicability of Subsection (b). — The unambiguous language of subsection (b) of this section makes it clear that its provisions are activated when the trial judge rejects a negotiated plea arrangement before actual arraignment of defendant and before the introduction of evidence. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

Withdrawal of Plea Offer. — No enforceable plea agreement existed between defendant and the State nor were defendant's constitutional rights violated where the State withdrew plea offer before defendant entered a guilty plea or in any other way detrimentally relied upon it, and the plea agreement was never presented to the trial court for approval as required by subsection (b). State v. Johnson, 126 N.C. App. 271, 485 S.E.2d 315 (1997).

Right to Continuance Absolute. — By adding the fourth sentence of subsection (b) of this section, the legislature has clearly granted to the defendant an absolute right to a continuance upon rejection of a proposed plea agreement at arraignment. State v. Tyndall, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Trial court is not required under this section to order continuance on its own motion. State v. Martin, 77 N.C. App. 61, 334 S.E.2d 459 (1985), cert. denied, 317 N.C. 711, 347 S.E.2d 47 (1986).

A jury has no role in a plea agreement; thus, defendant's argument to the jury asking why he should not be allowed to plead guilty to second-degree murder was improper. State v. Roseborough, 344 N.C. 121, 472 S.E.2d 763 (1996).

Statements by Prosecutor Excluded. — Trial court did not err in excluding statements made by the prosecutor at the plea and sentencing of codefendant as statements were not admissible as admissions of a party opponent and relevant to his defense in the guilt-innocence phase of the trial. State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996).

Modification Not Mandatory. — Section 15A-1023(b) merely requires the trial court to afford the parties an opportunity to modify the terms of a rejected plea if both parties so desire; the State is not mandated to do so on pain of not being able to proceed against the defendant on the original indictment. State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814, 2001 N.C. App. LEXIS 578 (2001).

Applied in State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979); State v. Deal, 99 N.C. App. 456, 393 S.E.2d 317 (1990).

Cited in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003).

§ 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement.

If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section is based in part on A.L.I. Code § 350.6, except the Commission did not adopt the part that would tie down for the record defendant's acquiescence as to the sentence pronounced. The right to automatic continuance was added by the Commission.

The Commission's proposal allowed withdrawal of the plea if the sentence was "more severe" than specified in the arrangement. After some discussion in a legislative committee as to whether a short sentence of imprisonment was more severe than a substantially longer probationary period, the section was amended to apply if there is any change at all concerning the sentence.

CASE NOTES

Applicability of Section. — The unambiguous language of this section discloses that it applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

G.S. 15A-1024 did not apply as defendant failed to comply with the plea agreement's requirement that defendant cooperate truthfully with the ongoing investigation, and no plea agreement was in place when defendant was sentenced; the agreement expressly stated that the state was not bound to recommend the less stringent sentence if defendant did not comply with the agreement's terms. State v. Hatley, 185 N.C. App. 93, 648 S.E.2d 222, 2007 N.C. App. LEXIS 1688 (2007).

There is no conflict in the language of this section and § 15A-1023 requiring that they be harmonized or construed. Rather, it clearly appears that the legislature intended that these separate statutes be independent and apply to entirely different, carefully delineated factual situations. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

Refusal of Witness to Testify on Grounds That Agreement Might Be Revoked. — A witness who had entered a guilty plea pursuant to a plea bargain to the same crimes for which defendant was being tried but who had not been sentenced had a right to refuse to answer questions in defendant's trial on the ground that his answers might tend to incriminate him since there was a possibility that the witness would be tried on the charges if the trial judge decided to impose a different sentence than that agreed upon in the plea bargain. State v. Corbin, 48 N.C. App. 194, 268 S.E.2d 260, cert. denied, 301 N.C. 97, 273 S.E.2d 301 (1980).

Reinstatement of a guilty plea following the correction of an error of law does not violate the principles of double jeopardy, and on remand, the trial court can impose a sentence other than the original plea arrangement, if it follows this section by giving the defendant an opportunity to withdraw his plea and have the matter continued to the next session of court. State v. Oakley, 84 N.C. App. 273, 352 S.E.2d 447 (1987).

Failure to Comply with Plea Agreement. — Defendant was not entitled to withdraw a guilty plea pursuant to G.S. 15A-1024; the trial court did not enter a sentence inconsistent with the plea agreement, because the plea agreement did not provide a sentence if defendant failed to comply with the plea agreement. State v. Russell, 153 N.C. App. 508, 570 S.E.2d 245, 2002 N.C. App. LEXIS 1182 (2002).

Trial court erred in ordering defendant to surrender her nursing license when she pled guilty to possessing drug paraphernalia, when such surrender was not part of the plea agreement; the trial court failed to inform defendant of her right to withdraw her plea, and thus failed to follow procedure required by G.S. 15A-1024. State v. Carriker, 180 N.C. App. 470, 637 S.E.2d 557, 2006 N.C. App. LEXIS 2385 (2006).

Trial judge erred in reopening sentencing hearing and resentencing defendant; trial judge should have: (1) informed defendant of his decision to impose a sentence other than that provided in the plea agreement, (2) informed him that he could withdraw his plea, and (3) if defendant chose to withdraw his plea, granted a continuance until the next session of court. State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731, 2004 N.C. App. LEXIS 297 (2004).

Defendant Held Entitled to Withdraw Guilty Plea. — Trial court erred in denying defendant's motion to withdraw a guilty plea to charges including assault; once the trial court entered a sentence other than the one included in the original plea agreement based on a mistake in defendant's prior record level, it should have allowed defendant to withdraw the plea pursuant to G.S. 15A-1024. State v. Wall, 167 N.C. App. 312, 605 S.E.2d 205, 2004 N.C. App. LEXIS 2174 (2004).

Applied in State v. Puckett, 299 N.C. 727, 264 S.E.2d 96 (1980).

Cited in State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003).

§ 15A-1025. Plea discussion and arrangement inadmissible.

The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

The parallel provision in A.L.I. Code § 350.7 has an initial qualifying clause: "Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn. . . ." The Commission thought this clause unnecessary as G.S. 15A-1022(b) requires the judge to examine the defendant as to plea arrangements, and G.S. 15A-1026 requires that a verbatim record be kept.

The Commission rejected a proposal to add a proviso to this section allowing evidence of plea discussions and arrangements to come in when essential to perjury prosecutions or contempt proceedings. It is not clear whether this was a deliberate policy decision or was based upon the assumption that the courts of necessity would engraft those exceptions upon the literal words of the section.

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

For survey of 1977 case law on evidence, see 56 N.C.L. Rev. 1069 (1978).

CASE NOTES

Purpose of Section. — This section was designed to facilitate plea discussions and agreements by protecting both defendants and prosecuting officials from being penalized for engaging in practices which are consistent with the objectives of the criminal justice system. State v. Wooten, 86 N.C. App. 481, 358 S.E.2d 78 (1987).

Discussion Between Defendant and Arresting Officer. — This section is not applicable where the only evidence of plea negotiation concerns a discussion between defendant and an arresting officer. State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977).

New Trial Required. — Admission of investigating police officer's testimony that defendant said that "his lawyer wanted to plead him to six years to the offense and he wanted to know what he should do" was highly prejudicial to defendant's case and potentially influenced the jury verdict, warranting a new trial. State v. Wooten, 86 N.C. App. 481, 358 S.E.2d 78 (1987).

Defendant's letters to the district attorney constituted a "plea discussion" within the intent and meaning of G.S. 15A-1025 and G.S. 8C-1, N.C. R. Evid. 410, so the State could not cross-examine defendant concerning those plea negotiations; the trial court committed reversible error and a new trial was ordered because the State's questioning repeatedly placed before the jury defendant's statements that he made a big mistake and was willing to confess to what he had done and to reveal who planned the robbery, which information was highly prejudical and potentially influenced the jury's decision. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Statement Not Made During Actual Negotiations. — Trial court erred by not allowing witness to testify regarding statement allegedly made by defendant: "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk," as this section did not cover this statement because it was not made during actual plea bargain negotiations. State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995), cert. dismissed, 599 S.E.2d 560 (2004).

The defendant waived his right to appellate review of a possible violation of this section by introducing evidence during his own direct examination of plea discussions and subsequently failing to object to the State's eliciting of further evidence during cross-examination. State v. Thompson, 141 N.C. App. 698, 543 S.E.2d 160, 2001 N.C. App. LEXIS 20 (2001), cert. denied, 353 N.C. 396, 548 S.E.2d 157 (2001).

Applied in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997).

Cited in State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977); State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885 (1982); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003).

§ 15A-1026. Record of proceedings.

A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, his counsel, and the prosecutor be recorded. If the judge rejects the plea arrangement under G.S.

15A-1023(b), then the rejection of the plea arrangement must also be made part of the record pursuant to G.S. 15A-1023(b). (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1975, 2nd Sess., c. 983, s. 144; 2009-179, s. 2.)

OFFICIAL COMMENTARY

This section is similar to A.L.I. Code § 350.8.

Effect of Amendments. — Session Laws 2009-179, s. 2, effective December 1, 2009, and applicable to pleas accepted on or after that date, added the last sentence.

CASE NOTES

Failure to Strictly Comply with Section. — Where although the trial court did not strictly comply with this section in making and preserving a verbatim record of the proceedings at which defendant plead guilty, but in addition to witnesses being able to recall the events in question, and the availability of the written transcripts of plea, the judgment made and preserved copious notes which aided him in refreshing his recollection, defendant was not entitled to relief on account of this omission. State v. Stevens, 305 N.C. 712, 291 S.E.2d 585 (1982).

Where there was no court record indicating defendant's plea, nor the court's allocution to her, with respect to her guilty plea to a charge of failing to notify the Department of Motor Vehicles of a change of address pursuant to G.S. 20-17, such was more than a technical noncompliance with the reporting requirements of G.S. 15A-1022 and G.S. 15A-1026, but instead was sufficient to establish prejudice, requiring that the conviction thereunder be vacated and the matter remanded. State v. Glover, 156 N.C. App. 139, 575 S.E.2d 835, 2003 N.C. App. LEXIS 78 (2003).

Submission of Charge to Jury. — Where, at the start of trial, defendant informed the court, before the jury, that he wished to plead guilty to two counts of incest, the trial court noted this for the record, and defendant neither asked to execute a transcript of plea, nor requested the court to limit or exclude any evidence on the basis of his offer to plead guilty; no plea of guilty was accepted or entered by the court on the two offenses to which defendant pleaded guilty, therefore, the charges were properly submitted to the jury. State v. Shelton, 167 N.C. App. 225, 605 S.E.2d 228, 2004 N.C. App. LEXIS 2178 (2004).

Applied in State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980); State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

Cited in State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003).

§ 15A-1027. Limitation on collateral attack on conviction.

Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired. (1973, c. 1286, s. 1; 1975, c. 166, s. 21; 1989, c. 290, s. 4.)

OFFICIAL COMMENTARY

This section was originally similar to A.L.I. Code § 350.9 in banning collateral attack except when review is required by constitutional provisions "or by other law of this State." The section was amended during the course of passage to delete the reference to constitutional provisions (as they apply in any event) and to specify the North Carolina statute presently governing the question.

CASE NOTES

Reviewability. — It is permissible for the court of appeals to review, pursuant to a petition for writ of certiorari, during the appeal period a claim that the procedural requirements of N.C. Gen. Stat. art. 58 were violated. State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731, 2004 N.C. App. LEXIS 297 (2004).

An inmate's complaint for declaratory relief was not barred by G.S. 15A-1027 because the inmate challenged the application of the parole eligibility statute, G.S. 15A-1340.4, to his 40-year sentence; the complaint did not directly challenge the 40-year sentence itself. Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

Although a trial court found that a 40-year sentence exceeded the total of presumptive terms for each felony offense and concluded that the maximum sentence it could impose for a kidnapping charge was 15 years, the order entered in the inmate's declaratory judgment case was not a collateral attack on the sentence imposed because the order was limited to the calculation of parole eligibility based on a 40-year sentence and did not change the inmate's original sentence. Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

Cited in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003); State v. Rush, 158 N.C. App. 738, 582 S.E.2d 37, 2003 N.C. App. LEXIS 1255 (2003).

§§ 15A-1028, 15A-1029: Reserved for future codification purposes.

Article 58A.

Procedures Relating to Felony Guilty Pleas in District Court.

§ 15A-1029.1. Transfer of case from superior court to district court to accept guilty and no contest pleas for certain felony offenses.

(a) With the consent of both the prosecutor and the defendant, the presiding superior court judge may order a transfer of the defendant's case to the district court for the purpose of allowing the defendant to enter a plea of guilty or no contest to a Class H or I felony.

(b) The provisions of Article 58 of this Chapter apply to a case transferred under this section from superior court to district court in the same manner as if the plea were entered in superior court. Appeals that are authorized in these matters are to the appellate division. (1995 (Reg. Sess., 1996), c. 725, s. 6.)

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

CASE NOTES

Applied in State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003).

§ 15A-1030: Reserved for future codification purposes.

Article 59.

Maintenance of Order in the Courtroom.

OFFICIAL COMMENTARY

The fountainhead case dealing with maintenance of order in the courtroom is Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). In addition to this case, the Commission in its drafting also consulted applicable standards of the American Bar Association cited below.

Note on Official Commentary. — The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§ 15A-1031. Custody and restraint of defendant and witnesses.

A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained, he must:

(1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and

(2) Give the restrained person an opportunity to object; and

(3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based on A.B.A. Project on Standards for Criminal Justice, Standards Relating to Trial by Jury § 4.1(c) (1968) (hereinafter cited as A.B.A. Standards, Trial by Jury), and the North Carolina case. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

CASE NOTES

There is no ban, constitutional or otherwise, against physical restraint in the courtroom per se. What is forbidden by the due process and fair trial guarantees of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19 is physical restraint that improperly deprives a defendant of a fair trial. State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986).

When Defendant May Be Restrained During Trial. — A defendant may be physically restrained during his trial when restraint is necessary to maintain order, prevent the defendant's escape, or protect the public. State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986).

The circumstances appropriate for the trial court's consideration of whether to physically restrain a defendant in the courtroom include, inter alia, the defendant's temperament and character, his age and physical attributes, his past record, his past escapes or attempted escapes, evidence of a present plan to escape, and threats to harm others or to cause a disturbance. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Trial court properly ordered defendant in capital murder case to be discreetly shackled because of the defendant's numerous instances of misconduct while in jail awaiting trial and while in the detention center immediately prior to trial. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002), cert. denied, 537 U.S. 1010, 123 S. Ct. 478, 154 L. Ed. 2d 412 (2002).

Trial court did not abuse its discretion in ordering a juvenile defendant to be restrained with leg shackles, as the bailiff had requested the same out of concern about the juvenile's desire to run, and especially where the shackles could not be seen and there was no evidence that the jury was affected by, or even aware of, the restraints. State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005), aff'd in part, vacated in part, review improvidently allowed in part, 361 N.C. 550, 648 S.E.2d 819 (2007).

A judge may base his findings supporting the use of restraints upon reliable information which would not be admissible as evidence at a trial. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Judge Did Not Err in Decision to Restrain or Remove Defendant. — Where the trial judge warned defendant out of the presence of the jury that he would be removed from the courtroom if his disruptive behavior continued and entered into the record his reasons for the removal, and where the court informed defendant that he could return to the courtroom upon his assurance of good behavior and that if he chose not to return he would be given an opportunity to confer with his attorney, there was no error in the trial court's decision to restrain defendant or to remove him from the courtroom. State v. Callahan, 93 N.C. App. 579, 378 S.E.2d 812, cert. denied, 325 N.C. 274, 384 S.E.2d 521 (1989).

There was no error where the defense witnesses were shackled while in the courtroom, because they were placed in, and removed from, the witness chair outside the presence of the jury. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Defendant was not deprived of a fair trial by being forced to wear shackles when he took the witness stand to testify, where he was in the courtroom when his case was tried, the shackles were concealed from the jury, and photographs about which defendant testified were passed to the jury for their viewing. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

The trial judge's decision to require defendant to wear a leg brace restraint during trial, which was not visible to the jury, did not violate defendant's constitutional rights. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Trial court's determination that it was both necessary and appropriate for defendant to be restrained at trial was supported by ample evidence; the trial court specifically noted that the charges arose out of attack on defendant's former attorney and a sheriff's deputy in a prior courtroom proceeding. State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241, 2005 N.C. App. LEXIS 392 (2005).

Restraint During Sentencing Phase. — The trial court did not err by permitting leg irons to be placed on the defendant during his sentencing proceeding for capital murder, where the court conducted a hearing pursuant to this section following a report of the defendant's possible escape attempt from jail, and the court noted the defendant's history of violence. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Capital murder defendant properly shackled during the sentencing phase of his trial, where the court was concerned for defense counsel's safety after the defendant's outburst at the end of the guilt phase. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

Defendant waived error as to having his legs shackled when, instead of objecting to being shackled, he objected to a conference regarding the shackles being held in his absence. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222, 1999 N.C. App. LEXIS 857 (1999), appeal dismissed, cert. denied, 351 N.C. 119, 541 S.E.2d 468 (1999).

No Prejudice in Failing to Instruct Jury. — Trial court failed to instruct the jury that it was not to consider defendant's restraint in its deliberations, but as there was no showing that the jurors were affected by, or even aware of the restraint, the conviction was affirmed. State v. Simpson, 153 N.C. App. 807, 571 S.E.2d 274, 2002 N.C. App. LEXIS 1251 (2002).

The court's failure to comply with the requirements of G.S. 15A-1032(b)(1) was not reversible error in the defendant's murder trial after the defendant was both physically restrained under G.S. 15A-1031 and was removed for disruptive behavior since the defendant's counsel waived the instruction under G.S. 15A-1032(b)(1) because they felt it would just call more attention to the fact that the defendant was not in the courtroom. State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

Cited in State v. Elliott, 137 N.C. App. 282, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000); State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002); State v. Jackson, 162 N.C. App. 695, 592 S.E.2d 575, 2004 N.C. App. LEXIS 265 (2004).

§ 15A-1032. Removal of disruptive defendant.

(a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.

(b) If the judge orders a defendant removed from the courtroom, he must:

(1) Enter in the record the reasons for his action; and

(2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The primary basis for this section comes from A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge § 6.8 (1972) (provisions on courtroom disruption approved in 1971) (hereinafter cited as A.B.A. Standards, Function of the Trial Judge). The warning requirement in subsection (a) is suggested in the commentary to the

A.B.A. Standards, and the Commission originated the provision that the warning and order for removal occur out of the jury's presence if practicable.

The provisions of subsection (b) as to recordation and jury instruction were added by the Commission to parallel those in G.S. 15A-1031. The remainder of subsection (b) is based on A.B.A. Standards, Function of the Trial Judge § 6.8, though the Commission has omitted the explicit statement that "removal is preferable to gagging or shackling the disruptive defendant." The Commission agreed in general with this policy, but was reluctant to put merely precatory instructions into statutory text. The Commission was of the opinion that judges would consider the applicable A.B.A. Standard in exercising their discretion.

A more substantive change has been made by the Commission as to the defendant's opportunity to return to the courtroom following his removal. The Commission deleted the specification that the opportunity should be "continuing" and further omitted this sentence found in the A.B.A. Standards: "The removed defendant should be summoned to the courtroom at appropriate intervals, with the offer to permit him to remain repeated in open court each time."

CASE NOTES

Judge Did Not Need to Use Word "Absence" in Place of "Removal". — Trial judge's instruction to jury on defendant's removal from the courtroom was proper and he need not use the word "absence" in place of "removal" to meet the requirements of subdivision (b)(2). State v. Callahan, 93 N.C. App. 579, 378 S.E.2d 812, cert. denied, 325 N.C. 274, 384 S.E.2d 521 (1989).

The court's failure to comply with the requirements of this section was not reversible error where, given the clear and undisputed nature of the evidence before the jury, it was difficult to imagine that defendant's outburst and subsequent removal had any effect on the determination of his guilt or innocence of being an habitual felon. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

Trial court's failure to give the instruction required under G.S. 15A-1032(b)(2) after ordering defendant removed from the courtroom during jury selection was not reversible error, as defendant did not show that a different result would have been reached had the instruction been given; in any event, error was waived because defendant did not object to the omission of the instruction. State v. Miller, 146 N.C. App. 494, 553 S.E.2d 410, 2001 N.C. App. LEXIS 975 (2001).

The court's failure to comply with the requirements of this section was not reversible error in the defendant's murder trial after the defendant was both physically restrained under G.S. 15A-1031 and was removed for disruptive behavior since the defendant's counsel waived the instruction under G.S. 15A-1032(b)(1) because they felt it would just call more attention to the fact that the defendant was not in the courtroom. State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

Disruptive Pro Se Defendant's Removal Upheld. — Where record indicated that defendant continued disruptive behavior while court attempted to enter findings into the record, in spite of the trial court's warnings that persistence would warrant his removal, and defendant was present when the proceedings resumed and was given opportunity to make his objections, the court's decision to remove defendant was without error. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222, 1999 N.C. App. LEXIS 857 (1999), appeal dismissed, cert. denied, 351 N.C. 119, 541 S.E.2d 468 (1999).

Cited in State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

§ 15A-1033. Removal of disruptive witnesses and spectators.

The judge in his discretion may order any person other than a defendant removed from a courtroom when his conduct disrupts the conduct of the trial. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The genesis of this section is A.B.A. Standards, Function of the Trial Judge § 6.10, although the judge's discretion to exclude is somewhat broader than that recommended by the American Bar Association.

CASE NOTES

Badges Did Not Necessitate Mistrial. — Trial court did not err by denying motion for a mistrial on the grounds that members of the audience were wearing badges that appeared to be photographs of one of the murder victims. State v. Braxton, 344 N.C. 702, 477 S.E.2d 172 (1996).

Removal Was Justified. — Trial judge did not err in removing four spectators from the courtroom, where the evidence showed, inter alia, that the spectators were talking in the courtroom, in violation of the judge's pretrial order. State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

Applied in State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985).

§ 15A-1034. Controlling access to the courtroom.

(a) The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present.

(b) The judge may order that all persons entering or any person present and choosing to remain in the courtroom be searched for weapons or devices that could be used to disrupt or impede the proceedings and may require that belongings carried by persons entering the courtroom be inspected. An order under this subsection must be entered on the record. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section originated with the Commission based upon several acts of violence occurring in courtrooms in the early 1970s.

CASE NOTES

Ordering Closure of the Courtroom. — Appellate court noted that defendant had threatened to hurt someone in the courtroom and to have someone help him escape, and that defendant had a history of attempting to escape and injuring law-enforcement officials, and held that the trial court did not err when it told unidentified spectators to leave the courtroom and closed the courtroom after the jury returned its verdict convicting defendant of felonious possession of stolen goods and misdemeanor possession of stolen goods. State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003).

Removal of Spectators From Courtroom Was Justified. — Trial judge did not err in removing four spectators from the courtroom, where the evidence showed, inter alia, that the spectators were talking in the courtroom, in violation of the judge's pretrial order. State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

Cited in State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

§ 15A-1035. Other powers.

In addition to the use of the powers provided in this Article, a presiding judge may maintain courtroom order through the use of his contempt powers as provided in Chapter 5A, Contempt, and through the use of other inherent powers of the court. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Compare A.B.A. Standards, Function of the Trial Judge § 6.10: "Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if his conduct is intentional, may be punished for contempt." See also A.B.A. Standards, Function of the Trial Judge §§ 7.1 to 7.5.

§§ 15A-1036 through 15A-1039: Reserved for future codification purposes.

ARTICLE 60.

§§ 15A-1040 through 15A-1050: Reserved for future codification purposes.

ARTICLE 61.

Granting of Immunity to Witnesses.

OFFICIAL COMMENTARY

In its second interim report to the President and the Congress dated March 17, 1969, the National Commission on Reform of Federal Criminal Laws recommended a legislative enactment to be considered separately from its later comprehensive recommendations for revision of the federal substantive criminal law. The separate proposal dealt with immunity to witnesses, and out of the proposal grew the Federal Immunity of Witnesses Act, 18 U.S.C. §§ 6001 to 6005. This act replaced over 50 scattered federal immunity provisions with one general law.

The Commission in drafting relied upon the wording of the National Commission's proposal rather than the slightly different act that passed. See 2 National Commission on Reform of Federal Criminal Laws, Working Papers 1405-48 (1970). The federal model contained provisions concerning the granting of immunity before:

(1) Courts;

(2) Grand juries;

(3) Administrative agencies conducting hearings; and

(4) Legislative bodies conducting hearings.

The Commission's proposal only extends to grants of immunity before courts and grand juries.

Another major departure from the federal model was the retention of "transactional" immunity rather than using the narrower "use" immunity approved by the Supreme Court of the United States. This will be discussed in more detail below.

In utilizing the immunity provisions of this Article, it is instructive to note the concurrent amendments to G.S. 5-1, G.S. 5-4, and G.S. 5-8 to strengthen the contempt laws in the event a person granted immunity then refuses to testify.

§ 15A-1051. Immunity; general provisions.

(a) A witness who asserts his privilege against self-incrimination in a hearing or proceeding in court or before a grand jury of North Carolina may be ordered to testify or produce other information as provided in this Article. He may not thereafter be excused from testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him. Except as provided in G.S. 15A-623(h), no testimony or other information so compelled, or any information directly or indirectly derived from the testimony or other information, may be used against the witness in a criminal case, except a prosecution for perjury or contempt arising from a failure to comply with an order of the court. In the event of a prosecution of the witness he shall be entitled to a record of his testimony.

(b) An order to testify or produce other information authorized by this Article may be issued prior to the witness's assertion of his privilege against self-incrimination, but the order is not effective until the witness asserts his privilege against self-incrimination and the person presiding over the inquiry communicates the order to him.

(c) As used in this Article, "other information" includes any book, paper, document, record, recordation, tangible object, or other material. (1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, ss. 4, 6; 1987 (Reg. Sess., 1988), c. 1040, s. 1; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 636, s. 3.)

OFFICIAL COMMENTARY

A formal grant of immunity is not conferred under this Article unless the witness is first asked the incriminating question, claims his privilege against self-incrimination, and is then ordered by judge to answer the question notwithstanding his privilege. If he does answer the question, then immunity from prosecution is conferred.

When it is anticipated that a witness in a trial in the district or superior court will claim the privilege against self-incrimination, the solicitor may request the superior court judge in advance for an order directing the witness to testify (after notifying the Attorney General in advance also, in accordance with G.S. 15A-1052(b)), but subsection (b) makes it clear that the order of the judge is not effective until the witness formally claims the privilege. In the original draft subsection (b) applied to the various types of immunity grants in the federal statute, but the Commission reduced the coverage to court and grand jury proceedings. Later by a change of wording in the grand jury immunity provision, the Commission effectively allowed for advance order of immunity only in court proceedings.

Until recently it was believed that a witness had to be given a complete grant of immunity with respect to any matter on which he testified to protect fully a witness's privilege against self-incrimination. This conferring of full immunity is known as "transactional" immunity. The National Commission on Reform of Federal Criminal Laws, however, proposed granting a somewhat narrower immunity. The argument ran that a person in being forced to testify should only be protected against having his disclosures, and the evidentiary leads flowing from his disclosures, used against him. If, for example, a totally independent investigation had been in progress for some time in Agency A, conferring of immunity in connection with another overlapping matter should not fortuitously frustrate the efforts of Agency A to prosecute — using only its independently gathered evidence. This narrower form of immunity for use of evidence and its leads is known as "use" immunity.

The Supreme Court of the United States has held that "use" immunity is all that is constitutionally required by the Fifth Amendment, but indicated that the prosecutor in a prosecution covering the same ground as that on which the defendant was formally compelled to testify as a witness would bear an extremely heavy burden of proving that the evidence being used was in fact totally independent. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972).

Despite the ruling upholding "use" immunity as constitutional, the Commission decided to retain within North Carolina a full transactional immunity for anyone compelled under this Article to testify to incriminating information. The model used for conferring transactional immunity was former 18 U.S.C § 3486, which is now repealed by the Federal Immunity of Witnesses Act.

Editor's Note. — Session Laws 1991, c. 686, s. 3 amended Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete an October 1, 1991 expiration provision. The 1991 act, which is in the coded bill drafting format set out in G.S. 120-20.1, did not mention Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, which amended the 1985 act, as amended, to change the expiration date to October 1, 1993.

CASE NOTES

This Article formalizes and gives statutory sanction to the granting of immunity from prosecution. It also provides a series of safeguards to protect against the reputed unreliability of witnesses who are receiving quid pro quo for their testimony. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

The separate provisions of this Article establish a pretrial and trial procedure designed to provide full and adequate prior disclosure of the prosecution's arrangement with its witness to the Attorney General and trial court, to defense counsel or to the unrepresented defendant and to the jury. These safeguards are aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

Standing to Challenge Grant of Immunity to Witness. — Defendants had no standing to challenge either the propriety or the effectiveness of a grant of immunity to a witness testifying against them since the privilege against self-incrimination is a personal one. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

Applied in State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983).

Cited in State v. Hicks, 60 N.C. App. 718, 300 S.E.2d 33 (1983); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Rankin, 191 N.C. App. 332, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

§ 15A-1052. Grant of immunity in court proceedings.

(a) When the testimony or other information is to be presented to a court of the trial division of the General Court of Justice, the order to the witness to testify or produce other information must be issued by a superior court judge, upon application of the district attorney:

(1) Be in writing and filed with the permanent records of the case; or

(2) If orally made in open court, recorded and transcribed and made a part of the permanent records of the case.

(b) The application may be made whenever, in the judgment of the district attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application.

(c) In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

Under the federal model, applications for immunity orders in court or grand jury proceedings may be done only with the approval of the Attorney General of the United States, the Deputy Attorney General, or a specifically designated Assistant Attorney General. The reason for centralized clearance is that under the Constitution of the United States the privilege against self-incrimination applies nationwide; to be effective, then, a grant of immunity must be nationwide. The Supreme Court has suggested that a grant of valid immunity conferred by one jurisdiction under our federal system will automatically be extended to apply in all jurisdictions under our federal system. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964).

The Commission determined that there was also a need for central clearance in North Carolina to guard against the solicitor's unwittingly granting immunity to a key figure under investigation elsewhere in the State or in the United States. The Commission decided, though, that it would be sufficient for the district solicitor to inform the Attorney General of North Carolina, or a deputy or assistant attorney general designated by him, of the proposed application for an immunity order. The person in the Department of Justice receiving the information should then be able to tell the district solicitor whether our Department of Justice knows of any reason why the particular individual should not be given immunity. A telephone call should be sufficient to satisfy the terms of the statute. Only the elected district solicitor may apply for the immunity order from the judge.

One interesting point might be noted. Even though the North Carolina statute grants full transactional immunity, this grant would be effective only with respect to prosecutions under the laws of North Carolina. In other jurisdictions the immunity would be the automatic one conferred by the holding in Malloy v. Hogan, but under Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) and Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972) this immunity would be "use" immunity only.

A question was raised in the Commission as to whether the judge has any option to refuse to issue the order to the witness to testify if he determines that:

(1) The applicant is a district solicitor;

(2) The district solicitor notified the proper person in the North Carolina Department of Justice before making application; and

(3) A witness has refused, or apparently will refuse, to testify on Fifth Amendment grounds in a proceeding covered by the statute.

The answer seems to be that the judge, except in the most extraordinary situations, must issue the order. He is the one to issue it so that the contempt powers of the court may attach upon any refusal to testify notwithstanding the grant of immunity. Also, the judge in his order would spell out the exact questions or subject-matter area as to which the witness is compelled to testify. Having this carefully delineated in the record may be of importance later. Compare the comment in the National Commission's Working Papers at 1435-36:

"The President's Commission mentioned only two grounds for a court order requirement. It spoke of avoiding abuse of authority by prosecutors, and it spoke of the danger of hidden immunization for corrupt purposes. However, with the approval power centralized in the Attorney General, these two points really are a single point: is the Attorney General to be trusted, or is a court somehow to review his good faith? Professor Blakey, in his supporting memorandum for the President's Commission, speaks of making 'visible' the Attorney General's decision in order to minimize the 'danger of hidden immunization of friends.' If such were attempted, he suggested, the Federal district court would 'have inherent power to refuse to be a party to it.'

"A court order requirement will be harmless, however, if the Federal district courts continue to view their role here as being solely ministerial — i.e, service as a recording agency. This approach was outlined in the leading case of Ullmann v. United States, 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956), sustaining the constitutionality of the initial court order requirement statute, 18 U.S.C. § 3486(c), concerning grand jury investigation and national security. At the same time the proposed language, while clearly negating a full policy review, would not prevent a Federal district court from finding sufficient reserve authority to deny a request for an immunity order in the context of cronyism."

Many of the practicing lawyers in the General Assembly expressed fears that prosecutors might abuse the power of granting immunity. One of several added provisions was subsection (c). It not only requires the judge during his charge to instruct the jury to scrutinize the immunized testimony with care but goes the further step of requiring that the judge inform the jury of the grant of immunity prior to the witness's testimony. See also the commentary under G.S. 15A-1055.

CASE NOTES

This Article established a pretrial and trial procedure designed to provide full and adequate prior disclosure of the prosecution's arrangement with its witness to the Attorney General and trial court, to defense counsel or to the unrepresented defendant and to the jury. These safeguards are aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

Legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Section requires the trial judge to inform the jury "of the grant of immunity" and not the details of the grant. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Ordinarily it is in the defendant's interest to show that a witness against him is testifying pursuant to an agreement with the state and to disclose the terms of the bargain because such evidence tends to impeach the witness. In some cases the state may wish to make the jury aware of the specific terms of the plea bargain. However, the court is not required to disclose the special terms of a plea bargain to the jury; that decision is left to the parties. When the court, acting on its own motion, removes that decision from the parties, there is the potential for prejudicial reversible error to occur. State v. Castleberry, 73 N.C. App. 420, 326 S.E.2d 312, cert. denied, 314 N.C. 670, 335 S.E.2d 497 (1985).

Jury Should Be Instructed in Final Charge. — Subsection (c) of this section clearly requires the court to instruct the jury as to the interest of the witness under the grant of immunity but "during the charge of the jury." This language means during the judge's final charge, and not in advance of the witness's testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Subsection (c) of this section requires that the trial court inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. State v. Rutherford, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985).

When "Scrutiny" Instruction Required. — The statutory "scrutiny" instruction is required, absent a special request by the defendant, only when a witness testifies under immunity. Thus, where defendant makes no special request for a "scrutiny" instruction, and his witness receives no grant of immunity but merely has some of the charges against him dismissed, subsection (c) of this section does not apply. State v. Pollock, 56 N.C. App. 692, 289 S.E.2d 588, cert. denied and appeal dismissed, 305 N.C. 590, 292 S.E.2d 573 (1982).

Unless a witness has been formerly granted immunity, there is no statutory requirement for any cautionary instruction that the witness is testifying under a grant of immunity prior to the testimony. State v. McLaughlin, 321 N.C. 267, 362 S.E.2d 280 (1987).

"Scrutiny" Instruction Not Mandated Under Arrangement Short of Immunity. — Subsection (c) of this section contains a mandatory "scrutiny" instruction when a witness testifies under immunity, but such an instruction is not mandated under an arrangement short of "immunity," such as charge reduction or sentence concession, as provided for in G.S. 15A-1054. State v. Bagby, 48 N.C. App. 222, 268 S.E.2d 233 (1980), cert. denied, 301 N.C. 723, 276 S.E.2d 284 (1981); State v. Pollock, 56 N.C. App. 692, 289 S.E.2d 588, cert. denied and appeal dismissed, 305 N.C. 590, 292 S.E.2d 573 (1982).

Instruction Need Not Be Given Immediately Before Witness's Testimony. — Nothing in this section requires the instruction in subsection (c) of this section to be given immediately before the witness's testimony. The statute only specifies that the instruction be given "prior" to the testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

While this section specifies "prior" to the testimony, there was no requirement that the instructions be given "immediately" preceding the witnesses' testimony, and that the instruction about scrutinizing the testimony is properly given during the "final" charge to the jury. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

Instruction Given Before Any Witness Called. — The trial judge's instruction as to the grant of immunity compiled with the spirit as well as the letter of the law where it was given before any witnesses were called in the case, but not immediately before the witness testified. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Interest of Witness Held Jury Question. — Where there is no evidence to show that the witnesses were accomplices, testifying under a grant of immunity from the State, or otherwise clearly interested witnesses, whether the witnesses should be considered interested parties is a question for the jury. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980), overruled on other grounds, 318 N.C. 457, 349 S.E.2d 566 (1986).

In a prosecution for murder, the trial court did not err in failing to instruct the jury that two witnesses who testified pursuant to an agreement that they would not be prosecuted for certain charges against them were interested in the verdict, the instruction on the credibility of the witnesses being sufficient where the court instructed that if either or both of the witnesses testified in whole or in part because of such concessions, the jury should examine the testimony of that witness with great care and caution, and that if the jurors should believe the testimony in whole or in part, they should treat what they believed the same as any other reliable evidence. State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741, appeal dismissed, 302 N.C. 400, 279 S.E.2d 354 (1981).

Substantial Compliance. — Where the material terms of the grant of immunity are explained to the jury, there is substantial compliance with this section and no prejudicial error. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Noncompliance Prejudicial. — The failure of the prosecution to provide advance notice of the grant of immunity pursuant to G.S. 15A-1054(c), its allowance of the witness' denials that such immunity existed to stand uncorrected and the trial court's failure to instruct the jury to consider the testimony of the immunized witness as it would consider the testimony of any other interested witness, pursuant to subsection (c) of this section resulted in manifest prejudice to the defendant requiring a new trial. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

Applied in State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982); State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983).

Cited in State v. Hicks, 60 N.C. App. 718, 300 S.E.2d 33 (1983); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Rankin, 191 N.C. App. 332, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

§ 15A-1053. Grant of immunity before grand jury.

(a) When the testimony or other information is to be presented to a grand jury, the order to the witness to testify or produce other information must be issued by the presiding or convening superior court judge, upon application of the district attorney. The order of a superior court judge under this section must be in writing and filed as a part of the permanent records of the court.

(b) The application may be made when the district attorney has been informed by the foreman of the grand jury that the witness has asserted his privilege against self-incrimination and the district attorney determines that the testimony or other information is necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

OFFICIAL COMMENTARY

This section was originally to be construed in conjunction with G.S. 15A-625. That section provided that the foreman of the grand jury must report to the district solicitor if a witness before the grand jury refuses to answer on the ground of self-incrimination, and indicated that the district solicitor had the discretion to seek the order of immunity or to refuse to do so. In committee, G.S. 15A-625 was deleted from the Article on the grand jury, but this section — considered at a different time — was left intact. It is apparently sufficiently complete within itself to be given effect notwithstanding the omission of G.S. 15A-625.

The language of subsection (b) states that the application to the judge "may be made when the solicitor *has* been informed by the foreman of the grand jury that the witness has asserted his privilege against self-incrimination. . . ." (Emphasis added.) Contrasting this language with that in G.S. 15A-1052(b) makes plain that the statute authorizes the order of immunity in grand jury proceedings only after the witness's refusal to testify. The delay in grand jury proceedings to obtain the judge's order, however, may not be so disruptive as it would be in a trial situation.

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

(a) Whether or not a grant of immunity is conferred under this Article, a prosecutor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed within the prosecutorial district as defined in G.S. 7A-60, to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.

(b) Recommendations as to sentence concessions must be made to the trial judge by the prosecutor in accordance with the provisions of Article 58 of this Chapter, Procedure[s] Relating to Guilty Pleas in Superior Court.

(c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1987 (Reg. Sess., 1988), c. 1037, s. 65.)

OFFICIAL COMMENTARY

After studying the federal models, the Commission thought that formal grants of immunity in North Carolina would probably be few and far between. Several persons described a more informal assurance of lenience or nonprosecution often offered by solicitors as being more effective and much more prevalent in the run of cases coming before the courts of North Carolina. The Commission, therefore, described this quasi-immunity practice which merges into plea negotiation, and added a notice requirement as a safeguard. The result is this section.

Because sentence concessions may only come from the judge, subsection (b) is a "piggyback" provision which stipulates that the working out of agreements concerning sentence must be in accordance with the provisions of Article 58, Procedures Relating to Guilty Pleas in Superior Court.

CASE NOTES

Constitutional Right to Disclosure. — Subdivision (c) and the Fourteenth Amendment to the Constitution of the United States require that any plea bargain with a person who is to testify against a defendant be disclosed to the defendant. State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

This Article formalizes and gives statutory sanction to the granting of immunity from prosecution. It also provides a series of safeguards to protect against the reputed unreliability of witnesses who are receiving quid pro quo for their testimony. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

The separate provisions of this Article establish a pretrial and trial procedure designed to provide full and adequate prior disclosure of the prosecution's arrangement with its witness to the Attorney General and trial court, to defense counsel or to the unrepresented defendant and to the jury. These safeguards are aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

Law-Enforcement Agencies Not Covered. — Defendant's contentions that he was prejudiced by the trial court's failure to compel the State to disclose any agreements between the prosecutor or any law-enforcement agency and any potential witness, was without merit since within subsection (c) there is no mention of law-enforcement agencies. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Disclosure Required Only When Arrangement Reached. — Subsection (c) of this section requires disclosure of a prosecutor's arrangement with a witness only when an arrangement has been reached. State v. Howell, 59 N.C. App. 184, 296 S.E.2d 321, cert. denied, 307 N.C. 271, 299 S.E.2d 218 (1982).

Prosecutor's Obligation Not Dependent on Request. — The obligation on the prosecutor to divulge the information required by subsection (c) of this section does not depend upon a request by the defendant. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Failure to Give Notice of Prosecution's Offer. — In a prosecution for murder, the district attorney violated subsection (c) of this section by failing to give defendants written notice prior to trial of an offer to permit a State's witness to plead guilty to misdemeanors in 11 felony cases pending against him in return for his truthful testimony against defendants where the witness testified that, although no deal had been made, he nevertheless expected the district attorney to reduce the felony charges to misdemeanors, and it appeared that the plea bargain offer may have induced the witness's testimony; however, the district attorney's noncompliance with the statute did not require suppression of the witness's testimony since the remedy for failure to comply with the statute was to move for a recess. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521, appeal dismissed, 302 N.C. 401, 279 S.E.2d 356 (1981).

Testimony Need Not Be Suppressed for Noncompliance Where Defense Knew of Agreement. — The district attorney's failure to disclose to defense counsel an agreement with a State witness under this section did not warrant suppression of the witness's testimony where the trial judge granted a recess as required by this section, and the record showed that defense counsel had known of the agreement of over three weeks. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

The defendant's rights under subsection (c) of this section were not violated by failure of the State to disclose an anticipated plea bargain between the State and a witness, where not only was there no formal agreement between the State and the witness, but the defendant's counsel was aware sufficiently in advance of trial that the witness was going to testify for the State under a hope of leniency to have brought out in cross-examination the circumstances under which the testimony was being offered. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Agreement as to Witness Whose Credibility Is Important. — Where the prosecutor remained silent while his witness testified that no plea arrangement had been made with the State, though he well knew that such an agreement did exist, and not only did the prosecutor allow the jury to be misled as to the witness's reasons for testifying, but by keeping the witness ignorant of the terms of the plea bargain, he contrived a means of ensuring that this evidence would not come before the jury, and the witness's credibility as a witness was an important issue in the case, evidence of any understanding or agreement for leniency was relevant to his credibility, and the jury was entitled to know of it. Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979).

Jury Need Not Be Informed. — This section, unlike G.S. 15A-1052, contains no requirement that the judge inform the jury of any agreement concerning charge reduction or sentence consideration. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Section 15A-1052(c) contains a mandatory "scrutiny" instruction when a witness testifies under immunity, but such an instruction is not mandated under an arrangement short of "immunity," such as charge reduction or sentence concession, as provided for in this section. State v. Bagby, 48 N.C. App. 222, 268 S.E.2d 233 (1980), cert. denied, 301 N.C. 723, 276 S.E.2d 284 (1981).

When a witness enters into an arrangement with the prosecutor under this section, absent a request from defendant, the trial court need not charge the jury that the witness testified as an accomplice or that the jury closely scrutinize the testimony because the witness testified under an agreement with the district attorney. Thus, absent request, the trial judge need not give an interested witness instruction to the jury. State v. Hicks, 60 N.C. App. 718, 300 S.E.2d 33 (1983).

Remedy for failure to comply with subsection (c) of this section is the granting of a recess upon motion by the defendant, rather than suppression of the testimony. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

Noncompliance Held Prejudicial. — The failure of the prosecution to provide advance notice of the grant of immunity pursuant to subsection (c) of this section, its allowance of the witness' denials that such immunity existed to stand uncorrected and the trial court's failure to instruct the jury to consider the testimony of the immunized witness as it would consider the testimony of any other interested witness, pursuant to G.S. 15A-1052(c) resulted in manifest prejudice to the defendant requiring a new trial. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

Noncompliance Held Not Prejudicial. — The State failed to comply with subsection (c) of this section by not disclosing the information that a law-enforcement official had promised to speak to the district attorney on witness' behalf and see what he could do regarding a reduction in her sentence in exchange for her "truthful" testimony against defendant, but as defendant ultimately was able to attack the witness' credibility through testimony elicited from the agent on cross-examination, and provided counsel for defendant with an extended lunch recess to enable him to prepare his cross-examination of the witness, the court's failure to grant a recess in this instance did not constitute prejudicial error. State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986).

Applied in State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825 (1982); State v. Daniels, 59 N.C. App. 442, 297 S.E.2d 150 (1982); State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Castleberry, 73 N.C. App. 420, 326 S.E.2d 312 (1985); State v. Arnold, 314 N.C. 301, 333 S.E.2d 34 (1985); State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995).

Cited in State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977); State v. McLaughlin, 321 N.C. 267, 362 S.E.2d 280 (1987); State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988); State v. Howell, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005).

§ 15A-1055. Evidence of grant of immunity or testimonial arrangement may be fully developed; impact may be argued to the jury.

(a) Notwithstanding any other rule of evidence to the contrary, any party may examine a witness testifying under a grant of immunity or pursuant to an arrangement under G.S. 15A-1054 with respect to that grant of immunity or arrangement. A party may also introduce evidence or examine other witnesses in corroboration or contradiction of testimony or evidence previously elicited by himself or another party concerning the grant of immunity or arrangement.

(b) A party may argue to the jury with respect to the impact of a grant of immunity or an arrangement under G.S. 15A-1054 upon the credibility of a witness. (1973, c. 1286, s. 1.)

OFFICIAL COMMENTARY

This section was added in the General Assembly and is another manifestation of fears by some attorneys of prosecutorial misuse of this new, for North Carolina, set of provisions. It is important to note that the section applies both to grants of immunity and to arrangements for truthful testimony under G.S. 15A-1054. It seems probable that the law of evidence would allow defense attorneys to attack testimony given under immunity or under an arrangement pursuant to G.S. 15A-1054 in the ways contemplated by this section, but the proponents wanted to nail the matter down. The same goes for the right of argument in subsection (b).

CASE NOTES

Purpose. — This section is aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement. State v. Colvin, 90 N.C. App. 50, 367 S.E.2d 340, cert. denied, 322 N.C. 608, 370 S.E.2d 249 (1988).

This Article formalizes and gives statutory sanction to the granting of immunity from prosecution. It also provides a series of safeguards to protect against the reputed unreliability of witnesses who are receiving quid pro quo for their testimony. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

The separate provisions of this Article establish a pretrial and trial procedure designed to provide full and adequate prior disclosure of the prosecution's arrangement with its witness to the Attorney General and trial court, to defense counsel or to the unrepresented defendant and to the jury. These safeguards are aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement. State v. Morgan, 60 N.C. App. 614, 299 S.E.2d 823 (1983).

Trial judge's refusal to inform the jury of an agreement between the district attorney and a State witness under G.S. 15A-1054 was not prejudicial error where the jury was fully informed of the agreement prior to the time it began deliberations by trial judge's instructions following the testimony, and by defense counsel's cross-examination of the witness concerning promises made to him. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Where defense counsel initially introduced evidence of co-conspirator's plea arrangement with the State, and the contents of a letter concerning that agreement were relevant to defendant's case and in no way prejudiced him, merely informing the jury of the plea arrangement and his interest in testifying against defendant, there was no error in the admission of this letter. State v. Colvin, 90 N.C. App. 50, 367 S.E.2d 340, cert. denied, 322 N.C. 608, 370 S.E.2d 249 (1988).

Applied in State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982).

Cited in State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977); State v. Roseborough, 344 N.C. 121, 472 S.E.2d 763 (1996); State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996).

§§ 15A-1056 through 15A-1060: Reserved for future codification purposes.

ARTICLE 62.

Mistrial.

OFFICIAL COMMENTARY

The Commission's original impulse was to draft a comprehensive article detailing all of the various situations in which a mistrial may be granted or must be granted. After struggling unsuccessfully with several drafts utilizing this approach, the Commission abandoned the attempt. The major problem was that there are stringent constitutional limitations on when a mistrial may be granted without the consent, or on motion, of the defendant. See, e.g., Illinois v. Sommerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973).

In seeking a more general codification of the rules that must govern the granting of mistrials, the Commission used as a model an earlier draft of the material now published in National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, Rule 541 (1974) (hereinafter cited as Uniform Rules). This Article does not purport to be exclusive in its coverage, and there are other sections in this chapter which specifically deal with the granting of mistrials in particular circumstances. See, e.g., G.S. 15A-1224 (death or disability of trial judge) and G.S. 15A-1235(d) (deadlocked jury).

Note on Official Commentary. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1061. Mistrial for prejudice to defendant.

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not make or join in the motion. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

With only minor changes of wording this section reflects the substance of Uniform Rules, Rule 541(a).

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

CASE NOTES

The purposes of mistrial are to prevent prejudice arising from conduct before the jury and to provide a remedy where the jury is unable to perform its function. Once the court has discharged the jury, there is no purpose in ordering a mistrial: the proceedings may be determined by rulings of the court on matters of law, including new trial motions. State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493, modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

When Motion Granted. — A motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law. State v. McCraw, 300 N.C. 610, 268 S.E.2d 173 (1980).

Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law. State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985); State v. Stroud, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

A defendant's motion for mistrial must be granted, pursuant to this section if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. The decision as to whether such prejudice has occurred is addressed to the discretion of the trial judge. His decision is not reviewable absent a showing of gross abuse of discretion. State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

A mistrial must be declared upon a defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

A mistrial is to be declared when conduct takes place inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice defendant's case and make it impossible for defendant to receive a fair and impartial verdict. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

Not every disruptive event occurring during trial automatically requires the court to declare a mistrial. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Mistrial Is Matter of Court's Discretion. — The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979); State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980), appeal dismissed, 302 N.C. 399, 279 S.E.2d 353 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, cert. denied, 304 N.C. 198, 287 S.E.2d 127 (1981), cert. denied, 305 N.C. 591, 292 S.E.2d 16 (1982); State v. Rutherford, 70 N.C. App. 674, 320 S.E.2d 916 (1984); State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985).

Ruling on a motion for mistrial in a criminal case rests largely in the trial judge's discretion. State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

Ruling on a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court. State v. McCraw, 300 N.C. 610, 268 S.E.2d 173 (1980); State v. Daniels, 59 N.C. App. 442, 297 S.E.2d 150 (1982); State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

It is within the court's discretion to decide whether substantial and irreparable prejudice to the defendant's case has occurred, and the court's decision will not be disturbed on appeal absent a showing of gross abuse of that discretion. State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Glover, 77 N.C. App. 418, 335 S.E.2d 86 (1985).

A motion for mistrial is addressed to the sound discretion of the trial judge and those rulings will not be reversed on appeal absent an abuse of discretion. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983); State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987); State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988); State v. Hogan, 321 N.C. 719, 365 S.E.2d 289 (1988).

The decision of whether to grant a mistrial rests in the sound discretion of the trial judge, and it will not be disturbed absent a showing of an abuse of discretion. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

On appeal, the decision of the trial judge is entitled to the greatest respect. He is present while the events unfold and is in a position to know just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of emotional outburst. Therefore, unless his ruling is so clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

A trial court's ruling on a motion for mistrial is not reviewable on appeal absent the appearance of a manifest abuse of discretion. State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990).

Whether a mistrial should be granted pursuant to this section is a matter which rests in the sound discretion of the trial judge. Because such a ruling is within the trial judge's discretion, a mistrial is only appropriate where such serious procedural or other improprieties would make it impossible for a fair and impartial verdict to be rendered under the law. State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991), cert. denied, 331 N.C. 120, 414 S.E.2d 764 (1992).

It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable. State v. Hill, 347 N.C. App. 275, 493 S.E.2d 264 (1997).

A motion for mistrial and the determination of whether defendant's case had been irreparably prejudiced is within the trial court's sound discretion. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999).

In defendant's trial on a charge of first-degree murder, the trial court did not abuse its discretion by denying defendant's motion for a mistrial because a police officer testified that, in an unrelated case, police seized a gun that appeared to be the gun defendant used to kill defendant's victim, and the appellate court refused to reverse defendant's conviction because defendant did not show that the jury failed to follow a curative instruction they were given by the trial court. State v. McCollum, 157 N.C. App. 408, 579 S.E.2d 467, 2003 N.C. App. LEXIS 747 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 467 (2003), aff'd, without op., 358 N.C. 132, 591 S.E.2d 519 (2004).

When defense counsel asked the jury to find defendant guilty based on the State's failure to prove defendant guilty beyond a reasonable doubt, the trial court did not abuse its discretion by declining to declare a mistrial because: (1) counsel's error was in form, not substance, as, contextually, he did not ask the jury to find defendant guilty; (2) counsel's error was cured when he was allowed to make additional argument to the jury; and (3) the trial court's ruling on defendant's mistrial motion was correctly based on the totality of the circumstances. State v. Mason, 159 N.C. App. 691, 583 S.E.2d 410, 2003 N.C. App. LEXIS 1524 (2003).

Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on his absence from the courtroom during his trial on drug charges as defendant waived his general right to be present at his trial through his voluntary and unexplained absence from the court after his trial had already commenced. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the trial court did not abuse its discretion by denying the defendant's motion for a mistrial made when law enforcement officers approached the jury box to purportedly block the victim's mother from seeing autopsy photographs, as the trial court acted promptly and effectively to regain control of the courtroom and the reviewing court would not second-guess the trial court to presume that the incident was fatally prejudicial. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

Failure to Rule Promptly. — The trial court abused its discretion in denying defendant's motion to set aside the jury verdict after waiting a year to rule on the motion. State v. Smith, 138 N.C. App. 605, 532 S.E.2d 235, 2000 N.C. App. LEXIS 778 (2000).

Mistrial in Capital Cases. — Under the common law of this State, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of "manifest necessity" for a mistrial. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

The retroactive declaration of a mistrial upon reconsideration has no valid basis in policy or law. This practice, if allowed, would impermissibly place a defendant who made any mistrial motion at any time in peril, subject to the unlimited discretion of the trial court, of losing his constitutional right to not be twice put in jeopardy for the same offense. State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493, modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

Effect of Denial of Motion. — The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

Remedy Less Drastic Than Mistrial Held Sufficient. — The trial court did not abuse its discretion in denying defendants' motions for severance or for a mistrial on the ground that they did not receive a fair and impartial trial due to the in-court outbursts of a codefendant, where, when possible, the trial judge immediately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it, when it became apparent that the codefendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom and at this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do so, and where in his final charge to the jury, the judge again instructed the jury not to allow the codefendant's behavior to influence its decision. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 100 S. Ct. 300, 62 L. Ed. 2d 310 (1979).

Where one juror heard a statement made by a rejected juror during the jury selection process, the trial court did not err in not declaring a mistrial since only one juror heard the statement; defendant and his counsel stated that they did not want the juror removed; the court carefully examined the juror who heard the statement as to whether it would in any way influence his verdict in the case, and the court offered defendant's counsel an opportunity to examine the jury further with respect to the statement, but counsel stated they were content with the original 12 jurors. State v. Pollock, 50 N.C. App. 169, 273 S.E.2d 501 (1980).

The trial court did not err in permitting the State to question a witness with respect to another offense unrelated to the case being tried and in denying defendant's motion for a mistrial because of the admission of the evidence and comments of the district attorney which followed, where the court instructed the jury that the objectionable evidence had nothing to do with the case, that the jury should strike the evidence from their minds, and that any juror who could not do so should raise his hand, which no juror did. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder where the trial court, after the motions to strike were allowed, instructed the jury not to consider the stricken evidence and specifically referred to the evidence and the witness who provided it, and since there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration; defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Any prejudice to defendant caused by the prosecutor's closing remark that "in [the] sympathy game, ladies and gentlemen of the jury, it's a hands-down victory [for the prosecution]" was remedied by the actions of the trial court in sustaining defendant's objection to the statement and instructing the jury not to consider it. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

The trial judge did not abuse his discretion in refusing to grant a mistrial pursuant to this section after the victim's sister, following defendant's testimony on direct examination, began to cry loudly and shouted, "You liar! You lied!" After the outburst, the judge demonstrated its inappropriateness by his direction to the prosecutor that persons unable to control their emotions will not be allowed in the courtroom. State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000), cert. denied, 353 N.C. 382, 547 S.E.2d 816 (2001).

Where a trial court immediately sustained defendant's objection to inadmissible prior crime evidence and gave a curative instruction telling a jury to "completely and totally disregard" the objectionable statement, the trial court did not abuse its discretion in denying defendant's motion for a mistrial; the trial court also asked the jury members to indicate any inability to follow the instruction by raising their hands and indicated for the record that none of the jurors raised his or her hand. State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804, 2004 N.C. App. LEXIS 819 (2004).

Although a victim suffered an emotional breakdown while on the stand, given the rapidity with which the trial court removed the jury and gave a curative instruction, the refusal to grant a mistrial was not an abuse of discretion under G.S. 15A-1061. State v. Simmons, 191 N.C. App. 224, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (2008).

Due process requires that a defendant have a panel of impartial, indifferent jurors. State v. Rutherford, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985).

The trial judge must insure that jurors remain impartial and uninfluenced by outside forces. State v. Rutherford, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985).

Remarks of Prosecutor. — Refusal of court to grant a mistrial based on prosecutor's remarks directed solely toward defendant's failure to offer evidence to rebut the State's case, made in response to defendant's jury argument, and based on comments in the State's closing argument, in which the prosecutor argued that certain evidence was uncontradicted, did not constitute error. State v. Taylor, 340 N.C. 52, 455 S.E.2d 859 (1995).

The court's denial of the defendant's motion for mistrial was not improper where the trial judge, who heard the argument and knew the atmosphere of the trial, carefully considered the circumstances before determining that the prosecutor's rhetorical questions although improper were not prejudicial to the defendant. The prosecutor had asked, "Wouldn't you have wanted to smoke a cigarette, too?" and "How would you like to have to perform oral sex?" while he was facing in the direction of defense counsel and brandishing a pistol in a state of apparent agitation. State v. Hill, 139 N.C. App. 471, 534 S.E.2d 606, 2000 N.C. App. LEXIS 990 (2000).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after the prosecutor recited a poem called "Dance, Death," and remarked that the jurors had better hope they were never victims of crime, that the police do "the best they can," and that defendant's version of the shooting was the biggest, most preposterous accident that had ever happened in the county. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Trial court did not err in denying defendant's motion for a mistrial; even though defendant argued that the trial court allowed the State to cross-examine defendant improperly about the details of defendant's prior convictions since defendant's detailed explanations of the actions which gave rise to the charges opened the door and allowed the prosecutor to divulge more details about the crimes in question, and defendant had not alleged or shown any prejudicial error from the prosecutor's questioning. State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898, 2002 N.C. App. LEXIS 1266 (2002), cert. denied, 357 N.C. 65, — S.E.2d — (2003), cert. dismissed, — N.C. —, 602 S.E.2d 679 (2004).

Denial of defendants' motion for a mistrial was not an abuse of discretion, as, even assuming it was error for the State to refer to a conviction for the lesser-included offense of assault inflicting serious injury as a misdemeanor amounting to a slap on the wrist, the evidence was sufficient to support first defendant's conviction for assault inflicting serious bodily injury. State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

Prosecutor's Outburst. — Where prosecutor interjected that he did not want to make an objection but that another judge he named would have had the defense counsel "locked up," the prosecutor's outburst, while inappropriate, did not make it impossible for defendant to receive a fair and impartial trial and defendant failed to show that the trial court abused its discretion by denying a mistrial. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

A mistrial was not warranted on the basis of the cumulative effect of prosecutor's allegedly improper arguments in defendant's capital case. The prosecutor used biblical references to encourage the jury to follow the civil law, mentioned the defendant's previous life sentence and parole related thereto, urged the jury to consider his future dangerousness, and denigrated the proffered mitigating circumstances. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Mistrial Required After Race-Based Remark. — The trial court abused its discretion in denying defendant's motion for a mistrial after the prosecutor gratuitously referred to the jury as "twelve people good and true, twelve white jurors" although the judge, prosecutor and defendant were all white; furthermore, the comment by the trial court that "We're not going to have that thing going on" failed to cure the prosecutor's opprobrious appeal for a "race-based decision." State v. Diehl, 137 N.C. App. 541, 528 S.E.2d 613, 2000 N.C. App. LEXIS 412 (2000).

Mistrial Not Required After Race-Based Remark. — Reversal was not warranted based on prosecutor's fragmented closing remark appearing to comment on the race of the jurors where, although the challenged portion of the prosecutor's closing argument was unsettling, the comment was made to pursue the prosecutorial theory that one of the defendant's motives for stabbing the victim was racial. State v. Diehl, 353 N.C. 433, 545 S.E.2d 185, 2001 N.C. LEXIS 430 (2001).

Where attorney became emotional and could not continue to question defendant the brief emotional display was not prejudicial to defendant as the attorney removed herself from the courtroom quickly and quietly and the jury was immediately removed from the courtroom. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Motion Based upon Defendant's Own Misconduct. — Judge properly denied defendant's motion for a mistrial based upon defendant's own misconduct; if defendant was prejudiced in the eyes of the jury due to his own actions in the courtroom, he could not be heard to complain. In addition, evidence of defendant's guilt was overwhelming and it was unlikely that the outburst prevented him from receiving a fair verdict. State v. Marino, 96 N.C. App. 506, 386 S.E.2d 72 (1989).

Defendant's absence during the final two hours of jury deliberations did not result in substantial and irreparable prejudice to her case and was harmless error with regard to denying her the constitutional right to be present at every stage of her trial. State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808, cert. denied, 335 N.C. 180, 438 S.E.2d 206 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994).

When the jury was inadvertently exposed to the charges originally filed against defendant, defendant's counsel did not provide ineffective assistance by not moving for a mistrial under G.S. 15A-1061 because the jury's discovery that defendant was originally charged with different crimes than those he faced at trial did not result in substantial and irreparable injury to defendant's case, and defendant did not show he was prejudiced by his counsel's failure to seek a mistrial. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C. 255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

Exposure of Jurors to News Reports. — The problem of exposure of jurors to news media reports during trial is primarily one for the trial judge, who must weigh all the circumstances in determining in his sound judicial discretion whether the defendant's right to a fair trial has been violated so as to require a mistrial when information or evidence reaches the jury which would not be admissible at trial. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

Same — Mistrial Not Required. — In a prosecution for possession and sale of heroin, where three jurors read a newspaper article which included information of defendant's prior conviction on a charge of selling heroin which was not admissible at trial, defendant was not entitled to a mistrial, since evidence of another prior transaction in which an officer paid defendant $350.00 for a white powder was properly admitted; the trial judge examined the jurors who had read the newspaper article and justifiably concluded that they had not formed an opinion as a result of reading the article and that they could make a decision based solely on the evidence presented at trial; and defendant did not request the right to examine the jurors. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

Trial court did not err by denying the defense's motion for a mistrial where two jurors saw, but did not read, a newspaper article discussing the case before them. State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982).

Where a juror inadvertently read a portion of a newspaper article which reported that the defendant had Acquired Immune Deficiency Syndrome (AIDS), it was reasonable to conclude that the juror did not read the entire article and had formed no opinion that would jeopardize the defendant's right to a fair trial; there was no abuse of discretion in the decision of the trial judge to deny the defendant's motion for a mistrial. State v. Degree, 114 N.C. App. 385, 442 S.E.2d 323 (1994).

Trial court did not abuse its discretion in denying a motion for mistrial, where seven jurors were exposed to newspaper article revealing that the defendant fled during jury selection and was a fugitive, as the court conducted an inquiry as to which of the jurors could remain fair and impartial, and continued to admonish the jury as to the State's burden of proof, which insured that no prejudice resulted to defendant. State v. Jordan, 131 N.C. App. 678, 508 S.E.2d 819 (1998).

Violation of Sequestration Order. — There was no abuse of discretion where inadvertent violation of the order for the sequestration of a witness did not prejudice defendant. State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996).

Withdrawal of Incompetent Evidence by Court Cured Prejudice. — The trial court did not err in failing to declare a mistrial when a detective read from a recorded statement of co-conspirator, part of which indicated that the defendant had been involved with drugs in the past. The trial court had granted the defendant's motion in limine and forbidden any evidence concerning the defendant's prior drug dealings. Even so, the co-conspirator's statement as read by the detective included the remark that, "I knew that he (the defendant) had, you know, drug involvement in the past." The trial court then instructed the jury to disregard the statement. When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Prejudice from Court's Question Cured by Instructions. — Any possible prejudice to defendant from the trial court's question to expert witness, which might have invaded the province of the jury to determine the credibility of the witness, was cured by the court's later jury instructions, and the trial court did not abuse its discretion by denying defendant's motion for a mistrial on this basis. State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996).

Late Discovery of Undisclosed Exculpatory Evidence. — In a first-degree rape case the trial court did not err in denying defendant's motion for mistrial based on the discovery by defendant, on the fourth day of trial, of a previously undisclosed laboratory report which revealed that an expert had found insufficient characteristics present in the photographs of shoeprints at the crime scene to enable the examiner to render an opinion as to whether defendant's shoes could have made the heel impressions shown in the photographs where the existence of that report in no way affected the competency of the investigating officer's testimony concerning his personal observation of the shoeprints and where defendant did not take advantage of the trial court's offer to assist in locating the expert if defendant thought his testimony would be helpful and although defendant obtained possession of the report before the State rested its case, he made no effort to introduce the report into evidence; inasmuch as the report was prepared in connection with the investigation of the case, the report was not statutorily discoverable except by voluntary disclosure. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Use of Firearm in Argument to Jury. — In a prosecution for first-degree murder and armed robbery, it was not improper for the prosecutor to use in his jury argument a revolver which had been offered in evidence in the trial so long as he did not attempt to draw any inferences from the weapon which were not supported by the evidence or to frighten or intimidate the jury with it; thus, the trial court properly did not grant a mistrial. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Remark by Witness. — Remark made by witness concerning seeing defendant on death row did not result in substantial and irreparable prejudice to defendant's case. State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997), cert. denied, 522 U.S. 1096, 118 S. Ct. 892, 139 L. Ed. 2d 878 (1998).

Witness' challenge to defendant to take the stand and testify did not require a mistrial for infringement of the defendant's Fifth Amendment rights, where the prosecutor did not solicit the witness' response, but tried to avoid further comments, and the trial court instructed the jury to disregard the statement. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999).

Emotional Outburst by Prosecuting Wit-

ness. — In light of a trial court's prompt actions in directing the removal of the prosecuting witness after her emotional outburst and in resuming his instructions to the jury and the otherwise compelling case against the defendant, the witness's emotional outburst was not so prejudicial to the defendant as to result in reversible error where the trial judge refused to grant a mistrial. State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985).

Trial court did not err by failing to instruct the jury to disregard an emotional display by a murder victim's widow, when the defendant did not request a curative instruction or move for a mistrial. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Victim's husband's emotional outburst was not so prejudicial to defendant as to render the denial of the motion for mistrial a manifest abuse of discretion reversible on appeal where the incident was apparently over quickly and caused minimal interruption. State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, 514 U.S. 1134, 115 S. Ct. 2014, 131 L. Ed. 2d 1012 (1995), cert. denied, 343 N.C. 757, 473 S.E.2d 626 (1996), cert. denied, 354 N.C. 74, 571 S.E.2d 835 (2001).

Emotional Outburst by Victim's Family. — Trial court did not abuse its discretion in denying a motion for mistrial where the trial court excused jurors when an emotional outburst occurred, cautioned the audience, provided a curative instruction to the jury and the defendant failed to establish that it was clearly erroneous for the trial court to find that the emotional outburst did not result in irreparable prejudice to defendant. State v. Revels, 153 N.C. App. 163, 569 S.E.2d 15, 2002 N.C. App. LEXIS 1090 (2002).

Bailiff Intrusion into Jury Room. — No mistrial was warranted under this section where the evidence showed that when the intrusion by the bailiff became known to the court, the trial judge put the bailiff under oath, determined that the bailiff had, without authorization of the court, knocked on the door of the jury room, that he did so because another bailiff had asked him to retrieve some magazines for defendant, that the bailiff said nothing to the jurors and the jurors said nothing to him, and that he heard no deliberations and had no other contact with the jurors. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Entry of Prosecution Witness into Jury Room. — The trial court did not err in denying defendant's motion for a mistrial made on the ground that one of the prosecuting witnesses entered the jury room during a recess at the conclusion of the trial but prior to the charge of the court, since the trial judge determined that the prosecuting witness knocked at the door of the jury room, came through the room and used the restroom, but did not communicate with any of the jurors. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

Conversation Between Witness and Juror. — Where a witness had brief conversation with an empaneled juror during the trial, which was shown to be related to the case, the appeals court determined that the trial court's failure to declare a mistrial as provided for under G.S. 15A-1061 was not plain error because there was no basis to suppose that absent the witness' brief interaction with the juror, the result of the trial would have been any different. State v. Hinton, 155 N.C. App. 561, 573 S.E.2d 609, 2002 N.C. App. LEXIS 1578 (2002).

Nonverbal, Out-of-Court Contact Between Juror and State's Witnesses. — Trial court did not abuse its discretion in denying defendant's G.S. 15A-1061 motion for a mistrial because of contact between two jurors and two of the victim's family members, who had given victim impact statements. The family member's offered a can of Fix-A-Flat to a juror whose car had a flat tire, but the juror, having seen the gesture, walked away; any contact occurred at a distance and was nonverbal, fleeting, and unrelated to defendant's trial. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Comment of victim's father during trial in response to defendant's contention that he was being railroaded did not result in such prejudice to defendant, who failed to request curative instructions, as to render the denial of his motion for mistrial a manifest abuse of discretion reversible on appeal. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Coercion Not Shown. — Trial judge's remarks to the jury concerning the time available for deliberations were made in open court and in the presence of defendant and his counsel, and the substance of those remarks appeared of record. Trial judge's unrecorded remarks did not amount to coercion of the jury. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Defendant in Handcuffs Not Prejudiced. — The defendant suffered no prejudice by being seen by jurors in handcuffs and in the custody of the sheriff, where defendant alleged that this occurred while he was being transported from the jail to the courtroom on one morning of trial, but he was not handcuffed during trial, and no juror responded positively to the trial court's inquiry of whether jurors had seen anything since the trial began that would cause them to be prejudiced against the defendant. State v. Dennis, 129 N.C. App. 686, 500 S.E.2d 765 (1998).

The trial court is not required to undertake a voir dire of an entire panel of prospective jurors whenever there is a possibility that one or more members of the panel observed the defendant in restraints. State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001).

Defendant Seen in Custody. — Defendant was not entitled to a mistrial after a juror saw him in custody, when it was determined that no other jurors saw this or were told about it, and the juror was replaced. State v. VanCamp, 150 N.C. App. 347, 562 S.E.2d 921, 2002 N.C. App. LEXIS 506 (2002).

Conduct of sheriff, as jury custodian, on the first day of jury selection, in initially taking a seat adjacent to the prosecutor, did not constitute substantial and irreparable prejudice to defendant where, following objection, the trial judge took immediate steps to correct the situation, and where the sheriff engaged in no communications with the jury during the short interval between the time he sat down and the lodging of the objection, and there was no allegation that the sheriff made improper extrajudicial comments to any of the jurors. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Where trial judge cautioned both parties before trial to avoid references to polygraph tests, but State's witness testified that he had asked defendant to take a polygraph test, there was no abuse of discretion by judge in denying defendant's motion for mistrial after defendant had been allowed to cross-examine the witness on that point and trial judge gave a cautionary instruction to the jury. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Reference to Polygraph. — The defendant was not entitled to a mistrial where the investigator's mention of the word "polygraph" was not such a "serious impropriety" as to render it impossible for defendant to receive a fair and impartial verdict, and any possible prejudice was removed by the trial court's prompt and timely instruction. State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258, 2000 N.C. App. LEXIS 811 (2000).

Doctor's Testimony on Defendant's Mental State. — Despite doctor's testimony in response to the court's inquiry regarding defendant's agitated state on the morning of his trial that defendant would "probably not, in his state" be able to effectively testify, defendant failed to show that the court's refusal to grant a mistrial was error; defendant did testify at trial and nothing in his testimony supported the argument that his alleged impaired condition prevented him from effectively testifying in his own defense. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Scope of Review. — Basically, the determination whether the evidence causes substantial or irreparable prejudice to the defendant's case is within the discretion of the trial judge. The scope of review therefore is limited to whether in denying the motion for a mistrial there has been an abuse of judicial discretion. State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983), aff'd, 310 N.C. 563, 313 S.E.2d 585 (1985).

A ruling on a motion for a mistrial is not reviewable absent a showing of gross abuse of discretion. State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

The ruling on a motion for mistrial will be disturbed on appeal only if so clearly erroneous as to amount to a manifest abuse of discretion. State v. Stroud, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

The scope of appellate review is limited to whether in denying motion for a mistrial, there has been an abuse of judicial discretion. State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988).

Mistrial Properly Denied. — The trial court acted properly when, after the prosecutor and defense counsel completed their initial arguments but prior to final closing arguments, it reversed its earlier ruling, informed the parties that it would instruct the jury as requested by defendant on the lesser-included offenses of second-degree murder and voluntary manslaughter, then permitted both parties to reopen their initial arguments after strongly cautioning that neither party would be allowed to mention the ruling, and denied the defendant's motion for a mistrial. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

The trial court's denial of defendant's motion for a mistrial based upon the prosecution's comments during trial as to disturbances by noise from the audience and upon its objection to the drug informant being asked where he lived—which objection the defendant took to convey that he was a dangerous and violent man who might seek out the witness—was upheld where the defendant was not mentioned in these comments. State v. Manning, 139 N.C. App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS 983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

The State's failure to inform the defendant of the existence of, and its failure to provide him with, copies of the currency obtained from the defendant or the serial number list and photocopy used to identify the currency and to charge the defendant with the drug offenses was not condoned, where the State had destroyed the photocopies and serial number list and recirculated the money for other drug buys. However, the defendant did not show substantial and irreparable prejudice to his case due to the overwhelming evidence on the charges stemming from one of the drug buys, including a recording of the drug buy obtained from the wire-tapped informant, testimony of the informant, surveillance of the area by officers, and seizure of defendant just after the transaction, when a substantial amount of cocaine was found on his person. State v. Manning, 139 N.C. App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS 983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

Trial court did not abuse its discretion in refusing to declare a mistrial after a court officer made improper remarks in the presence of some jurors regarding one of defendant's witnesses and an alternate juror responded to the remarks. The trial court conducted a proper inquiry into the matter and dismissed the alternate juror who had spoken to the court officer, and the record supported the trial court's determination after questioning the jurors that the improper remarks did not prohibit the remaining jurors from rendering an impartial decision in the case. State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Trial court did not err in denying defendant's motion for a mistrial because the record did not disclose that isolated testimony by the sexual assault victim substantially and irreparably prejudiced the defendant; thus, a mistrial was not required. State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003).

Appellate court rejected defendant's argument that the trial court erred when it failed to order a mistrial, sua sponte, after he informed the court that a person who was in the courtroom used hand signals to communicate with a child victim while she testified. State v. McCall, 162 N.C. App. 64, 589 S.E.2d 896, 2004 N.C. App. LEXIS 12 (2004).

Since the evidence supported the trial court's finding that none of the 12 jurors selected for the sitting panel were in the jury room by the time a newspaper article regarding the trial appeared there, defendant did not show the substantial and irreparable harm required by G.S. 15A-1061 for declaring a mistrial. State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

Victim's declaration that defendant shot defendant's first wife did not warrant a mistrial because a curative instruction was given immediately after the statement was made and defendant failed to show he was substantially and irreparably harmed. State v. Brunson, 180 N.C. App. 188, 636 S.E.2d 202, 2006 N.C. App. LEXIS 2240 (2006), appeal dismissed, cert. denied, 361 N.C. 431, 648 S.E.2d 848; aff'd, 362 N.C. 81, 653 S.E.2d 144 (2007).

Second defendant's motion for a mistrial was denied, as statements that second defendant "partied" with a person on probation for an unknown offense were not so prejudicial as to require a new trial. State v. Wiggins, 185 N.C. App. 376, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007).

Trial court did not abuse the court's discretion in denying defendants' motion for a mistrial as the trial court specifically found that an eyewitness was just trying to offer what the eyewitness thought was logical testimony and that a steamroller driver's counsel had not intended to elicit the eyewitness's improper response. Outlaw v. Johnson, 190 N.C. App. 233, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Trial court did not abuse its discretion in denying defendant's motion for mistrial pursuant to G.S. 15A-1061; the trial court sought to determine the effect on the jury of any misconduct by thoroughly questioning all parties allegedly involved in or affected by the incident, reprimanded and warned the person who allegedly followed a juror, specifically questioned the two jurors involved in the incident and received their individual assurances of impartiality, and inquired generally of all jurors and received their assurances of impartiality. Additionally, there was no evidence tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Mistrial Improperly Denied. — Procedure followed by the trial court violated the provisions of G.S. 15A-2000(b) because the poll was not timely and because the intervening evidence heard by the jury of co-defendant's confession led to substantial and irreparable prejudice to defendant; accordingly, the trial court erred in denying defendant's motion for mistrial and he was entitled to a new sentencing proceeding. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Mistrial Properly Granted. — Under North Carolina law, with the concurrence of the defendant, a judge may declare a mistrial at any time during the trial; where, after the trial started, the trial court judge discovered that he was familiar with certain aspects of the case, and where defendant did not object to the trial court's order of a mistrial, the mistrial was appropriate, and double jeopardy did not prevent later prosecution. State v. Cummings, 169 N.C. App. 249, 609 S.E.2d 423, 2005 N.C. App. LEXIS 513 (2005).

Applied in State v. Loren, 302 N.C. 607, 276 S.E.2d 365 (1981); State v. Carr, 61 N.C. App. 402, 301 S.E.2d 430 (1983); State v. Walker, 319 N.C. 651, 356 S.E.2d 344 (1987); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Holman, 94 N.C. App. 361, 380 S.E.2d

128 (1989); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993); State v. Williams, 333 N.C. 719, 430 S.E.2d 888 (1993); State v. Johnson, 341 N.C. 104, 459 S.E.2d 246 (1995); State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001); State v. Galloway, 145 N.C. App. 555, 551 S.E.2d 525, 2001 N.C. App. LEXIS 744 (2001).

Cited in State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982); State v. Cherry, 55 N.C. App. 603, 286 S.E.2d 368 (1982); State v. McGee, 60 N.C. App. 658, 299 S.E.2d 796 (1983); State v. King, 67 N.C. App. 524, 313 S.E.2d 281 (1984); State v. Alston, 81 N.C. App. 459, 344 S.E.2d 339 (1986); State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986); State v. Hurst, 82 N.C. App. 1, 346 S.E.2d 8 (1986); State v. Stover, 321 N.C. 580, 364 S.E.2d 115 (1988); State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989); State v. McDonald, 97 N.C. App. 322, 387 S.E.2d 666 (1990); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991); State v. Vines, 105 N.C. App. 147, 412 S.E.2d 156 (1992); State v. Williamson, 333 N.C. 128, 423 S.E.2d 766 (1992); State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992); State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994); State v. Tucker, 347 N.C. 235, 490 S.E.2d 559 (1997); State v. Hines, 131 N.C. App. 457, 508 S.E.2d 310 (1998); State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999); State v. Poindexter, 353 N.C. 440, 545 S.E.2d 414, 2001 N.C. LEXIS 428 (2001); State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

§ 15A-1062. Mistrial for prejudice to the State.

Upon motion of the State, the judge may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct resulting in substantial and irreparable prejudice to the State's case and the misconduct was by a juror or the defendant, his lawyer, or someone acting at the behest of the defendant or his lawyer. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not join in the motion of the State if:

(1) Neither he, his lawyer, nor a person acting at his or his lawyer's behest participated in the misconduct; or

(2) The State's case is not substantially and irreparably prejudiced as to him. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon Uniform Rules, Rule 541(b). The major substantive change is to add the misconduct of a juror to the grounds for which the State may secure a mistrial on its own motion — provided the prejudice was substantial and irreparable.

CASE NOTES

Legislative Intent. — By the enactment of this section and G.S. 15A-1063 the General Assembly did not intend to limit the authority of trial judges to order a mistrial where events not instigated by the defendant or his lawyer have nevertheless colored the proceedings in such a way as to suggest that an impartial trial in accordance with law cannot be had. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied and appeal dismissed, 301 N.C. 96, 273 S.E.2d 442 (1980).

Jury Tampering. — An order of mistrial based upon the provisions of this section was not proper even though there was some evidence of jury tampering, where there was no evidence of any connection between defendant or his attorney and the alleged jury tampering, and the possibility or risk that defendant might be the beneficiary of such activity was not sufficient to allow a conclusion that the acts were done at the behest of the defendant or his lawyer. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied and appeal dismissed, 301 N.C. 96, 273 S.E.2d 442 (1980).

Necessity of Mistrial. — The North Carolina Supreme Court has recognized two kinds of necessity that justify a mistrial without defendant's consent — physical necessity and the necessity of doing justice. State v. Sanders, 347 N.C. 587, 496 S.E.2d 568 (1998).

Applied in State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493 (1984).

Cited in State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989).

§ 15A-1063. Mistrial for impossibility of proceeding.

Upon motion of a party or upon his own motion, a judge may declare a mistrial if:

(1) It is impossible for the trial to proceed in conformity with law; or
(2) It appears there is no reasonable probability of the jury's agreement upon a verdict. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon Uniform Rules, Rule 541(c). The Commission deleted, upon a divided vote, a discretionary ground for mistrial if the poll of the jury indicated there was not unanimous concurrence with the verdict returned. G.S. 15A-1238 states that the judge should direct the jury to retire for further deliberations in this instance, and the Commission saw no necessity to write in a special discretionary right to a mistrial. The defendant would always have the privilege under G.S. 15A-1061 to move for a discretionary mistrial if he thought the circumstances revealed by the poll of the jury were substantially prejudicial to him. The State would have a right to request a mistrial if the prejudice to it were tied to misconduct of a juror — under the Commission's version of G.S. 15A-1062. If the prejudice were so total as to make it "impossible" for the trial to proceed "in conformity with law," then either party or the judge on his own motion could trigger the mistrial under subdivision (1) of this section — provided this would be constitutional.

In its deliberations the Commission was furnished the following draftsman's comment with this section: "The language in subparagraph (1) is intended to cover the limited number of situations in which a judge may grant a mistrial without consent of the defendant because of the impossibility of proceeding with the trial. It covers the case in which a juror dies or becomes disabled to continue, and there is no alternate or else deliberations have already begun. It also covers the situation in which it becomes physically impossible for the trial to proceed — such as may be caused by fire, flood, or other catastrophe. . . . (This subparagraph gives) the judge as broad and flexible a power as possible in impossibility cases consistent with the constitutional rulings concerning former jeopardy."

CASE NOTES

Legislative Intent. — By the enactment of G.S. 15A-1062 and this section the General Assembly did not intend to limit the authority of trial judges to order a mistrial where events not instigated by the defendant or his lawyer have nevertheless colored the proceedings in such a way as to suggest that an impartial trial in accordance with law cannot be had. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied and appeal dismissed, 301 N.C. 96, 273 S.E.2d 442 (1980).

Section 15A-1235(d) allows declaration of a mistrial on the same grounds as this section. State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493, modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

Mistrial in Capital Cases. — Under the common law of this State, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of "manifest necessity" for a mistrial. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Mistrial Where Trial Not Fair and Impartial. — Subdivision (1) of this section allows a judge, over the defendant's objection, to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Discretion of Trial Judge. — The granting or denial of a motion for a mistrial is a matter within the sound discretion of the trial judge. State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

An order of a mistrial on a motion of the court is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

The trial judge did not violate this section by refusing to declare a mistrial where the court never expressed irritation at the jury for failing to reach a unanimous verdict, or intimated that the jury would be held for an unreasonable period of time to reach such a verdict although the jury was required to deliberate late on a Friday night and although it took the jury approximately eight hours to reach a verdict. State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815, 2000 N.C. App. LEXIS 1401 (2000).

Jury Tampering. — Where the trial court has reasonable grounds to believe that one or more jurors have been tampered with, it has the constitutional authority, if not the duty, to stop the trial, dismiss the jury, and direct a retrial. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied and appeal dismissed, 301 N.C. 96, 273 S.E.2d 442 (1980).

When the jury was inadvertently exposed to the charges originally filed against defendant, the trial court was not required under G.S. 15A-1063 to declare a mistrial ex mero motu, because the jury's discovery of the former charges did not create a situation where the trial could not proceed in conformity with law, and the trial court properly cured any possibility of prejudice by instructing the jury not to consider this inadmissible evidence. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C. 255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

The court may declare a mistrial when one of defendant's attorneys testifies for the State. State v. Malone, 65 N.C. App. 782, 310 S.E.2d 385, cert. denied and appeal dismissed, 311 N.C. 405, 319 S.E.2d 277 (1984).

Where the prosecutor's key witness suddenly refused to cooperate in a second degree sexual offense case, but the record was devoid of any evidence of misconduct, the trial court abused its discretion by granting a mistrial. State v. Chriscoe, 87 N.C. App. 404, 360 S.E.2d 812 (1987).

Jury's failure to reach a verdict due to deadlock is "manifest necessity" justifying declaration of a mistrial. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

Plea of former jeopardy will not preclude subsequent trial of a defendant, where the mistrial was ordered, over defendant's objections, due to physical necessity or the necessity of doing justice. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Defendant's failure to object to termination of her first trial for first degree murder by court's declaration of a mistrial would not prevent her from receiving the relief to which she was otherwise entitled on grounds of former jeopardy, on appeal of her conviction at a second trial. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Dismissal of Murder Conviction. — Where the initial declaration of a mistrial during defendant's first trial on the capital charge against her was not the result of manifest necessity, and therefore was error, and it could not be determined from the record whether the error in initially declaring a mistrial caused the jury to fail to reach agreement after the court had reinstated the jury, and thus deprived defendant of a verdict, the trial court erred when it later denied defendant's motion to dismiss the charge of first degree murder against her for the reason that she had formerly been placed in jeopardy for the same offense. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Plea of former jeopardy will not preclude subsequent trial of a defendant, where the mistrial was ordered, over defendant's objections, due to physical necessity or the necessity of doing justice. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Denial of Mistrial Upheld. — Defendant was not entitled to a mistrial based on a supplemental instruction to the deadlocked jury which did not threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

Applied in State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001).

Cited in State v. McGee, 60 N.C. App. 658, 299 S.E.2d 796 (1983); State v. Felton, 330 N.C. 619, 412 S.E.2d 344 (1992).

§ 15A-1064. Mistrial; finding of facts required.

Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This provision will be important when the rule against prior jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial. If the defendant requests or acquiesces in the mistrial, that finding alone should suffice.

CASE NOTES

The provisions of this section are simple and clear; their uniform application will protect valued rights of defendants and greatly facilitate the process of appellate review. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, 67 N.C. 377, 315 S.E.2d 699 (1984).

The purpose of this section is to ensure that mistrial is declared only where there exists real necessity for such an order. The right of the accused to completion of the proceedings before the same tribunal is thereby protected from sudden and arbitrary judicial action. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, 67 N.C. 377, 315 S.E.2d 699 (1984).

This section clearly requires findings of fact. Had the General Assembly wished to allow the matter to remain entirely in the discretion of the trial courts, it would have done so. Instead, in a departure from earlier law, the Legislature made such findings mandatory for all orders of mistrial. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, 67 N.C. 377, 315 S.E.2d 699 (1984).

The purpose of this section is to protect the constitutional rights of defendants and to facilitate the process of appellate review. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

The making of findings sufficient to support the judge's decision to grant a mistrial is mandatory, and the failure to make such findings is error. State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986); State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Even the most exigent of circumstances do not justify circumvention of this rule. State v. Johnson, 60 N.C. App. 369, 299 S.E.2d 237, cert. denied, 308 N.C. 679, 304 S.E.2d 759 (1983).

But Defendant Must Object to Failure to Make Findings. — Where defendant failed to make any objection at trial to the judge's failure to make findings as required by this section, he failed to preserve any error for appellate review under the requirements of N.C.R.A.P., Rule 10(b)(2), as the mandatory nature of this section does not relieve defendant of his responsibility to prevent avoidable errors and the resulting unnecessary appellate review by lodging an appropriate objection. State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986).

Defendant's failure to object to termination of her first trial for first degree murder by court's declaration of a mistrial would not prevent her from receiving the relief to which she was otherwise entitled on grounds of former jeopardy, on appeal of her conviction at a second trial. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Unless timely objected to by defense counsel, a trial court's failure to make findings in support of a mistrial is not subject to appellate review. However, in a capital case, the failure to object to a mistrial declaration will not prevent a defendant from assigning the declaration of mistrial as error on appeal. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

Failure to Make Findings. — Where the mistrial has been granted at defendant's request, there can be no prejudice to defendant in the failure to make findings as required by this section. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

Ordinarily, where a mistrial has been granted at defendant's request, there can be no prejudice to defendant in the failure to make such findings. However, when a defendant contends that serious prosecutorial misconduct precipitated his motion for mistrial, findings of fact may be as essential to adequate review of his double jeopardy claim as in a case in which mistrial is ordered over the defendant's objection. State v. White, 85 N.C. App. 81, 354 S.E.2d 324, aff'd, 322 N.C. 506, 369 S.E.2d 813 (1989).

Where, from the record the grounds for mistrial were clear, and were obviously clear to the trial court at the hearing on defendant's motion to dismiss, defendant was not prejudiced by the judge's failure to make the required findings before ordering mistrial and the omission thus constituted harmless error. State v. White, 85 N.C. App. 81, 354 S.E.2d 324, aff'd, 322 N.C. 506, 369 S.E.2d 813 (1988).

Where jury deadlock was apparent in record of trial, fact that court initially failed to make findings in support of mistrial declaration did not violate double jeopardy provisions. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

It is only a secondary purpose of this section to ensure that a full record is made. Its primary purpose is to protect the valued constitutional rights of criminal defendants. It would seriously weaken this protection if trial judges could ex post facto develop explanations for mistrial rulings. Findings must be made before the declaration to ensure full deliberation; the creation of a record subsequently is no substitute, except perhaps in a few isolated cases. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, 67 N.C. 377, 315 S.E.2d 699 (1984).

Dismissal of Murder Conviction. — Where the initial declaration of a mistrial during defendant's first trial on the capital charge against her was not the result of manifest necessity, and therefore was error, and it could not be determined from the record whether the error in initially declaring a mistrial caused the jury to fail to reach agreement after the court had reinstated the jury, and thus deprived defendant of a verdict, the trial court erred when it later denied defendant's motion to dismiss the charge of first degree murder against her for the reason that she had formerly been placed in jeopardy for the same offense. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Where the prosecutor's key witness suddenly refused to cooperate in a second degree sexual offense case, but the record was devoid of any evidence of misconduct, the trial court abused its discretion by granting a mistrial. State v. Chriscoe, 87 N.C. App. 404, 360 S.E.2d 812 (1987).

Where defendant failed to object to trial court's termination of first trial by a declaration of mistrial, defendant was not entitled, by reason of former jeopardy, to dismissal of charge against him; defendant was given notice and opportunity to object before mistrial was declared. State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (1996).

Facts Supporting Mistrial Shown. — Where there were three to six inches of snow in the county, several jurors were unable to get to the courthouse and defendant's attorney informed the court it would be difficult to get in to court, the trial court's decision to declare a mistrial was not an abuse of discretionary power. State v. Shoff, 128 N.C. App. 432, 496 S.E.2d 590 (1998), appeal dismissed, cert. denied, 348 N.C. 289, 501 S.E.2d 923 (1998).

Applied in State v. Coviel, 69 N.C. App. 622, 317 S.E.2d 917 (1984).

§ 15A-1065. Procedure following mistrial.

When a mistrial is ordered, the judge must direct that the case be retained for trial or such other proceedings as may be proper. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The statute on which this section is based, Kan. Stat. Ann. § 22-3423, added a provision requiring "that the defendant be held in custody pending such further proceedings, unless he is released pursuant to the terms of an appearance bond." The Commission thought the matter was already covered by Article 26, Bail, and deleted this portion.

§§ 15A-1066 through 15A-1070: Reserved for future codification purposes.

Article 63.

§§ 15A-1071 through 15A-1080: Reserved for future codification purposes.

Article 64.

§§ 15A-1081 through 15A-1100: Reserved for future codification purposes.

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 65.

In General.

§ 15A-1101. Applicability of superior court procedure.

Trial procedure in the district court is in accordance with the provisions of Subchapter XII, Trial in Superior Court, except for provisions:

(1) Relating to jury trial.
(2) Requiring recordation of proceedings unless they specify their applicability to the district court.
(3) That specify their applicability to superior court. (1977, c. 711, s. 1.)

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

§§ 15A-1102 through 15A-1110: Reserved for future codification purposes.

ARTICLE 66.

Procedure for Hearing and Disposition of Infractions.

§ 15A-1111. General procedure for disposition of infractions.

The procedure for the disposition of an infraction, as defined in G.S. 14-3.1, is as provided in this Article. If a question of procedure is not governed by this Article, the procedures applicable to the conduct of pretrial and trial proceedings for misdemeanors in district court are applicable unless the procedure is clearly inapplicable to the hearing of an infraction. (1985, c. 764, s. 3.)

§ 15A-1112. Venue.

Venue for the conduct of infraction hearings lies in any county where any act or omission constituting part of the alleged infraction occurred. (1985, c. 764, s. 3.)

§ 15A-1113. Prehearing procedure.

(a) Process. — A law enforcement officer may issue a citation for an infraction in accordance with the provisions of G.S. 15A-302. A judicial official may issue a summons for an infraction in accordance with the provisions of G.S. 15A-303.

(b) Detention of Person Charged. — A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation.

(c) Appearance Bond May Be Required. — A person charged with an infraction may not be required to post an appearance bond if:

(1) He is licensed to drive by a state that subscribes to the nonresident violator compact as defined in Article 1B of Chapter 20 of the General Statutes, the infraction charged is subject to the provisions of that compact, and he executes a personal recognizance as defined by that compact.

(2) He is a resident of North Carolina.

Any other person charged with an infraction may be required to post a bond to secure his appearance and a charging officer may require such a person charged to accompany him to a judicial official's office to allow the official to determine if a bond is necessary to secure the person's court appearance, and if so, what kind of bond is to be used. If the judicial official finds that the person is unable to post a secured bond, he must allow the person to be released on execution of an unsecured bond. The provisions of Article 26 of this Chapter relating to issuance and forfeiture of bail bonds are applicable to bonds required pursuant to this subsection.

(d) Territorial Jurisdiction. — A law enforcement officer's territorial jurisdiction to charge a person with an infraction is the same as his jurisdiction to arrest specified in G.S. 15A-402.

(e) Use of Same Process for Two Offenses. — A person may be charged with a criminal offense and an infraction in the same pleading. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 12.)

CASE NOTES

Power to arrest not necessarily include the authority to search motor vehicle in the absence of probable cause. State v. Braxton, 90 N.C. App. 204, 368 S.E.2d 56 (1988).

Motorist's rights were not violated by officer's performance of registration check or by use of handcuffs. Burton v. City of Durham, 118 N.C. App. 676, 457 S.E.2d 329 (1995).

Cited in State v. Ghaffar, 93 N.C. App. 281, 377 S.E.2d 818 (1989); State v. Parker, 183 N.C. App. 1, 644 S.E.2d 235, 2007 N.C. App. LEXIS 835 (2007).

§ 15A-1114. Hearing procedure for infractions.

(a) Jurisdiction. — Jurisdiction for the adjudication and disposition of infractions is as specified in G.S. 7A-253 and G.S. 7A-271(d).

(b) No Trial by Jury. — In adjudicatory hearings for infractions, no party has a right to a trial by jury in district court.

(c) Infractions Heard in Civil or Criminal Session. — A district court judge may conduct proceedings relating to traffic infractions in a civil or criminal session of court, unless the infraction is joined with a criminal offense arising out of the same transaction or occurrence. In such a case, the criminal offense and the infraction must be heard at a session in which criminal matters may be heard.

(d) Pleas. — A person charged with an infraction may admit or deny responsibility for the infraction. The plea must be made by the person charged in open court, unless he submits a written waiver of appearance which is approved by the presiding judge, or, if authorized by G.S. 7A-146, he waives his right to a hearing and admits responsibility for the infraction in writing and pays the specified penalty and costs.

(e) Duty of District Attorney. — The district attorney is responsible for ensuring that infractions are calendared and prosecuted efficiently.

(f) Burden of Proof. — The State must prove beyond a reasonable doubt that the person charged is responsible for the infraction unless the person admits responsibility.

(g) Recording Not Necessary. — The State does not have to record the proceedings at infraction hearings. With the approval of the court, a party may, at his expense, record any proceeding. (1985, c. 764, s. 3.)

CASE NOTES

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 15A-1115. Review of disposition by superior court.

(a) Appeal of District Court Decision. — A person who denies responsibility and is found responsible for an infraction in the district court, within 10 days of the hearing, may appeal the decision to the criminal division of the superior court for a hearing de novo. Upon appeal, the defendant is entitled to a jury trial unless he consents to have the hearing conducted by the judge. The State must prove beyond a reasonable doubt that the person charged is responsible for the infraction unless the person admits responsibility. Unless otherwise provided by law, the procedures applicable to misdemeanors disposed of in the superior court apply to those infraction hearings. In the superior court, a prosecutor must represent the State. Appeal from the judgment in the superior court is as provided for other criminal actions in superior court, and the Attorney General must represent the State in an appeal of such actions.

(b) Review of Infractions Originally Disposed of in Superior Court. — If the superior court disposes of an infraction pursuant to its jurisdiction in G.S. 7A-271(d), appeal from that judgment is as provided for criminal actions in the superior court. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 10.)

CASE NOTES

No Right to Appeal from Admission of Responsibility. — Defendant who is charged with an infraction and admits responsibility in the district court has no right to appeal for a trial de novo in superior court. State v. Richardson, 96 N.C. App. 508, 386 S.E.2d 98 (1989).

§ 15A-1116. Enforcement of sanctions.

(a) Use of Contempt or Fine Collection Procedures: Notification of DMV. — If the person does not comply with a sanction ordered by the court, the court may proceed in accordance with Chapter 5A of the General Statutes. If the person fails to pay a penalty or costs, the court may proceed in accordance with Article 84 of this Chapter. If the infraction is a motor vehicle infraction, the court must report a failure to pay the applicable penalty and costs to the Division of Motor Vehicles as specified in G.S. 20-24.2.

(b) No Order for Arrest. — If a person served with a citation for an infraction fails to appear to answer the charge, the court may issue a criminal summons to secure the person's appearance, but an order for arrest may not be used in such cases. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, ss. 1, 2, 15.)

CASE NOTES

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 15A-1117: Recodified as § 20-24.2 by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 3.

§ 15A-1118. Costs.

Costs assessed for an infraction are as specified in G.S. 7A-304. (1985, c. 764, s. 3.)

ARTICLE 67 TO 70.

§§ 15A-1119 through 15A-1200: Reserved for future codification purposes.

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 71.

Right to Trial by Jury.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1201. Right to trial by jury.

In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section preserves the existing law. The Commission briefly considered possible changes that would apparently require amendment of the Constitution of North Carolina, such as providing for trial to the court upon waiver of jury trial, less than unanimous verdicts, and fewer than 12 jurors in certain classes of cases, but decided against recommending such changes.

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

CASE NOTES

Unanimous Verdict. — When defendant was charged with 10 counts of statutory rape, the trial court submitted all 10 counts to the jury without differentiating among them, the indictment alleged 10 counts occurring between two dates, without specifying a date for any one charge, and the verdict sheets indicated guilty verdicts without specifying a particular offense, defendant's constitutional right to a unanimous jury verdict was violated because it could not be said that the jury unanimously agreed that defendant committed any particular offense. State v. Holden, 160 N.C. App. 503, 586 S.E.2d 513, 2003 N.C. App. LEXIS 1818 (2003), aff'd, 359 N.C. 60, 602 S.E.2d 360 (2004).

Trial court did not err by allowing defendant to be convicted with fewer than 12 jurors finding him guilty because the trial court's use of the term "consensus" in an instruction did not violate the verdict unanimity requirement, as the trial judge twice repeated that the jury had to unanimously agree on a verdict. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Defendant's right to an unanimous verdict under N.C. Const. art. I, § 24, G.S. 15A-1201, and G.S. 15A-1237(b) was not violated by generic testimony, or evidence of more incidents than there were criminal charges. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

When Double Jeopardy Attaches in Bench Trial. — In a bench trial, double jeopardy does not attach until the introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

Exchange of Witness List. — Subchapter XII of Chapter 15A covers the subject of criminal "Trial Procedure in Superior Court." This Article encompasses statutes on "Right to Trial by Jury." Nowhere is there any mention of a requirement for a witness list. While custom has been to exchange witness lists between counsel for use in the jury voir dire in criminal cases prior to questioning, there is no requirement for the State to furnish a list of the prospective witnesses to defense counsel at any stage. As observed by the North Carolina Supreme Court, the legislature rejected a proposal that would have allowed defendants to discover the names of witnesses the State intended to call. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

§§ 15A-1202 through 15A-1210: Reserved for future codification purposes.

ARTICLE 72.

Selecting and Impaneling the Jury.

OFFICIAL COMMENTARY

One of the models used in the initial drafts of this Article was American Law Institute, Code of Criminal Procedure, Chapter 13 (Proposed Final Draft 1930), but the material went through so many revisions that it can be said essentially to originate with the Commission.

Unless the context otherwise requires, the word "juror" in this Article refers to members of the jury panel generally, and not merely those selected as trial jurors or alternates.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

(a) The provisions of Chapter 9 of the General Statutes, Jurors, pertinent to criminal cases apply except when this Chapter specifically provides a different procedure.

(b) The trial judge must decide all challenges to the panel and all questions concerning the competency of jurors.

(c) The State or the defendant may challenge the jury panel. A challenge to the panel:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.
(2) Must be in writing.
(3) Must specify the facts constituting the ground of challenge.
(4) Must be made and decided before any juror is examined.

If a challenge to the panel is sustained, the judge must discharge the panel.

(d) The judge may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The challenge procedure set out in this section also applies when the challenge is to the panel from which grand jurors were drawn. See the 1977 amendment to G.S. 15A-622(a), effective July 1, 1978.

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

CASE NOTES

In order to properly allege a violation of G.S. 15A-1214, a defendant's challenge to a jury panel must be in writing, must specify the facts constituting the ground of challenge, and must be made and decided before any juror is examined; such challenges to jury selection must be made at the trial court level. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Subsection (b) requires trial judge to decide all challenges concerning the competency of jurors. Section 15A-1212 merely lists the various grounds for making challenges to jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

The extent of the inquiry of a prospective juror rests within the trial court's discretion and will not be found to be reversible error unless an abuse of discretion is shown. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Showing Required for Dismissal of Indictment. — In order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Knowing State's Witness Was Not Ground for Dismissal. — Defendant's challenge of a juror based on the fact that she admitted, during trial, to knowing one of the State's witnesses failed because the juror stated that she could continue to be fair and impartial, and defendant failed to show either an abuse of discretion or that he suffered any prejudice due to the continued service of the juror. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Juror No Longer Resident of County Where Trial Held. — Trial court properly executed its authority under G.S. 15A-1211(b) to determine that a prospective juror failed to meet the statutory requirements to sit as a juror in a trial; the court excused the prospective juror from the jury because she was no longer a resident of the county where the trial took place. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Jurors Conceptions of Parole Eligibility. — A court does not err by refusing to allow voir dire concerning prospective jurors' conceptions of the parole eligibility of a defendant serving a life sentence. State v. Smith, 347 N.C. App. 453, 496 S.E.2d 357 (1998).

Motion made pursuant to subdivision (c)(1) must be made and decided before any juror is examined. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Claim Considered Despite Failure to Comply With G.S. 15A-1211(c). — Although defendant did not comply with G.S. 15A-1211(c), defendant's claim that during unrecorded jury selection, in the judge's absence, the parties dismissed some potential jurors for cause by stipulation of the parties was considered; the trial judge erred by excusing himself from the courtroom during jury selection, but defendant failed to show that defendant was prejudiced by the error. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

When Findings Not Required. — In the absence of evidence that any qualified person was excluded from jury service, and in the absence of contradictory and conflicting evidence as to the material facts, the judge is not required to make findings. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Mere Violation of Statutory Procedures Will Not Merit Quashal. — In the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Mere Showing of Improper Disqualification Is Insufficient. — Even a showing that certain qualified persons were improperly disqualified, would not require a dismissal of an indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Reliance on Word of Sheriff as to Lack of Qualifications. — Where the testimony by the chairman of a jury commission indicated that, in certain instances, the commission did not make proper inquiry before disqualifying certain individuals, but instead simply took the sheriff on his word that such persons were disqualified, but there was no evidence indicating that persons qualified to serve were disqualified from the list, and there was no evidence that the sheriff was unlawfully delegated the responsibility, given the final say, of determining the jury list, the trial court properly denied a motion to quash the indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Juror's Financial Hardship. — Trial court did not abuse its discretion in denying defendant's challenge for cause of prospective juror who expressed concern over his financial hardship in the event of a long trial since the juror repeatedly stated during both the State's and defendant's voir dire that he could follow the law, that he had no outside distractions, that he could be fair to both sides, and could listen to all the evidence fairly. State v. Reed, 355 N.C. 150, 558 S.E.2d 167, 2002 N.C. LEXIS 13 (2002).

Prosecutor's Question as to Whether Jurors Had Opinion as to Guilt. — The trial court did not err in failing to strike the entire jury panel even though the prosecutor's question, in inquiring into the fitness of jurors to serve, as to whether the jurors had formed an opinion that the defendant was guilty was clearly improper, where the court sustained the defendant's objection to the question, and none of the jurors were permitted to respond to it. State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

If prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Jurors Opposed to Death Penalty. — Prospective jurors in a capital case may be excluded if they are unable or unwilling to accept state law which provides that in certain circumstances death is an authorized penalty and to address the issue of penalty in such a case without conscious distortion or bias. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Juror Must Be Unequivocally Opposed to Death Penalty to Be Excluded. — The exclusion of even one prospective juror in violation of the Witherspoon standard (Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)) invalidates a subsequent sentence of death, regardless of whether the State went to trial with peremptory challenges unexercised. The statement of the juror that he could not vote for the death penalty must be unequivocal. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Reopening Examination of Juror. — The decision of whether to reopen examination of a juror previously accepted by both parties is a matter within the discretion of the trial court. Once the trial court has exercised its discretion to reopen the examination of any juror, the trial court may excuse the juror for cause, and either party may exercise any remaining peremptory challenges to remove the juror. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Failure to Preserve Juror Challenge for Appellate Review. — Defendant who failed to object to juror selection process at trial, and in fact consented to the juror selection process at trial, failed to preserve issue of propriety of juror selection process in light of her failure to follow the procedures clearly set out for jury panel challenges and her failure to alert the trial court to the challenged improprieties. State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001), cert. denied, 356 N.C. 623, 575 S.E.2d 758 (2002).

Jury selection method used by the trial court, of dividing the jury panel into separate panels and calling the jurors such that both parties knew exactly which prospective juror was next to be called, was clearly in violation of G.S. 15A-1214(a), but since defendant did not follow the procedures outlined in G.S. 15A-1211(c) for challenging the panel, he waived appellate review of assignments of error under G.S. 15A-1214(a); defendant failed to show that absent the violation, a different result probably would have been reached, or that the process led to a miscarriage of justice or denied him of a fair trial he therefore failed to show plain error, and his convictions were affirmed. State v. Johnson, 161 N.C. App. 68, 587 S.E.2d 445, 2003 N.C. App. LEXIS 2001 (2003).

G.S. 15A-1214(a) randomness issue was not preserved for review since a defendant did not challenge the jury selection process in the manner provided by G.S. 15A-1211(c); the defendant stated after jury selection that he approved the jury selection process. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Defendant failed to preserve for review an alleged statutory violation of the requirement for random jury selection because he failed to follow the G.S. 15A-1211(c) procedure for challenging the randomness of jury selection when he did not object to the trial court's placement of a prospective juror in a specific seat. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Preservation for Review. — Defendant waived his assignment of error to the jury selection process because defendant never challenged the jury selection process in writing and never objected in any way to the allegedly improper method of placing prospective jurors in panels. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

There was no error where defendant never challenged the jury panel selection process, failed to follow the procedures clearly set out for jury panel challenges, and further failed, in any manner, to alert the trial court to alleged improprieties. State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996).

The defendant who failed to comply with this section could not successfully appeal the court's possible violation of G.S. 15A-1214. State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Challenge to the random selection of the jurors based on an alleged violation of G.S. 15A-1214 was not preserved where defendant failed to comply with this section. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

Defendants waived review of their assignments of error as to the selection process for jurors, whereby jurors were divided into panels, because they failed to comply with G.S. 15A-1211(c) by making an objection at trial. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Applied in State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000); State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000).

Cited in State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000); State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000).

§ 15A-1212. Grounds for challenge for cause.

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

(1) Does not have the qualifications required by G.S. 9-3.

(2) Is incapable by reason of mental or physical infirmity of rendering jury service.

(3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.

(4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

(5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.

(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

(7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

To the extent possible the Commission has attempted to restate in this Article the rules governing selecting and impaneling the jury in a criminal case. This section incorporates the disqualifications set out in G.S. 9-3 and adds a number of additional grounds for challenge for cause. A companion provision recommended by the Commission was the amendment of G.S. 9-3 to add as a qualification for jury service that the person be able to hear and understand the English language.

Subdivisions (3) and (4) supersede G.S. 9-15(c), which is concurrently amended to apply to civil cases only.

Subdivision (5) modifies North Carolina case law, which makes kinship within the ninth degree — by blood — a basis for challenge. The addition of kinship to the victim of the crime as a ground for challenge is new.

Subdivision (8) is primarily intended to codify the rule of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), but the Commission broadened the provision to apply generally rather than only to capital cases. It determined that in other situations certain jurors might, regardless of the circumstances, refuse to vote for conviction.

Legal Periodicals. — For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

I. General Consideration.
II. Mental or Physical Infirmity.
III. Opinion as to Guilt or Innocence.
IV. Inability to Render Verdict in Accordance with Law.

I. GENERAL CONSIDERATION.

Discretion of Court. — Challenges for cause in jury selection are matters in the discretion of the court and are not reviewable on appeal except for abuse of discretion. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987); State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

Decisions concerning the excusal of prospective jurors are matters of discretion left to the trial court. State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998).

When Juror's Answers Conflict. — The trial court did not abuse its discretion in violation of Article I, Sections 19, 23, and 27 of the North Carolina Constitution and this section by excusing for cause a juror who told the prosecutor that he had reasonably strong religious beliefs about the death penalty which he had held for a long period of time; that, because of those beliefs, it would be hard for him to find the death penalty warranted under any circumstances; that his religious beliefs would substantially impair his duty as a juror to recommend to the trial court a punishment of death if the evidence warranted it; even though he also claimed he could follow the law and "go by which one I thought was right, whoever proved the most." State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000), cert. denied, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000).

Relation to Defense Counsel. — It was not an abuse of the trial court's discretion to excuse juror for cause where he was defense counsel's brother-in-law. State v. Exum, 128 N.C. App. 647, 497 S.E.2d 98 (1998).

Standard of Review. — Unless the trial court's ruling on a challenge for cause is required by law, the ruling is reviewable on an abuse of discretion standard, and this section permits a challenge for cause against any prospective juror who "is unable to render a fair and impartial verdict." State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

The holding in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, applies only to peremptory challenges, not challenges for cause. State v. Norwood, 344 N.C. 511, 476 S.E.2d 349 (1996), cert. denied, 520 U.S. 1158, 117 S. Ct. 1341, 137 L. Ed. 2d 500 (1997).

Section Lists Grounds for Challenges. — Section 15A-1211(b) requires the trial judge to decide all challenges concerning the competency of jurors. This section merely lists the various grounds for making challenges to jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Defendant's Right Is to Reject Jurors. — A defendant is not entitled to any particular juror; his right to challenge is not a right to select but to reject a juror. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

The function of a challenge for cause is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise. The purpose of challenge should be to guarantee not only freedom from any bias against the accused, but also from any prejudice against his prosecution. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579, cert. denied, 303 N.C. 319 (1981).

Challenges for cause are granted to ensure that defendants are tried by fair, impartial, and unbiased juries. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Who May Challenge for Cause. — This section expressly overrules older case law that allowed challenge for cause only by the party against whom the opinion was formed or expressed. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579, cert. denied, 303 N.C. 319 (1981).

Defendant's Use of Peremptory Challenge When Court Refuses to Remove for Cause. — When a defendant has failed to exhaust all his peremptory challenges, he has suffered no prejudice in having to use a peremptory challenge to excuse a juror whom the trial court has refused to excuse for cause. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Nature of Employment Alone Not Grounds. — An individual should not be excused for cause solely by virtue of the nature of his employment. Such holding might well require exclusion of numerous classes of individuals solely by virtue of employment or membership in voluntary associations which were perceived as indicating some type of predisposition on the part of a prospective juror. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159, cert. denied, 295 N.C. 736, 248 S.E.2d 865 (1978).

Employment as Police Officer. — A prospective juror could not be excluded for cause solely by virtue of his employment as a police officer and his exposure to some unspecified information about the case to be tried. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159, cert. denied, 295 N.C. 736, 248 S.E.2d 865 (1978).

Ties to Officers and Courthouse Personnel. — Refusal to remove a prospective juror for cause based on the juror's ties to law-enforcement officers and other courthouse personnel was not an abuse of discretion because the officers only provided testimony about the scene of the crime, while defendant's culpability was established by civilian witnesses, including a cooperating codefendant. State v. Lasiter, 361 N.C. 299, 643 S.E.2d 909, 2007 N.C. LEXIS 408 (2007).

Juror's Financial Hardship. — Trial court did not abuse its discretion in denying defendant's challenge for cause of prospective juror who expressed concern over his financial hardship in the event of a long trial since the juror repeatedly stated during both the State's and defendant's voir dire that he could follow the law, that he had no outside distractions, that he could be fair to both sides, and could listen to all the evidence fairly. State v. Reed, 355 N.C. 150, 558 S.E.2d 167, 2002 N.C. LEXIS 13 (2002).

Exclusion of Panelists from Jury Upheld. — Defendant's contention that the State's exclusion of six black panelists from the jury that tried his case was racially motivated and a violation of various constitutional provisions had no support in the record, where two of the panelists had had brothers who had been charged with cocaine offenses, one knew two of defendant's witnesses, two others knew defendant's parents and one of his attorneys, and the last one knew defendant's family and both of his attorneys. To prevail on such a contention it must be shown, among other things, that the circumstances of the exclusions raise an "inference of racist motivation". State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Knowing State's Witness Was Not Ground for Dismissal. — Defendant's challenge of a juror based on the fact that she admitted, during trial, to knowing one of the State's witnesses failed because the juror stated that she could continue to be fair and impartial. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Question to Jurors on "Intestinal Fortitude" for Death Penalty. — Prosecutor's question to the potential jurors, asking whether they possessed the "intestinal fortitude" to vote for a sentence of death was not made to badger the prospective jurors but, rather, to elicit from the jurors answers which would have provided grounds for a challenge for cause. State v. Murrell, 362 N.C. 375, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

Prejudice Not Shown. — Although defendant sought to have a peremptory challenge restored prior to passing on the twelfth juror, there was nothing in the record to indicate that he would have used that restored challenge to excuse that juror, and accordingly defendant could not show that he was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges; this fact defeated defendant's claim of prejudice because, assuming arguendo that the trial court abused its discretion by denying defendant's challenges of two jurors for cause, any such error amounted to error without prejudice. State v. Clemmons, 181 N.C. App. 391, 639 S.E.2d 110, 2007 N.C. App. LEXIS 155 (2007).

Applied in State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982); State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990); State v. Locklear, 331 N.C. 239, 415 S.E.2d 726 (1992); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Green, 336 N.C. 142, 443 S.E.2d 14; State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996); Conaway v. Polk, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

Cited in State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31 (1981); State v. Baldwin, 61 N.C. App. 688, 301 S.E.2d 725 (1983); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987); State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993); State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994); State v. Williams, 343 N.C. 345, 471 S.E.2d 379 (1996); State v. Burrus, 344 N.C. 79, 472 S.E.2d 867 (1996); State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998); State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179, 2001 N.C. LEXIS 672 (2001); State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003).

II. MENTAL OR PHYSICAL INFIRMITY.

Heart Condition. — In a prosecution for first-degree murder and armed robbery, the trial court did not abuse its discretion in the denial of defendant's challenge for cause of a 65-year-old juror who stated that she had a history of heart trouble, took medication daily for high blood pressure, utilized nitroglycerin if she experienced pain or became upset, was not sure her health would allow her to sit for more than one day and felt that a trial lasting more than a week would be too strenuous where the trial court fully questioned the juror about her health and observed that the work of a juror was not strenuous, that often veniremen with heart conditions serve on a jury, and that counsel on both sides had agreed that the trial would not last more than a week. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Where prospective juror had a medical history including coronary bypass surgery and an addiction to Valium and stated that thinking about the case was "bringing the problem back" and stated that the stress of being a prospective juror awakened him in the middle of the night, the trial court properly exercised its discretion in excusing a prospective juror whose health was possibly in jeopardy. State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998).

Hearing Impairment. — Although it is the better practice for trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties, the trial judge's failure to do so did not amount to an abuse of his discretion where the juror stated he had understood what the lawyers had said during the voir dire; he had not understood the trial judge at first; he did understand the questions presently being put to him by the judge; and he could raise his hand during the proceeding if anything was said which he did not understand. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Inability to Follow Instructions. — The granting of a challenge for cause of a juror is within the discretion of the judge; nevertheless where a juror's answers show that he could not follow the law as given to him by the judge in his instructions to the jury, it was error not to excuse the juror. State v. Scales, 114 N.C. App. 735, 443 S.E.2d 124, cert. denied, 337 N.C. 805, 449 S.E.2d 755 (1994).

Brain Tumor and Loss of Memory. — Denial of defendant's challenge for cause to juror whose brain tumor and consequent loss of memory had not interfered with his full-time job as a loan officer and office supervisor and who stated that note-taking would likely compensate for any memory impairment did not constitute an abuse of discretion. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883 (1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

III. OPINION AS TO GUILT OR INNOCENCE.

Subdivision (6) is a codification of the case law which requires that a juror be excused when he is, in the trial judge's opinion, unable to render a fair and impartial verdict because of preconceived opinions as to defendant's guilt or innocence. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Which interpretation is consistent with subdivision (9), which permits a challenge to be made on the grounds that a juror for any other cause is unable to render a fair and impartial verdict. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Jurors who are predisposed with regard to the law or evidence in a case are properly dismissed for cause. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Juror's Reaction to Nontestifying Defendant. — Where the questioned juror said that he could follow the law as given to him by the court but he repeatedly said the defendant's failure to testify would "stick in the back of [his] mind" while he was deliberating, the court should have allowed defendant's challenge for cause. State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992).

Jurors need not be totally ignorant of the facts and issues involved. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Notwithstanding a juror's opinion as to how the case should be decided, the juror may still serve if the court determines that the juror could "lay aside his impression or opinion and render a verdict based on the evidence presented in court." State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

Ability to Set Aside Opinion. — Even assuming arguendo that prospective juror had formed an opinion as to defendant's culpability, because he stated clearly and unequivocally that he could set aside that opinion and reach a decision based solely on the evidence presented at trial the trial court did not err by denying the challenge for cause. State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

The trial court properly denied the defendant's challenge for cause of a prospective juror where the juror indicated his ability to set aside his opinion and render a verdict based on the law and evidence as presented in court. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Ability to Be a Fair and Impartial Juror. — Trial court did not err by denying challenge for cause to a juror who stated, during voir dire for murder case, that he had known a young girl who was murdered and had strong feelings about it which he would take into the jury room because he also said he could be a fair and impartial juror. State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997), cert. denied, 522 U.S. 837, 118 S. Ct. 111, 139 L. Ed. 2d 64 (1997).

The court's excusal of a prospective juror for cause was within its discretion and not a violation of defendants' constitutional rights where the juror initially indicated that she could be fair and impartial but then later expressed some doubt as to that. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Prior Knowledge of Case. — To demand dismissal of every prospective juror who had prior knowledge of a case because he kept himself informed of current affairs arguably would require our courts to exclude from service those best qualified to hear and deal with evidence and to understand instructions upon the law. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Avidly Following News of Case. — The trial court properly exercised its discretion in denying defendant's challenge for cause, where although the juror testified to having avidly followed the case in the media, she also said she would decide the case without bias, based on the evidence presented at trial and the law as explained by the court. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

Merely Having Heard Case Discussed Not Ground for Challenge for Cause. — The fact that a prospective juror had heard the case to be tried discussed previously was not determinative of his competence to serve as a member of the jury. To exclude all individuals who had prior information concerning a given case from jury duty would, in cases involving extensive publicity, often tend to require the exclusion of most individuals who regularly read newspapers or otherwise kept themselves informed as to current affairs of public note. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159, cert. denied and appeal dismissed, 295 N.C. 736, 248 S.E.2d 865 (1978).

Jurors' Prior Knowledge of Related Conviction. — Where five jurors challenged for cause said they could set aside their knowledge, based on news media accounts, of defendant's prior first-degree murder conviction and could decide guilt or innocence based solely on evidence presented at trial, the trial court did not err in refusing to excuse them even though the State offered evidence during the trial that the two murders were connected. State v. Sokolowski, 351 N.C. 137, 522 S.E.2d 65 (1999).

Juror's answers need not be completely unequivocal or unambiguous for the judge to make his determination that a juror will base his findings solely upon evidence presented at trial. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Generally, a juror who has formed an opinion as to defendant's guilt or innocence is not impartial and ought not serve. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Defendant must prove existence of an opinion in the juror's mind that will raise a presumption of partiality. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Juror May Serve If He Can Lay Aside Opinion. — If a prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

The trial court is not required to remove from the panel every potential juror who has any preconceived opinions as to the potential guilt or innocence of a defendant. If the prospective juror, in the trial court's opinion, credibly maintains that he will be able to lay aside his impression or opinion and render a verdict based on the evidence presented in court, then it is not error for the court to deny defendant's motion to remove said juror for cause. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where each juror stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court, the trial court did not abuse its discretion in denying defendant's challenges for cause of these jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Thorough Questioning of Jury. — Trial court did not err in denying defendant's motion to excuse jurors for cause where the record revealed that two potential jurors were thoroughly questioned with regard to whether their familiarity with the case might taint their ability to be fair and impartial in rendering a verdict; their testimony demonstrated a conscientious and deliberate resolve to put familiarity and possible prejudice aside and to abide by the law and the trial court's instructions. State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993).

Juror with "Sort of" an Opinion Not Automatically Disqualified. — This section does not mandate automatic disqualification of a juror who states he has "sort of" an opinion regarding defendant's guilt or innocence. It provides the basis for making a challenge for cause, and the voir dire examination serves to ascertain whether that cause in fact exists. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Trial court erred in denying defendant's challenge for cause where juror clearly stated that she believed defendant was guilty, and that he would have to be proven innocent, and this error was prejudicial where it stripped defendant of a peremptory challenge and prevented him from excusing another unacceptable juror who worked with the victim's brother and whom defendant believed would be sympathetic to the prosecution. State v. Shope, 118 N.C. App. 270, 454 S.E.2d 716 (1995).

IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

Length of Trial and Financial Concerns Affecting Verdict. — The defendant's challenge for cause should have been allowed pursuant to subdivision (9) of this section where the juror stated that his financial concerns and desire to return to work as soon as possible would weigh on his mind during the trial, would interfere with his ability to pay attention during the trial, and would interfere with his ability to listen to and act on the evidence fairly. State v. Reed, 143 N.C. App. 155, 545 S.E.2d 249, 2001 N.C. App. LEXIS 233 (2001).

Applicability of Subdivision (8). — Subdivision (8) of this section, a codification of the rule in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), was intended to apply not only to the death qualification of prospective jurors in capital cases, but also generally to qualifying jurors in all cases. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Juror Belief That Bible Interpretation Supersedes Law. — Trial court did not err by excusing a prospective juror for cause ex mero motu, where she stated that she would not follow the law if it did not "line up with" the Bible. State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

One who is unwilling to accept as a defense, if proved, that which the law recognizes as such should be removed from the jury when challenged for cause. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

New Trial Required Where Jurors Stated They Could Not Acquit for Insanity. — Where jurors in a prosecution for murder stated that they could not acquit the defendant even though her insanity was proven to them, they were committed to disregarding the evidence presented to them as well as the court's instructions on the law arising from that evidence. The failure of the court to dismiss them for cause, coupled with the subsequent exhaustion of the defendant's peremptory challenges, forced her to accept a jury which cannot be considered impartial. For this reason a new trial was required. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Mandatory Life Term. — In case in which defendant faced mandatory life imprisonment on each of five charges, it was not improper for the trial court to permit the prosecutor to ask prospective jurors whether, if they were satisfied beyond a reasonable doubt of the defendant's guilt, the mandatory life sentences which would be imposed would prevent them from returning a verdict of guilty. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Inability to Faithfully and Impartially Apply the Law. — While a prospective juror's reservations about capital punishment or conscientious or religious scruples against its imposition were not a sufficient basis for the juror's excusal, when the trial court was left with the definite impression that the juror would be unable to faithfully and impartially apply the law, due to her equivocal responses to questions about applying the law, the trial court did not abuse its discretion by excusing the juror for cause. State v. Jones, 355 N.C. 117, 558 S.E.2d 97, 2002 N.C. LEXIS 12 (2002).

Inability to Impose Death Penalty. — The trial court in a first-degree murder prosecution properly excused for cause prospective jurors who admitted a specific inability to impose the death penalty under any circumstances. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a prosecution for first-degree murder and armed robbery where prospective jurors who admitted a specific inability to impose the death penalty under any circumstances were excused for cause, there was no merit in defendants' contention that this "death qualification" jury selection process deprived them of a jury selected from a representative, fair cross-section of the community on the guilt phase of the case. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Excuse for cause of jurors due to their stated opposition to the death penalty did not deprive defendant of his constitutional rights to trial by a jury representing a cross-section of the community or due process of law. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

It is not unconstitutional to be tried by a "death qualified" juror. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982). See also, Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Where the transcript of the jury voir dire revealed that each juror excused for cause as a result of his or her views on capital punishment clearly indicated that he or she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the present case, the trial court properly excused such jurors for cause. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

In Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, rehearing denied, 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186 (1986), the United States Supreme Court authorized exclusion for cause of a juror if it is established that the juror would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. The North Carolina statute which sets forth the grounds for challenging a juror for cause, adopts the Witherspoon test as the basis for excluding jurors who as a matter of conscience, regardless of the facts and circumstances, would be unable to return a verdict imposing the death penalty. State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

Jurors who indicated that they could not vote for the death penalty under any circumstances were properly excused for cause under the requirements of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) and this section. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

The practice of "death qualifying" juries in capital cases violates neither the United States Constitution nor N.C. Const., Art. I, § 19. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Where a contextual reading of a prospective juror's responses on voir dire showed that she could not, under any circumstances, vote to impose the death sentence against anyone, the trial court did not err in excusing this prospective juror for cause. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

The proper standard for determining whether a prospective juror may be excused for cause due to views concerning the death penalty is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

In defendant's trial for murder and robbery, trial court did not err in excusing two jurors for cause where neither could affirmatively agree to follow the law in carrying out his duties as a juror with respect to imposing the death penalty. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Trial court did not abuse its discretion in allowing district attorney to ask potential jurors whether they were "strong enough to recommend the death penalty," because this question was intended to elicit information that would indicate whether a challenge for cause was warranted. State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991).

It was not error to deny rehabilitation where a prospective juror said she was unable to impose the death penalty whatever the evidence showed. State v. Norwood, 344 N.C. 511, 476 S.E.2d 349 (1996), cert. denied, 520 U.S. 1158, 117 S. Ct. 1341, 137 L. Ed. 2d 500 (1997).

Based on juror's responses that he could not impose the death penalty on a defendant who did not pull the trigger and given that the venire had been informed by the State that defendant was not present when the murder was committed, the excusal for cause of juror should have been allowed under both subsections (8) and (9) of this section. State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996), reh'g denied, 345 N.C. 355, 479 S.E.2d 210, cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997).

Where four prospective jurors clearly demonstrated their inability to render a verdict in accordance with the laws of the State because of their feelings or opinions about capital punishment, the trial court did not abuse its discretion by granting the State's for-cause challenges. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

The trial court did not abuse its discretion in excusing juror because of his perceived inability to follow the law with regard to the possible imposition of capital punishment. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Trial court did not err when it granted the State's challenges for cause against two potential jurors who said they would have difficulty voting in favor of the death penalty. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Two prospective jurors clearly demonstrated their inability to render a verdict in accordance with the laws of the state, pursuant to G.S. 15A-1212(8), where one juror repeatedly insisted that he was unsure if he could recommend the death penalty and stated that he "probably could not recommend the death penalty," and the other juror unequivocally stated that she could not recommend the death penalty for defendant; the jurors were properly excused for cause. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Trial court acted properly in excusing a prospective juror for cause in defendant's murder trial, pursuant to Wainwright, Cummings, and G.S. 15A-1212(8), where the juror equivocated and was inconsistent in her answers as to whether she could vote to impose the death penalty, which she testified that she had always been opposed to in terms of public policy; accordingly, defendant's constitutional right to an impartial jury under N.C. Const. art. I, § 24, was not violated, as there was no abuse of discretion in the trial court's determination that the juror was biased and in therefore allowing the juror to be excused for cause. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Exclusion of jurors who raised questions about their ability to follow the law on the death penalty was proper. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Juror with Preference for Death Penalty. — The trial court did not err by denying defendant's challenge for cause of juror who according to the defendant had an admitted tendency to "lean more strongly towards the death penalty." State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Failure to excuse two prospective jurors for cause because they indicated that they would always vote for death upon a finding of first-degree murder was not erroneous where they later affirmed that they could set aside their personal opinions and reach a decision based on the law. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

The trial court acted within its discretion in refusing to remove a juror for cause although the juror knew who the victim was but was not friends with her, although the juror's father knew the victim and the victim's family and although the juror attended a pretrial protest of the delay in bringing the case to trial with his dad. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Defendant failed to show an abuse of the trial court's discretion in granting a challenge for cause as to a prospective juror, as the juror lived down the road from the victim, had known the victim his entire life, had been in the victim's home, and had attended the victim's funeral. The victim called the prosective juror shortly before the murder to request a ride to get his car serviced. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

§ 15A-1213. Informing prospective jurors of case.

Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This procedure is designed to orient the prospective jurors as to the case, and is discussed in the commentary to G.S. 15A-1221.

To facilitate enforcement of the prohibition against reading the pleadings to jurors, chosen or prospective, and minimize difficulties where courtroom facilities are limited, the Commission contemplates that in most instances arraignment will occur on a different day than the day jurors are called, or else arraignment will be waived pursuant to G.S. 15A-945.

Cross References. — For provision forbidding reading of indictments to the jury, see G.S. 15A-1221(b).

CASE NOTES

Purpose. — The purpose of this section, when read as a whole and considered together with the Official Commentary, is to avoid giving jurors a distorted view of the case through the stilted language of indictments. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667, appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14, cert. denied, 300 N.C. 377, 267 S.E.2d 680 (1980); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982); State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982); State v. Leggett, 305 N.C. 213, 287 S.E.2d 832 (1982); State v. Hall, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

The purpose of this section is to orient the prospective jurors as to the case in such a way as to avoid giving jurors a distorted view of the case through use of the stilted language of indictments and other pleadings. State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982).

Nothing in this section requires the court to instruct prospective jurors concerning the presumption of innocence. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

This section does not require the judge to inform the jury of the elements of each crime, but only requires the jury to be informed of the charges pending against defendant. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Nor does this section require a trial court to divulge a defendant's theory of the case to the venire. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Nothing in this section requires the court to instruct prospective jurors about sentences a defendant may have received for other offenses, either related or unrelated to the crime for which the jurors ultimately selected will recommend sentencing. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Summary of Indictment Does Not Violate Section. — The trial judge did not improperly refer to the bills of indictment returned against defendant while informing prospective jurors about the case where the judge summarized the indictments and explained to the jury the circumstances under which defendant was being tried. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Trial court, as directed by this section, may refer to and summarize an indictment when explaining to the jury the circumstances under which defendant is being tried. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982).

Where the trial court merely drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried, the trial court did not commit error. State v. Leggett, 305 N.C. 213, 287 S.E.2d 832 (1982).

The trial judge did not violate this section or G.S. 15A-1221(a)(2) by advising the prospective jurors that defendant had been accused in a bill of indictment returned by a grand jury alleging that he broke and entered a certain building and that when he did so he had the intent to commit larceny. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

Trial judge did not read from the indictments, but instead summarized the indictments in order to explain the charges to the jury. Such summarization is permissible and is in fact necessary to inform the jurors of the circumstances surrounding case against defendant, as required by this section. State v. Tilley, 100 N.C. App. 588, 397 S.E.2d 368 (1990).

Reading Indictment to Prospective Jurors. — Defendant was not entitled to a new trial because the trial court read the bill of indictment to all the prospective and eventual jurors during jury selection, where the trial court drew from the indictment the name of the defendant, the name of the victim, the date of the crime, and the elements of the charge for which defendant was being tried. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Reading of Indictment as Part of Jury Charge. — The prohibition against reading the pleadings to the jury is inapplicable to the judge's jury charge. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981); State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982).

The reading to the jury by the trial judge of a portion of the indictment as part of the charge after the close of the evidence was not a violation of this section where it would in no way serve the purpose of this section to avoid giving the jurors a distorted view of the case. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667, appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979); State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980), appeal dismissed, 302 N.C. 399, 279 S.E.2d 353 (1981).

The trial judge does not violate this section by reading a portion of the indictment to the jury as a part of his charge after the close of the evidence. However, reading the indictments at the very beginning of the trial is the very evil sought to be prevented, giving the jury a distorted view of the case through the stilted language of indictments, and constitutes prejudicial error. State v. Hall, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

Inaccurate Paraphrasing of Charge. — In a prosecution under G.S. 14-32, where the court made the statement that defendant was charged with the "North Carolina equivalent of attempted murder" at the very beginning of defendant's trial, which was not repeated in the court's charge to the jury, and the statement was an apparent attempt to paraphrase a portion of the indictment, while it cannot be said that the trial court gave the jury a distorted view of the case through the use of the "stilted" language of the indictment, a distorted view was given through the use of an inaccurate and misleading paraphrase. "Intent to kill" and "attempted murder" do not mean the same thing. State v. Hall, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

Defining Legal Terms Not Required. — There is no requirement that the trial court, during the brief introduction of the case to prospective jurors, define any of the legal terms used or to be used in the case. State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996), cert. denied, 520 U.S. 1180, 117 S. Ct. 1457, 137 L. Ed. 2d 561 (1997).

Asking Defense Counsel About Affirmative Defenses. — In a criminal prosecution, there was no merit to the defendant's contention that the trial judge erred by asking defense counsel in the presence of the jury whether there were any affirmative defenses of which counsel wished the judge to inform the jury, since the trial judge merely insured that defendant exercised his opportunity to bring forward any affirmative defense he might have. State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269, cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1981).

Evidence regarding defendant's mental state at the time of the crime is not an affirmative defense for which defendant bears the burden of proof; thus under this section the trial court has no statutory duty to inform the jury about such anticipated expert testimony. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Failure to Instruct on Affirmative Defense. — Trial court committed error in declining, in violation of this section, to inform prospective jurors of the presumption of spousal coercion as an affirmative defense, but its many curative steps ameliorated any prejudice the defendant may have suffered. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999).

Instruction That Insanity Defense Not in Fact Presented. — Where defendant filed notice of intent to raise the defense of insanity, as required by G.S. 15A-959, and, pursuant to this section, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity, it was proper at the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense. State v. Hart, 44 N.C. App. 479, 261 S.E.2d 250 (1980).

Applied in State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990); State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Cited in State v. Griffin, 308 N.C. 303, 302 S.E.2d 447 (1983); State v. Callahan, 77 N.C. App. 164, 334 S.E.2d 424 (1985); State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986); State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990).

§ 15A-1214. Selection of jurors; procedure.

(a) The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called. When a juror is called and he is assigned to the jury box, he retains the seat assigned until excused.

(b) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213. He may briefly question prospective jurors individually or as a group concerning general fitness and competency to determine whether there is cause why they should not serve as jurors in the case.

(c) The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question.

(d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.

(e) Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.

(f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. Only replacement jurors may be examined and challenged. This procedure is repeated until all parties have accepted 12 jurors.

(g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

(1) Exhausted the peremptory challenges available to him;
(2) Renewed his challenge as provided in subsection (i) of this section; and
(3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

(j) In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

In comparing notes, members of the Commission discovered that procedures for selecting jurors varied from district to district, and decided there would be a virtue in spelling out a uniform system. The Commission recognized that absolute uniformity would not be possible because of differences in size of caseloads, physical facilities, and the like. Some counties use a jury pool; others do not. For this reason the Commission deliberately refrained from attempting to draft any definition of the jury "panel."

The Commission considered an alternative draft to subsections (e) and (f) in which the defense would be required to examine replacement jurors and tender a full panel of 12 back to the State, but chose the procedure in this section by a divided vote. Experienced defense attorneys on the Commission differed as to which of the two procedures they preferred.

Prior case law required that a party must not only exhaust his peremptory challenges but must also attempt to challenge one more juror in order to preserve his right to appeal. The Commission thought this to be an extremely undesirable requirement since, in most cases, the juror attempted to be challenged would remain on the jury. Therefore, the Commission devised the new procedure set out in subsection (i) to allow renewal of a challenge in writing so the juror would not be aware of it, and further provided for restoration of a previously used challenge if there are grounds for reconsideration. In this latter event the challenge would be to some other juror — an attempt to exercise the peremptory challenge which the party asserts should be restored to him. In most cases it is assumed the judge will deny restoration of the challenge, and the party will then be able to appeal the judge's action in refusing to allow the prior challenge for cause. If, of course, the judge does grant the additional challenge, then the party will have no basis for appeal as to that particular challenge. See subsection (h).

The Commission visualized that the written renewal of challenge may be made by a simple form showing the name of the juror as to whom the challenge for cause was denied, and containing space for the party to set out briefly the basis for the challenge.

Subsection (g) only speaks to the procedure applicable before the jury is empanelled. There is a problem as to the procedure to be followed if a question as to a juror's fitness arises during trial while there is an alternate juror available to replace him. See State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977) which was decided after the Commission's draft was submitted. Cf. G.S. 15A-1215.

While the Commission did not intend in subsection (j) to authorize individual selection of jurors in every capital case, an obvious illustration of "good cause" for such selection would exist when pretrial publicity required individual examination of jurors in order not to expose the remainder of the panel to the prior knowledge of the juror being questioned. The reference to sequestration was included to make sure that the judge's powers are spelled out for highly sensitive cases, but it should be noted that G.S. 15A-1236(b) gives the judge plenary authority as to sequestration.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures," see 64 N.C.L. Rev. 501 (1986).

CASE NOTES

I. General Consideration.
II. Authority of Trial Judge.
III. Questioning of Prospective Jurors.

I. GENERAL CONSIDERATION.

Editor's Note. *— Many of the cases cited below were decided under G.S. 9-21, which formerly governed jury selection.*

In order to properly allege a violation of G.S. 15A-1214, a defendant's challenge to a jury panel must be in writing, must specify the facts constituting the ground of challenge, and must be made and decided before any juror is examined; such challenges to jury selection must be made at the trial court level. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Right to Impartial Jury. — The basic concept in jury selection is that each party to a trial has the right to present his cause to an unbiased and impartial jury. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

The State, like the defendant in a criminal case, is entitled to a jury all members of which are free from a preconceived determination to vote contrary to its contention concerning the defendant's guilt of the offense for which he is being tried. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Compliance with the Random Selection Requirement. — The failure of a new, computer-generated system of summoning prospective jurors did not taint the selection of jurors or require that the selection be suspended until the system was examined for compliance with the law where the court, because of concerns with the system, ordered the clerk to call jurors by the old system which satisfied the random-selection requirement of this section. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

State supreme court rejected defendant's argument that G.S. 15A-1214(d) deprived him of his right to a fair and unbiased jury because it allowed the State to remove prospective jurors from a 12-juror panel and replace them with other potential jurors before passing the entire panel to defendant. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Defendant's allegation that the trial court violated the random selection provision of G.S. 15A-1214(a) by allowing prosecutors to examine remaining jurors following the exercise of a peremptory challenge without first calling a replacement juror to the jury box lacked merit where defense counsel acquiesced to the procedure at trial and defendant failed to show that he was prejudiced by the procedure. State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004).

Right to Challenge. — Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors, without assigning any cause, and as many more as he can assign a good cause for. State v. Patrick, 48 N.C. 443 (1856).

The jury selection system permits parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. State v. Hedgepeth, 66 N.C. App. 390, 310 S.E.2d 920 (1984).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v. Hedgepeth, 66 N.C. App. 390, 310 S.E.2d 920 (1984).

Where defendant did not renew his challenge for cause of any of the prospective jurors whose previous challenge for cause had been denied, defendant failed to comply with subsection (h) and failed to preserve the issue for appellate review. State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996), cert. denied, 520 U.S. 1180, 117 S. Ct. 1457, 137 L. Ed. 2d 561 (1997).

Defendant cannot demonstrate prejudice in the jury selection process if he does not exhaust his peremptory challenges. State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

Additional Challenges. — This section allows the trial court, for good cause, to examine and excuse a juror already accepted by a party; however, this statute does not afford additional peremptory challenges after a previously accepted juror is removed for cause. State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997).

Purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976).

Whether to grant individual voir dire is within the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. State v.

Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, 514 U.S. 1134, 115 S. Ct. 2014, 131 L. Ed. 2d 1012 (1995), cert. denied, 343 N.C. 757, 473 S.E.2d 626 (1996), cert. denied, 354 N.C. 74, 571 S.E.2d 835 (2001).

A trial court is not required to permit individual voir dire of jurors in a capital case. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Challenge May Be Peremptory or for Cause. — A person charged with crime may, when called upon to plead to the bill of indictment, challenge the array; or he may, after his plea, challenge individual jurors for cause or peremptorily. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

A challenge to the poll (to each prospective juror) may be peremptory within the limits allowed by law, or for cause without limit if cause is shown. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

Reasonable limitations on peremptory challenge procedure may be fixed, so long as the right itself is not taken away. Indeed, although the matter is one of discretion, the general rule is that after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

But Party Has No Right to Select Jurors. — It is well established that the system by which juries are selected does not include the right of any party to select certain jurors but to permit parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

An accused is not entitled to a jury of his choice. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

And defendant has no vested right to a particular juror. State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Person has no right to be indicted or tried by a jury of his own race or even to have a representative of his own race on the jury; he does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982).

When Challenge Should Be Made. — The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is commenced. State v. Patrick, 48 N.C. 443 (1856).

Defendant Has Last Opportunity to Challenge. — The defendant has the last opportunity to exercise his right of challenge when the State had all pertinent information concerning the fitness and competency of the juror before he was tendered to the defendant. State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

Obvious purpose is to protect defendants by giving them the last opportunity to challenge a venireman. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

Compliance with provisions for renewal of challenges for cause is a mandatory predicate to defendant's right to assert this argument on appeal. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Procedure Applicable to Capital Cases. — In relation to jury selection, G.S. 15A-1214(j), applicable only in capital cases, contains a distinct procedure, separate from the mandatory procedure outlined in G.S. 15A-1214(d)-(f); thus, when the trial court directs individual voir dire on all issues pursuant to G.S. 15A-1214(j), all parties are required either to accept or reject a juror before the next prospective juror is called. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

When the trial court directs individual voir dire on all issues pursuant to G.S. 15A-1214(j), all parties are required either to accept or reject a juror before the next prospective juror is called; therefore, the trial court did not err by not requiring the prosecution to pass a full panel of 12 jurors before defendant began his selection, in defendant's trial for capital murder. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Defendant cannot wait until the jury has returned a verdict of guilty to challenge the competency of the jury to determine the question. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

Challenge of Juror Previously Accepted by State. — Nothing prohibited the trial court, in the exercise of its discretion, before the jury was impaneled, from allowing the State to challenge peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Right to Challenge Juror When Examination Is Reopened. — The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court, and once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to exercise such juror. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Defendant's conviction for murder and sentence of death were reversed and a new trial was ordered because a trial judge questioned a juror after voir dire and then allowed counsel to question the juror, but did not allow defendant to exercise a remaining peremptory challenge on the juror; when counsel were allowed to question the juror, voir dire was automatically reopened and the parties had an absolute right under G.S. 15A-1214(g)(1)-(3) to use any remaining peremptory challenges. State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004).

Preserving Exception to Acceptance of Juror Challenged for Cause. — Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

In order to preserve an exception to the court's rulings on challenges to the polls, the appellant must exhaust his peremptory challenges and thereafter undertake to challenge an additional juror. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

In a prosecution for murder the defendant properly preserved her exception to the court's denial of her challenge for cause by (1) exhausting her peremptory challenges and (2) thereafter asserting her right to challenge peremptorily an additional juror. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

When the trial court denied defendant's challenge of a juror for cause, defendant having failed to exercise his remaining peremptory challenge and having accepted the juror instead, defendant therefore failed to preserve his exception to the denial of his challenge for cause. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

A defendant has not been prejudiced by the acceptance of a juror who is challenged for cause and the cause is disallowed unless he exhausts his peremptory challenges before the panel is completed. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Where defendant had a peremptory challenge available to him at the time he challenged a juror for cause but did not use it, he did not preserve the ruling on the challenge for cause for appellate review. State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review. State v. Goode, 350 N.C. 247, 512 S.E.2d 414 (1999).

Defendant did not preserve his exception to the ruling on his challenge for cause for appellate review where he—after using a peremptory challenge to remove a juror whom he believed the court should have excused for cause, being denied his request for additional peremptory challenges, and announcing that he was satisfied with the last seated juror—failed to renew his earlier challenge for cause to said juror. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Although defendant sought to have a peremptory challenge restored prior to passing on the 12th juror, there was nothing in the record to indicate that he would have used that restored challenge to excuse that juror; accordingly, defendant could not show that he was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges. State v. Clemmons, 181 N.C. App. 391, 639 S.E.2d 110, 2007 N.C. App. LEXIS 155 (2007).

Defendant failed to preserve for appellate review an objection to the denial of a challenge for cause because defendant failed to renew the challenge as provided for in G.S. 15A-1214(i). State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Preserving Exception to Excusing of Prospective Juror. — If defense counsel desires to take exception to the act of the court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the voir dire examination as to that juror in the case on appeal. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign it for error, if a jury is obtained before he has exhausted his peremptory challenges. State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888); State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906).

By failing to comply with the procedure made mandatory by the statute, defendant in a prosecution for murder failed to preserve any purported error by the trial court in refusing to allow his challenge of prospective jurors for cause for appellate review. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Acquaintance with Prospective Witnesses Insufficient to Require Challenge for Cause. — Defendant's contention that the trial judge erred in denying his challenge for cause to a juror was without merit where this juror knew four of the police officers who were prospective witnesses for the state, and although the defendant searched diligently during voir dire to discover some indication that the juror would be partial to these witnesses, the juror unequivocally stated repeatedly that his acquaintance with them would not affect his verdict in any way and there was no evidence to the contrary; there being no showing of prejudice on the part of the juror, his mere acquaintance with the officers was insufficient to find the trial judge's ruling erroneous. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Where the record was clear that potential juror ultimately felt she could put her feelings about her friend's murder aside and give the defendant a fair trial based solely on the evidence presented at trial, the trial court's denial of defendant's challenge for cause was not error. State v. House, 340 N.C. 187, 456 S.E.2d 292 (1995).

Necessity of Exhausting Peremptory Challenges Under Subsection (h). — Where defendant exercised only six of the fourteen peremptory challenges permitted him under G.S. 15A-1217(a)(1), because he did not exhaust his peremptory challenges as provided by subsection (h) of this section, no prejudice had been shown as to the juror who remained on the panel. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987) vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

Where defendant only used 13 of his 14 peremptory challenges during jury voir dire, leaving one remaining peremptory challenge which he could have used to strike juror defendant did not comply with statute; therefore, he did not preserve his right to appeal on that issue. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Defendant cannot demonstrate prejudice in the jury selection process if he does not exhaust his peremptory challenges. State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001), cert. denied, 356 N.C. 623, 575 S.E.2d 758 (2002).

Necessity of Exhausting Peremptory Challenges. — Where defendant did not exhaust all of the peremptory challenges or seek additional challenges, defendant did not meet the requirements of G.S. 15A-1214(h) to preserve a challenge to a venire member for cause. State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

Where defendant did not exhaust his peremptory challenges as provided by subsection (h) of this section, no prejudice was shown in court's refusing to allow him to elicit from a certain juror the opinion expressed to the juror by friends about defendant's guilt or innocence. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985); State v. Billings, 348 N.C. 169, 500 S.E.2d 423 (1998).

Defendant satisfied the mandates of subsection (h) of this section by (1) exhausting his peremptory challenges, (2) renewing his challenge for cause as to a juror who stated that she believed defendant would need to prove his innocence to avoid conviction on the charge of first-degree murder, and (3) having that renewed challenge denied by the trial court. State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993).

Defendant satisfied the mandates of subsection (h) by (1) challenging the prospective juror for cause, which the trial court denied; (2) exhausting his peremptory challenges; and (3) renewing his challenge for cause as to juror above, which the trial court also denied. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

The verb tense in subdivision (i)(2) of this section refers to a time before the renewal motion is made; it does not refer to the time at which the renewal is being made. Had the legislature intended to refer to the time at which the motion is being made, subdivision (i)(2) would read: "States in the motion that he would challenge the juror peremptorily were his challenges not then exhausted." Subdivision (i)(2) refers back to the time at which the unsuccessful challenge for cause was made. It contemplates a situation where there were no peremptories available at that time. State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

Subdivisions (i)(1) and (i)(2) Require Exercise of Available Peremptory Challenges. — Subdivisions (i)(1) and (i)(2), read together, require a party who has peremptory challenges available when a challenge for cause is denied to exercise a peremptory challenge to remove the unwanted juror. A party who fails to do so cannot thereafter bring himself within either subdivision (i)(1) or (i)(2). State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

Failure to Pass Full Panel Not Prejudicial. — Although the jury selection procedure violated the express requirement of this section that the state pass a full panel of twelve jurors, the defendant failed to show prejudice where he was not forced to accept an undesirable juror—he did not exhaust his peremptory challenges nor request removal of the juror for cause—and, thus, could not establish any prejudice as a result of the jury selection procedure under G.S.15A-1443(c). State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Although a trial court violated G.S. 15A-1214(f) when it deviated from the statutorily mandated jury selection process in selection of replacement jurors when the prosecutor passed less than a full panel of 12 replacement jurors to defendant on two separate occasions, defendant did not object to the deviations at trial, nor did he show that he was prejudiced by such deviation, and accordingly, he was not entitled to a new trial; defendant was required to prove that a reasonable possibility existed that, had the error not been committed, a different result would have been reached at trial, pursuant to G.S. 15A-1443(a), which he could not show because he did not exhaust his peremptory challenges and he therefore could not claim that he was forced to accept an undesirable juror. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Defendant's statutory rights were not infringed merely because State and codefendant had removed jurors before she began her voir dire examination. She still had the right to exercise her 14 peremptory challenges and to exert her right to challenge for cause. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Selection of jury where voir dire began with only 11 members of the jury venire held harmless error where defendant exercised only two of the peremptory challenges available to him. State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Oral Arguments Not Required Before Final Ruling by Court. — Although fundamental fairness would seem to require it, at least when a proper and timely request therefor is made, this section does not specifically mandate the receipt and consideration of oral arguments prior to the entry of final rulings by the trial court. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1056, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Mandatory Method for Preserving Rulings for Review. — The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review. State v. Sanders, 317 N.C. 602, 346 S.E.2d 451 (1986).

Where defendants at no time sought to renew any of their previously denied challenges for cause, they failed to comply with subsections (h) and (i) of this section and were not entitled to any relief on appeal as a result of alleged errors by the trial court in denying their challenges for cause. State v. Sanders, 317 N.C. 602, 346 S.E.2d 451 (1986).

Defendant exhausted his peremptories but did not renew his challenge for cause. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

The standard for determining whether a potential juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

Failure to Show Discrimination. — Where the record indicated that defendant failed to make a prima facie showing of discrimination and there were no suggestions of racial animus within the prosecutor's articulated motives for challenging the two veniremen, the assignment of error relating to selection of the petit jury was overruled on appeal. State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988), cert. denied, 324 N.C. 248, 377 S.E.2d 757 (1989).

Failure to Show Prejudice. — When a defendant has expressed satisfaction at trial with the jurors who actually considered his case and fails to show on appeal that any such juror was unable to be fair and impartial, the defendant has failed entirely to show possible prejudice from the denial of his challenges for cause and is entitled to no relief. State v. Sanders, 317 N.C. 602, 346 S.E.2d 451 (1986).

Exclusion of Panelists from Jury Upheld. — Defendant's contention that the State's exclusion of six black panelists from the jury that tried the case was racially motivated and a violation of various constitutional provisions had no support in the record, where two had had brothers who had been charged with cocaine offenses, one knew two of defendant's witnesses, two others knew defendant's parents and one of his attorneys, and the last one knew defendant's family and both of his attorneys. To prevail on such a contention it must be shown, among other things, that the circumstances of the exclusions raise an "inference of racist motivation." State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Defendants were neither prejudiced by the use of panels in the jury selection process nor by the trial court's placement of three specific jurors into specific panels, where neither defendant objected to the placement and neither exhausted all of his peremptory challenges, and where one of the jurors was subsequently excused for cause on a challenge by defendants while the other two were never called for questioning. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Defendants could not demonstrate prejudice from a trial court's placing prospective jurors on panels during jury selection, to make the selection process smaller and more manageable, and then placing a prospective juror, who wore a hearing aid, onto the last panel when she did not hear her name called for an earlier panel. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Use of Separate Panels in the Selection Process. — Jury selection method used by the trial court, of dividing the jury panel into separate panels and calling the jurors such that both parties knew exactly which prospective juror was next to be called, was clearly in violation of G.S. 15A-1214(a), but since defendant did not follow the procedures outlined in G.S. 15A-1211(c) for challenging the panel, he waived appellate review of assignments of error under G.S. 15A-1214(a); defendant failed to show that absent the violation, a different result probably would have been reached, or that the process led to a miscarriage of justice or denied him of a fair trial, thus failed to show plain error, and his convictions were affirmed. State v. Johnson, 161 N.C. App. 68, 587 S.E.2d 445, 2003 N.C. App. LEXIS 2001 (2003).

Restriction in Error. — Restriction prohibiting defendant from asking questions previously asked by the court violated subsection (c) and was error. State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997).

Refusal to Excuse Juror Not Error. — Where prospective juror, after initially indicating he felt first-degree murderers should receive the death penalty, stated he could consider both possible sentences and would follow the law, trial court's refusal to excuse him for cause was not error. State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995), cert. denied, 517 U.S. 1197, 116 S. Ct. 1694, 134 L. Ed. 2d 794 (1996).

Defendant must first establish that the trial judge abused his discretion in denying defendant's challenge for cause under subsections (h) and (i), and defendant then also must establish that he was prejudiced by such error. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

Failure to comply with § 15A-1211 prevented appeal of the court's possible violation of this section. State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Challenge to the random selection of the jurors based on an alleged violation of this section was not preserved where defendant failed to comply with G.S. 15A-1211. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

Review of Jury Selection Not Properly Preserved. — G.S. 15A-1214(a) randomness issue was not preserved for review since a defendant did not challenge the jury selection process in the manner provided by G.S. 15A-121I(c); the defendant stated after jury selection that he approved the jury selection process. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Applied in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981); State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981); State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988); State v. Moore, 335 N.C. 567, 440 S.E.2d 797; State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998); State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000); State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179, 2001 N.C. LEXIS 672 (2001); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Cited in State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842 (1981); State v. Mitchell, 62 N.C. App. 21, 302 S.E.2d 265 (1983); State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988); State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988); State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Powell, 340 N.C.

674, 459 S.E.2d 219 (1995); State v. Johnston, 123 N.C. App. 292, 473 S.E.2d 25 (1996); Frye v. Lee, 89 F. Supp. 2d 693, 2000 U.S. Dist. LEXIS 2915 (W.D.N.C. 2000); State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001); State v. Reed, 143 N.C. App. 155, 545 S.E.2d 249, 2001 N.C. App. LEXIS 233 (2001); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005); State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

II. AUTHORITY OF TRIAL JUDGE.

Power of Trial Judge. — The trial judge has the power to closely regulate and supervise the selection of a jury to the end that the defendant and the State be given the benefit of a trial by a fair and impartial jury. State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 99 (1973).

The trial judge has the power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State might receive a fair trial before an impartial jury. This discretion in the trial judge does not terminate at the impanelment of the jury. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Presiding judge has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Supervisory Duties. — The trial court has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Discretion of Trial Court. — Decision as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Regulation of the manner and extent of the inquiry of a prospective juror concerning his fitness rests largely in the trial court's discretion and will not be found to constitute reversible error unless harmful prejudice and clear abuse of discretion are shown. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159, cert. denied and appeal dismissed, 295 N.C. 736, 248 S.E.2d 865 (1978).

The right of the defendant to inquire into the fitness of jurors is subject to the close supervision of the trial court, and the extent of the inquiry lies within the court's discretion. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

The trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Although it is the better practice for trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties, the trial judge's failure to do so did not amount to an abuse of his discretion where the juror stated he had understood what the lawyers had said during the voir dire; he had not understood the trial judge at first; he did understand the questions presently being put to him by the judge; and he could raise his hand during the proceeding if anything was said which he did not understand. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

The trial judge, who questioned a juror about her relationship with the state's witness, and received assurances that the juror would have no difficulty in rendering a fair and impartial verdict despite that relationship, was acting well within his discretionary powers when he denied the defendant the opportunity to exercise his remaining peremptory challenge after the jury was impaneled. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

After a jury has been impaneled, further challenge of a juror is a matter within the trial judge's discretion. A ruling committed to a trial court's discretion is to be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

Whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

The trial court has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

The decision whether to reopen the examination of a passed juror is within the sound discretion of the trial court. State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (1996), cert. denied, 519 U.S. 1095, 117 S. Ct. 775, 136 L. Ed. 2d 719 (1997).

The decision to reopen voir dire rests in the trial court's discretion. State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996), reh'g denied, 345 N.C.

355, 479 S.E.2d 210, cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997).

A trial court's ruling on the issue of individual voir dire will not be disturbed absent an abuse of discretion. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

In a murder prosecution, as a prospective juror's responses to the trial court's questions left no doubt that he would be unable to give a fair trial if the murder arose out of a drug deal, the trial court did not abuse its discretion in sua sponte dismissing the prospective juror for cause under G.S. 15A-1214(g). State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

Discretion of Trial Court in Capital Case. — In a capital case, both the State and the defendant are entitled to inquire into a prospective juror's beliefs and attitudes regarding capital punishment, so that both sides may be assured a fair trial before an impartial jury. The trial court, however, is vested with broad discretion in controlling the extent and manner of such inquiry, and its decision will not be disturbed absent a showing of an abuse of discretion. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 109 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Discretion Under Subsection (j). — The provision of subsection (j) of this section vests in the trial judge discretion to allow individual voir dire and sequestration of jurors during voir dire. It is well settled in North Carolina that the trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Subsection (j) does not grant either party any absolute right. The decision whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 109 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Motions for individual voir dire and jury sequestration are directed to the discretion of the trial judge. The exercise of this discretion will not be reversed on appeal absent a showing of abuse. State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), overruled on other grounds, State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

Denial of a capital murder defendant's motion for individual voir dire of prospective jurors was not an abuse of discretion, even though defendant argued that the pretrial publicity was so great that it was reasonably likely that prospective jurors would make a decision based on pretrial information instead of evidence presented at trial. State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999).

The trial court did not abuse its discretion in denying individual voir dire during selection of a sentencing jury in a capital murder case, even though many prospective jurors admittedly had read or heard about the case prior to trial, where the record did not reveal selection of any juror who indicated that he or she would have difficulty setting aside any pretrial impressions, and challenges for cause were appropriately granted whenever any prospective juror stated that he or she could not set aside preconceived notions. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Subsection (c) does not preempt the exercise of the court's discretion during jury selection; it remains the court's prerogative to expedite jury selection by requiring general questions to be posed to the whole panel. State v. Campbell, 340 N.C. 612, 460 S.E.2d 144 (1995), cert. denied, 516 U.S. 1128, 116 S. Ct. 946, 133 L. Ed. 2d 871 (1996).

Excuse of Juror Without Challenge by Party. — It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

There was no error in the trial court's removal of juror for cause where she was visibly upset about her child's sickness, was in tears while explaining her situation to the trial judge and stated that she was distracted by her child's sickness and that she was sitting there thinking about it. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), cert. denied, 513 U.S. 1098, 115 S. Ct. 768, 130 L. Ed. 2d 665 (1995).

Defendants could not demonstrate prejudice from a trial court's excusing a prospective juror, who wore a hearing aid, when she demonstrated an inability to hear or to understand questions and instructions. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Duty of Judge When Jury Aware of Improper and Prejudicial Matters. — When there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

The trial judge did not err in refusing to allow defendant to rehabilitate certain jurors before ruling on the prosecutor's challenge for cause on Witherspoon grounds, where although defendant claimed that these jurors had apparently changed their minds, rendering their positions on the death penalty "ambiguous," and that examination by defendant could have clarified these "ambiguities," defendant made no showing that additional questioning might have produced different answers, and his only attempt at rehabilitation was unsuccessful. State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), overruled on other grounds, State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

Reopening Examination After Acceptance by Both Parties. — Prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon challenge, either peremptory or for cause, and there is no reason for the termination of this discretion in the trial judge at the impanelment of the jury. State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled by State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985), to the extent that it gives the trial court discretion to allow or refuse permission to defendant to use one of his peremptory challenges once the trial court has decided to reopen the examination.

The decision whether to reopen examination of a juror previously accepted by both the State and defendant and to excuse such juror either peremptorily or for cause is a matter within the sound discretion of the trial judge. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled by State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985), to the extent that it gives the trial court discretion to allow or refuse permission to defendant to use one of his peremptory challenges once the trial court has decided to reopen the examination.

This section gives the trial judge the discretion to reopen the voir dire examination of a juror even if he has previously been accepted by both the State and the defendant. The judge is also given statutory discretion to allow a party to exercise an unused peremptory challenge. State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

The intent of the Legislature in adopting subsection (g) was that the trial court have discretion as to whether to reopen examination of a juror under certain specific conditions, but that the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror once the trial court in its discretion reopened the examination. State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

Trial court acted within its discretion when it reopened voir dire in defendant's capital murder trial as to two jurors who erroneously stated during voir dire that they had no close friends or relatives who had been witness, a defendant, or a victim in a criminal case, while one had some cousins who had been convicted of capital crimes and the other's biological father had been convicted of murder and uncle was a fugitive from justice suspected of murder. State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007).

Deviations Not a Violation of This Section. — No violation of this section occurred where the record disclosed that no confusion or error resulted from any deviation from the prescribed statutory procedure, the defendant specifically requested or consented to such deviation, and the trial court's jury selection method did not disadvantage or prejudice him. State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

III. QUESTIONING OF PROSPECTIVE JURORS.

A party moving for a new trial grounded upon misrepresentation by a juror during voir dire must show: (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; (3) and the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998).

Whether to allow sequestration and individual voir dire is a matter for the trial court's discretion, and its ruling will not be reversed absent a showing of abuse of discretion. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

Subsection (j) of this section gives neither party an absolute right to sequestration and individual voir dire of prospective jurors. Such decision rests in the sound discretion of the trial court, and the court's ruling will not be disturbed absent a showing of an abuse of discretion. State v. Murphy, 321 N.C. 738, 365 S.E.2d 615 (1988).

A trial court's ruling on whether to grant sequestration and individual voir dire of prospective jurors will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

Trial court properly rejected defendant's alternate selection method whereby replacement jurors would be called and examined during defendant's voir dire until the defense was satisfied with the 12 jurors remaining in the box; further the trial court properly refused to direct that prospective jurors be questioned separately since whether to allow individual voir dire and sequestration of prospective jurors is a decision squarely within the discretion of the trial court and will not be overruled on appeal unless the party challenging the ruling establishes an abuse of that discretion. State v. Anderson, 355 N.C. 136, 558 S.E.2d 87, 2002 N.C. LEXIS 14 (2002).

Whether to grant individual voir dire is within the sound discretion of the trial court, whose ruling will not be disturbed on appeal absent a showing of abuse of discretion. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Collective Voir Dire. — The defendant's arguments that collective voir dire made the prospective jurors aware of prejudicial matters, inhibited the candor of the jurors, and permitted the prospective jurors to become "educated" as to responses which enabled them to be excused from the panel were properly rejected as mere speculation. State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985).

Harm of Collective Voir Dire. — The burden is on defendant to show harm to him that resulted from his being required to question jurors collectively. State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

General Questions to Panel as a Whole. — It remains the prerogative of the court to expedite jury selection by requiring certain general questions to be submitted to the panel as a whole. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); State v. Gray, 322 N.C. 457, 368 S.E.2d 627 (1988).

Questions About Aggravating and Mitigating Factors. — The prosecutor's questions to prospective jurors during voir dire did not stake the jurors to the proposition that they would weigh aggravating circumstances more heavily than mitigating circumstances, where the prosecutor asked if jurors could weigh the significance to be given to aggravating and mitigating circumstances rather than the relative number of aggravators and mitigators. State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118, 143 L. Ed. 2d 113 (1999).

Prosecutor could ask jurors whether, if aggravating factors outweighed mitigating factors and were sufficiently substantial, the jurors could impose the death penalty, because the question did not presume evidentiary facts nor require that jurors pledge themselves to a position under any given set of evidentiary facts. State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118, 143 L. Ed. 2d 113 (1999).

Question as to Verdict Juror Would Render. — The trial court should not permit counsel to question prospective jurors as to the kind of verdict they would render or how they would be inclined to vote, under a given state of facts. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159, cert. denied and appeal dismissed, 295 N.C. 736, 248 S.E.2d 865 (1978); State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Although the prosecutor could seek to determine if the juror would automatically vote for the death penalty, it was improper to attempt to learn what verdict the juror would render if a particular aggravating factor was found. State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118, 143 L. Ed. 2d 113 (1999).

Question as to Whether Jurors Would Be Sympathetic to Defendant Who Was Intoxicated at Time of Offense. — Where the prosecutor in a murder case asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense, the questions were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. The questions did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing; they did not tend to "stake out" the jurors as to their potential verdict or to ask how they would vote under a given state of facts, and the questions did not fish for answers to legal questions before the judge had instructed the jury. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Question as to Whether Victim's HIV-positive Status Would Prejudice Defendant. — Where the evidence of defendant's guilt was overwhelming, and his attorney conceded his guilt during closing arguments, the possibility of juror prejudice against defendant from the victim's HIV-positive status did not rise to the level of fundamental unfairness; the trial court's ruling that defendant could not directly pursue this line of questioning unless the victim's HIV-positive status was revealed in the answer of a prospective juror did not violate defendant's rights. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Question of whether any of the jurors felt defendant had to be guilty of some offense simply because he fired a gun which resulted in the death of another person was indistinguishable from questions generally allowed on voir dire, e.g., "Do you think the defendant must be guilty simply because he is charged with a crime?", and should have been allowed. State v. Parks, 92 N.C. App. 181, 374 S.E.2d 138 (1988).

Courts must review entire record of jury voir dire when determining propriety of jury voir dire questions, rather than just isolated questions. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Racial Statement During Voir Dire. — Where a prospective juror, on voir dire, made racially biased statement in presence of other prospective jurors, defendant's motion to dismiss all prospective jurors who had heard the racial comment was properly denied where the statement did not give rise to a substantial fear that the jury had been prejudiced. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Statement By Prospective Juror Held Not To Prejudice Other Prospective Jurors. — The mere fact that the prospective juror referred to an assault committed by a black male, combined with the fact that the defendant was a black male, did not present the trial court with any substantial reason to fear that other prospective jurors who heard the statement would be prejudiced against the defendant. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Question of whether a juror's attitude about conviction or acquittal would adversely affect her in the deliberation process was proper under the circumstances and should have been allowed. State v. Parks, 92 N.C. App. 181, 374 S.E.2d 138 (1988).

View on Death Penalty as Basis for Excusal for Cause. — Where one juror expressed his belief that every murderer should receive the death sentence; but upon assuring the trial court that he could and would follow the court's instructions and remain open-minded regarding the appropriate sentence, he was seated as a juror, and the other potential juror expressed his uncertainty about whether he could impose the death penalty, even if he were instructed to do so by the court, under the standard in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) and Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980), the first was properly not excused for cause; the second was properly so excused. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987) vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

Voir Dire Properly Reopened. — Where statements attributed to juror raised the possibility that juror had not been candid when she told the court on voir dire that she could consider the death penalty, the information established good reason to reopen voir dire to inquire into whether juror made the statements and, if so, whether these beliefs would prevent or substantially impair her performance as a juror. State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Likelihood That State Would Carry Out Execution. — Trial court did not err in sustaining the State's objection to defendant's question as to whether a juror did or did not feel that the State would carry out an execution, as defendant failed to show that the inclusion of such a juror would deprive him of a fair and unbiased jury. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 109 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Statement by a prospective juror that she could never vote to impose the death penalty regardless of the evidence is, in effect, a refusal to perform one's duties as a juror in accordance with the capital sentencing statute, and is therefore sufficient to support excusal for cause. State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

Hypothetical Question Tending to Commit Juror to Decision. — The trial court properly sustained an objection to a hypothetical question which could not reasonably be expected to result in an answer bearing upon a juror's qualifications, but rather would tend to commit the juror to a decision on the performance of his duties prior to an instruction by the court with regard to their proper performance pursuant to law. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159, cert. denied and appeal dismissed, 295 N.C. 736, 248 S.E.2d 865 (1978).

Juror's Training Affecting his Judgment as to Credibility. — The trial court did not abuse its discretion in refusing to excuse potential juror for cause where the juror's responses during voir dire indicated that he would not automatically give enhanced credence to testimony by any particular class of witness, but rather, certain factors in the witness's background, such as training or experience, would affect the credibility of that witness. State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991).

Fact that defense counsel was forced to ask certain questions relating to the insanity of the jury panel as a whole did not

negate the opportunity to adequately base use of peremptory challenges upon identification of prejudiced or biased jurors, where the questions were answered individually by the jurors where necessary. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Expression of Wish to Continue Questioning. — When a defendant peremptorily challenges some prospective jurors but wishes to continue asking questions of those remaining in the panel before passing them back to the prosecution, he must inform the trial court that he wishes to continue questioning the remaining prospective jurors. Hence, where defendant failed to object to trial court's statement that he must pass on remaining prospective jurors or to clarify that he was asking to continue questioning them rather than expressing uncertainty about the jury selection procedure, the court reasonably interpreted defendant's comment to be an expression of confusion about the jury selection procedure and the court's statement that defendant had to pass on the remaining jurors was not error. State v. Conaway, 339 N.C. 487, 453 S.E.2d 824, cert. denied, 355 N.C. 752, 565 S.E.2d 673 (2002), cert. denied, 516 U.S. 884, 116 S. Ct. 223, 133 L. Ed. 2d 153 (1995).

Where the trial court ruled from the outset that no questions would be allowed if they had been previously asked of and answered by the juror in question, court erred since its ruling had the effect of preventing the defendant from asking questions solely because jurors had previously been asked the same questions. State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994).

Trial court erred in preventing defendant's counsel from asking jurors questions, solely because the trial court had previously asked the same or similar questions; however, the defendant did not suffer any resulting prejudice. State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994).

Refusal to Allow Questioning. — When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow defendant to question the juror challenged. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Where, after the jury was impanelled, defense counsel asked that a question he had asked a prospective juror during voir dire and the court's ruling sustaining the state's objection to the question be noted on the record, but the entire jury voir dire was not transcribed or made a part of the record, it was impossible for the court to tell on appeal whether the trial court erred in sustaining this objection. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990), finding neither abuse nor prejudice in the courts' ruling.

Questions posed did not amount to a proper inquiry as to whether the jurors could base their decision solely on the evidence presented at trial, but were an attempt by the defense counsel to "stake out" the prospective jurors on how they would react to potential publicity during the trial and the possibility of facing critical public opinion if the verdict, either guilty or not guilty, was not popular, the questions were not likely to result in answers relevant to a juror's qualification to serve; the trial court did not abuse its discretion by sustaining the prosecutor's objections to defendant's questions. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Jurors Conceptions of Parole Eligibility. — A court does not err by refusing to allow voir dire concerning prospective jurors' conceptions of the parole eligibility of a defendant serving a life sentence. State v. Smith, 347 N.C. App. 453, 496 S.E.2d 357 (1998).

Decision whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court, and its ruling will not be disturbed absent a showing of an abuse of discretion. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Jury Voir Dire Need Not Be Conducted Individually in All Capital Cases. — Where, in a prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant failed to identify any reasonable grounds upon which the trial court could have determined that there was good cause for granting his motion for sequestration and individual voir dire of prospective jurors and the trial court did not abuse its discretion in denying the defendant's motion since there was no precedent for the defendant's suggestion that the jury voir dire must be conducted individually in all capital cases. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Prejudice Not Shown. — The defendant failed to demonstrate how he was prejudiced by a procedure used by the trial court to subdivide the jury venire into panels from which prospective jurors were called for individual voir dire. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Although the trial court violated the mandatory statutory procedure for jury selection in G.S. 15A-1214, defendants failed to show any prejudice resulting therefrom; defendants failed to show jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial. State v. Love, 177 N.C. App. 614, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006).

Abuse of Discretion Not Shown. — Where the trial judge clearly intimated that district court facilities and trial schedule would not permit the sequestration and individual voir dire of prospective jurors, and defendant failed to establish that the jury selection process resulted in the "contamination" of other jurors by information from jurors previously exposed to pretrial publicity, defendant failed to show that the trial court abused its discretion by denying the motion for sequestration and individual voir dire of the prospective jurors. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Defendant failed to show that the trial court abused its discretion in denying a request for individual voir dire and sequestration of prospective jurors where 146 potential jurors had to be examined, the trial judge allowed selective individual voir dire whenever defendant requested it, and each juror who decided the case stated they had no preconceived opinions and could give the defendant a fair trial based on the evidence. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Where both the court and the defense attorney questioned juror about his relationship with the State's witness, and juror stated unequivocally that the acquaintance would not affect his ability to remain fair and impartial, there was no abuse of discretion in the trial judge's denial of defendant's motion to withdraw juror. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Trial court did not abuse its discretion in restricting individual voir dire of jurors, allowing defense counsel to question in detail only those individual jurors who responded to questions of the whole panel and seemed to favor the death penalty. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

In capital murder case that received substantial publicity, the trial court did not abuse its discretion in denying defendant's request for individual voir dire of potential jurors. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

There was no abuse of discretion in denying individual jury voir dire where defendant's motion did not set forth any grounds upon which the trial court could have found that there was "good cause" to grant individual jury voir dire. State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996), cert. denied, 520 U.S. 1180, 117 S. Ct. 1457, 137 L. Ed. 2d 561 (1997).

Trial court did not abuse its discretion by allowing only one of defendant's two attorneys to question prospective jurors. State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997).

Where defendant failed to identify any particular harm resulting from his having to question each of the prospective jurors in the presence of the others, he failed to demonstrate that the trial court abused its discretion by denying his motion for individual jury selection. State v. Gregory, 348 N.C. 203, 499 S.E.2d 753 (1998), cert. denied, 525 U.S. 952, 119 S. Ct. 382, 142 L. Ed. 2d 315 (1998).

Defendant was not entitled to sequestration and individual voir dire because prospective jurors did not truthfully answer questions during voir dire, where one juror was excused because he knew the victim's family and two others stated that they could not impose the death penalty. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

Trial court did not abuse its discretion in permitting a juror to sit on the jury because the court did not abuse its discretion in asking the juror questions about his ability to follow the law in an effort to determine whether, despite his feelings about drug use, he could follow the law; furthermore, the questions that the trial court asked the juror were not leading questions in an attempt to rehabilitate him. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

With regard to defendant's conviction for capital murder, the appellate court was unable to say that the trial court abused its discretion in denying defendant's challenge for cause as to a juror who, based on defendant's contention would vote automatically for the death penalty in every first-degree murder case, because the trial court's extensive findings and explanation of its reasoning demonstrated that the trial court's decision was not arbitrary or without thought; the appellate court found that the trial court's lengthy passages regarding inquiry into the juror's disposition indicated that the trial court was attentively listening to the questions and the answers given during voir dire, and therefore the trial court did not abuse its discretion or act arbitrarily in denying defendant's challenge for cause. State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Individual Voir Dire Not Required. — Court did not err in allowing the State to present evidence that the victim was a police officer; therefore, there was no need for individual voir dire to prevent prospective jurors from learning that information. State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997), cert. denied, 522 U.S. 917, 118 S. Ct. 304, 139 L. Ed. 2d 234 (1997).

§ 15A-1215. Alternate jurors.

(a) The judge may permit the seating of one or more alternate jurors. Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury, and obey all orders and admonitions of the judge. When the jurors are ordered kept together, the alternate jurors must be kept with them. If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury.

(b) In all criminal actions in which one or more defendants is to be tried for a capital offense, or enter a plea of guilty to a capital offense, the presiding judge shall provide for the selection of at least two alternate jurors, or more as he deems appropriate. The alternate jurors shall be retained during the deliberations of the jury on the issue of guilt or innocence under such restrictions, regulations and instructions as the presiding judge shall direct. In case of sequestration of a jury during deliberations in a capital case, alternates shall be sequestered in the same manner as is the trial jury, but such alternates shall also be sequestered from the trial jury. In no event shall more than 12 jurors participate in the jury's deliberations. (1977, c. 711, s. 1; 1979, c. 711, s. 1.)

OFFICIAL COMMENTARY

The Commission determined that it would be preferable to restate the procedure concerning alternate jurors in this Article rather than to continue allowing G.S. 9-18 to apply to all cases. As has been noted previously, an amendment restricts G.S. 9-18 to civil cases. The only changes of importance are those effected in other sections: limiting peremptory challenges to one per alternate juror (G.S. 15A-1217(c)) and selection of alternate jurors before the act of impaneling the jury (G.S. 15A-1216).

CASE NOTES

Legislative Intent. — The General Assembly did not intend that an alternate can be substituted for a juror after the jury has begun its deliberations. State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997).

Capital Cases. — Subsection (a) of this section does apply to capital cases; thus, an alternate juror may not be substituted for an incapacitated juror after the case has been submitted to the jury. State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997).

New Sentencing Hearing Required. — A trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand; thus, defendant was entitled to a new sentencing hearing where an alternate juror was substituted for a juror who was dismissed after participating in half a day of deliberations. State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997).

Replacing Juror for Explained Absence. — There is no abuse of discretion in replacing a juror with an alternate juror upon an explained absence of the original juror. State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

Disqualification and Replacement of Juror for Lack of Attention. — Trial court did not abuse its discretion in disqualifying a juror on grounds of "lack of attention" and substituting an alternate juror at the conclusion of the final arguments of counsel and court was not required to explain what was meant by "lack of attention." State v. Barbour, 43 N.C. App. 38, 258 S.E.2d 72 (1979), cert. denied, 299 N.C. 122, 261 S.E.2d 924 (1980).

Replacing Juror Who Contacted De-

fense Counsel at Home. — The trial judge did not abuse his discretion in removing a juror and substituting the alternate juror where the original juror contacted defense counsel at his home during the week-end recess and persisted in discussing matters of a personal nature, including counsel's marital status, and though there was no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Replacing Juror After Excluding Defendant from In Camera Hearing. — While it is clearly error for the trial court to communicate with a juror in chambers and in the absence of defendant, counsel, or a court reporter, not every violation of a constitutional right is prejudicial. Where the record of an in camera hearing attended only by a juror, the trial judge, counsel, and a court reporter reflected the benign substance of the conversation — the juror's growing unease with her ability to impose the death penalty — and where after the hearing the juror was promptly and properly removed for cause, obviating the possibility that anything said to her privately by the trial court might infect the jury as a whole, the court's action was harmless beyond a reasonable doubt. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Replacing Juror Who Overheard Something About Case. — Conversation between a juror and the court which related to the juror's having "overheard something about the case," could not have influenced the verdict, because this juror was removed from the case prior to deliberations, and no remaining juror indicated that he or she had overheard anything about the case. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

Replacing Juror Who Had Child Care Problems. — Where judge contacted juror by phone, in the presence of counsel but outside the presence of defendant, to inquire about juror's inability to attend court, any error was harmless, and there was no abuse of discretion in the judge's decision to replace that juror, who had child care problems. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Challenging a Juror After Impanelment. — While there is no statutory provision covering the situation when a party seeks to challenge a juror after impanelment, subsection (a) allows the trial court to replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason. State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995).

Replacing Juror for Medical Reasons. — Trial judge exercised his discretion when he excused pregnant juror for medical reasons, in spite of his noting, "Well, I don't see that I have much choice." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Trial judge has broad discretion in supervising the selection of the jury, to the end that both the State and the defendant may receive a fair trial. This discretionary power to regulate the composition of the jury continues beyond empanelment. It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Premature Selection of Foreperson. — Court found no violation of subsection (a) of this section or of the defendant's constitutional rights under N.C. Const., Article I, Section 24, when twelve jurors prematurely selected a foreperson while alternates were still present in the jury room, because they made no deliberations nor had any other conversation regarding the facts of the case. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Presence of Alternate Held Not Prejudicial. — Although the presence of an alternate juror in the jury room during deliberations constitutes reversible error per se, presence of alternate when jury was sent out so that counsel could argue for corrections to the charge and when jurors selected a foreman was not prejudicial error. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Applied in State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

Cited in State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004).

§ 15A-1216. Impaneling jury.

After all jurors, including alternate jurors, have been selected, the clerk impanels the jury by instructing them as follows: "Members of the jury, you have been sworn and are now impaneled to try the issue in the case of State of North Carolina versus ______. You will sit together, hear the evidence, and render your verdict accordingly." (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Impaneling the jury is an especially critical stage in criminal cases as jeopardy attaches at this point. The Commission believed that there should be no doubt concerning the procedure, and therefore drafted this section.

Given variance of customs in different districts, members of the Commission were not certain of all points of the customary procedure to mark the impaneling of the jury — for example, whether accomplished by the judge or the clerk — but Commission members did seem positive that the panel as such takes no additional oath.

The Commission believes it would be desirable for a parallel statute to be enacted applying to the process of impaneling the jury in civil cases, perhaps to be codified in Chapter 9 of the General Statutes, but the Commission did not submit such a draft as this exceeds the scope of its mandate.

CASE NOTES

Applied in State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981); State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

Cited in State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995); State v. Pointer, 181 N.C. App. 93, 638 S.E.2d 909, 2007 N.C. App. LEXIS 93 (2007).

§ 15A-1217. Number of peremptory challenges.

(a) Capital cases.
- (1) Each defendant is allowed 14 challenges.
- (2) The State is allowed 14 challenges for each defendant.

(b) Noncapital cases.
- (1) Each defendant is allowed six challenges.
- (2) The State is allowed six challenges for each defendant.

(c) Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Upon the recommendation of the Commission, G.S. 9-21 is repealed and the substance of that section is treated here. A companion amendment to G.S. 9-18 on alternate jurors makes that section apply only to civil cases.

In equalizing the number of peremptory challenges granted each side, the Commission followed the lead of the National Conference of Commissioners on Uniform State Laws. Uniform Rules, Rule 512(d). Accord, National Advisory Commission on Criminal Justice Standards and Goals, Report on the Courts, Standard 4.13 (1973). Giving an equal number of challenges to each side is the practice in most states. A.B.A. Standards, Trial by Jury, Commentary to § 2.6, at 75. See also Fed. Rules Crim. Proc. 24(b) (as amended effective August 1, 1976).

Subsection (c) makes a substantive change in that it provides for one peremptory challenge for each alternate juror rather than the two challenges allowed by G.S. 9-18 in civil cases.

Legal Periodicals. — For article, "Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures," see 64 N.C.L. Rev. 501 (1986).

For comment, "Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina," see 69 N.C.L. Rev. 1533 (1991).

CASE NOTES

I. General Consideration.
II. Number of Challenges.
III. Capital Cases.

I. GENERAL CONSIDERATION.

Editor's Note. *— Many of the cases cited below were decided under G.S. 9-21, which formerly governed jury selection.*

"Peremptory Challenge" Defined. — Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Peremptory challenges are challenges that may be made according to the judgment of the party entitled thereto. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

The right to challenge veniremen peremptorily is equally bestowed on the State and the defendant by this section. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

A party's reason for challenging a juror peremptorily cannot be inquired into. The law gives the litigant the right to object to a number of jurors without assigning cause. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

The reason for challenging a juror peremptorily cannot be inquired into. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control. In other words, the peremptory challenge permits rejection for a real or imagined partiality, and an examination of the prosecutor's reasons for the exercise of his challenges in any given case is not permitted. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

A peremptory challenge may be exercised without a stated reason and without being subject to the control of the court. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Examination of Reason for Challenge Not Constitutionally Required. — In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, the Constitution does not require an examination of the prosecutor's reasons for the exercise of his challenges in any given case, even where defendant alleged that the peremptory challenges were used to exclude blacks from the jury. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

The use of a peremptory challenge by one party does not unfairly prejudice the opposing party's position in the jury selection process. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Right of peremptory challenge is not a right to select but to exclude. State v. Smith, 24 N.C. 402 (1842); State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908).

Right to Challenge Juror When Examination Is Reopened. — The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court, and once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Wide Latitude Allowed in Interrogation of Jurors. — In order to permit intelligent exercise of peremptory challenges wide latitude must be allowed counsel in the interrogation of prospective jurors. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Use of Peremptory Challenge Where Challenge for Cause Erroneously Denied. — Where the trial court in a capital case erroneously disallowed defendant's challenge for cause of a prospective juror, and defendant exercised all of his peremptory challenges, including one for the juror for whom the challenge for cause was erroneously disallowed, the trial court's refusal to allow defendant to challenge peremptorily an additional juror on the ground that defendant had exhausted his peremptory challenges is a denial of defendant's right to challenge fourteen jurors peremptorily without cause. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Waiver of Objection to Number Allowed. — Assuming arguendo that defendant was entitled to 14 peremptory challenges, he waived his right to complain when he used only five peremptory challenges. State v. Clark, 18 N.C. App. 621, 197 S.E.2d 605 (1973).

Selection of jury where voir dire began with only 11 members of the jury venire held harmless error where defendant exercised only two of the peremptory challenges available to him. State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Where defendant did not exhaust his peremptory challenges, as provided by G.S. 15A-1214(h), no prejudice was shown in court's refusing to allow defendant to elicit from a certain juror the opinion expressed to the juror by friends about defendant's guilt or innocence. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Use of a peremptory challenge on an African-American juror for being previously rejected during jury selection in an unrelated case, while not sufficiently related to the case at bar, did not rise to the level of demonstrating discriminatory intent. State v. Matthews, 162 N.C. App. 339, 595 S.E.2d 446, 2004 N.C. App. LEXIS 122 (2004), cert. denied, 358 N.C. 379, 598 S.E.2d 140 (2004).

Failure to Show Prejudice. — When defendant has expressed satisfaction at trial with the jurors who actually considered his case and fails to show on appeal that any such juror was unable to be fair and impartial, defendant has failed entirely to show possible prejudice from the denial of his challenges for cause and is entitled to no relief. State v. Sanders, 317 N.C. 602, 346 S.E.2d 451 (1986), cert. denied, 325 N.C. 712, 388 S.E.2d 470 (1989).

Defendant's Rights Held Violated. — Where the district attorney violated a prior agreement, and when defendant arrived, the jury had been selected, his peremptory challenges had been expended and he had been deprived of the right to question the jurors and where he was only given the opportunity to challenge for cause those jurors he knew, defendant faced a jury that he had no part in selecting. Under the circumstances of the case, defendant did not waive his right to be present at the jury selection and was denied a substantial right. State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

Since a trial court reopened voir dire, defendant was entitled to exercise his remaining peremptory challenge under G.S. 15A-1217(b)(1) to excuse a juror who had attempted to contact an employee in the district attorney's office. By refusing to allow defendant to do so, the trial court erroneously deprived defendant of his right to use the remaining peremptory challenge. State v. Thomas, — N.C. App. —, 673 S.E.2d 372, 2009 N.C. App. LEXIS 240 (2009).

Applied in State v. Jenkins, 311 N.C. 194, 317 S.E.2d 345 (1984); State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985); State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

Cited in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31 (1981); State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991); State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000); State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003); Golphin v. Branker, 519 F.3d 168, 2008 U.S. App. LEXIS 5033 (4th Cir. 2008).

II. NUMBER OF CHALLENGES.

No Authority to Allow More Than Statutory Number of Challenges. — This section does not authorize trial judges to permit either the State or a defendant to exercise more peremptory challenges than specified by statute. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Trial court has no authority to increase the number of peremptory challenges provided by this section. State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989).

Challenges Allotted on Basis of Number of Defendants. — Peremptory challenges are allotted to both the State and the defendant on the basis of the number of defendants and not the number of charges against any one defendant. State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975).

Number Not Changed by Joint Defense. — Where several defendants are tried together for a crime other than a capital felony each is entitled to four (now six) peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four (now six) peremptory challenges for all the defendants, a new trial will be granted upon appeal. State v. Burleson, 203 N.C. 779, 166 S.E. 905 (1932).

Consolidated Bills of Indictment. — Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four (now six) peremptory challenges to the jury and not to four (now six) peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. State v. Alridge, 206 N.C. 850, 175 S.E. 191 (1934).

Not Affected by Decision Only to Seek Verdict for Lesser Offense. — Where, upon the trial of an indictment for murder, the solicitor (now prosecutor) states that he will ask only for a verdict of manslaughter, no special venire was necessary, and the defendant is not entitled to more than four (now six) peremptory challenges. State v. Hunt, 128 N.C. 584, 38 S.E. 473 (1901), overruled on other grounds, 317

N.C. 457, 346 S.E.2d 646 (1987); State v. Caldwell, 129 N.C. 682, 40 S.E. 85 (1901).

Failure to Exhaust Peremptory Challenges. — Where defendant exercised only six of the fourteen peremptory challenges permitted him under subdivision (a)(1), because he did not exhaust his peremptory challenges as provided by G.S. 15A-1214(h), no prejudice was shown as to the juror who remained on the panel. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987) vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

Exercise of Peremptory Challenges Held Not Prejudicial. — The State's exercise of peremptory challenges to exclude three potential black jurors did not violate defendant's constitutional rights, where the first was excused because that venire member had held three jobs in the preceding ten months, the next was peremptorily challenged because she claimed to have never participated in court proceedings while in fact she had an extensive criminal record, and where the State deemed the last member undesirable as a juror because of her headstrong and overbearing personality; these reasons rebutted the prima facie case of discrimination. State v. Sanders, 95 N.C. App. 494, 383 S.E.2d 409 (1989).

III. CAPITAL CASES.

"Capital Case" Defined. — A capital case has been defined as one in which the death penalty may, but need not necessarily, be imposed. State v. Clark, 18 N.C. App. 621, 197 S.E.2d 605 (1973).

If it is determined during jury selection in a prosecution for a crime which formerly had been punishable by death that the death penalty may not be imposed upon conviction, the case loses its capital nature, thereby rendering statutes providing for an increased number of peremptory challenges in capital cases inapplicable. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Where the district attorney announced at the beginning of a prosecution for first-degree murder that the State would not ask for the death penalty, the case lost its "capital nature," and the court committed no error in not allowing the defendant 14 peremptory challenges. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Batson Challenge Not Basis to Obviate Juror's Death Qualification. — State's peremptory challenge to a prospective juror who stated he would have "a bit of a struggle" imposing the death penalty did not violate defendant's rights under the Fourteenth Amendment, as he could not use the batson process to obviate the death qualification of a juror in a capital case. State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

A state may use its peremptory challenges to purge a jury of veniremen not excludable for cause under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1967), for scruples about the death penalty. Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Peremptory Challenges to Exclude Jurors Based on Voir Dire Testimony. — Both the prosecutor and defense counsel may exercise peremptory challenges to exclude jurors based upon their voir dire testimony regarding their attitude toward capital punishment. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

One charged with two capital offenses has no right to additional peremptory challenges. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Exhaustation of Peremptory Challenges. — A defendant is not required to exhaust peremptory challenges left over from regular jury selection under G.S. 15A-1217(a)(1) until the defendant uses the allotted challenges for alternate jurors in G.S. 15A-1217(c). Thus, a defendant charged with first-degree murder who was denied a peremptory challenge allotted to him by statute was deprived of a fundamental right and was entitled to a new trial. State v. Locklear, 145 N.C. App. 447, 551 S.E.2d 196, 2001 N.C. App. LEXIS 640 (2001).

§§ 15A-1218 through 15A-1220: Reserved for future codification purposes.

ARTICLE 73.

Criminal Jury Trial in Superior Court.

OFFICIAL COMMENTARY

The Commission decided to codify to a fairly large extent the procedures applicable to criminal jury trial, though it is obvious that many matters not specifically covered will continue to be governed by common law or tradition. In searching for drafting models, the Commission did not find any single satisfactory source, and has employed a wide variety of sources — and, additionally, has drafted several sections from scratch. In all events, this Article went through a large number of drafts, and all sections were changed in the course of successive meetings. Because of the numerous changes and many drafts it may not always be possible to pinpoint the source of a particular provision in the ensuing commentary. Citation of source, however, will be made when available and still pertinent to the statute in its final form.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.

(a) The order of a jury trial, in general, is as follows:

(1) Repealed by Session Laws 1995 (Regular Session 1996), c. 725, s. 10.

(1a) Unless the defendant has filed a written request for an arraignment, the court must enter a not guilty plea on behalf of the defendant in accordance with G.S. 15A-941. If a defendant does file a written request for an arraignment, then the defendant must be arraigned and must have his or her plea recorded out of the presence of the prospective jurors in accordance with G.S. 15A-941.

(2) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213.

(3) The jury must be sworn, selected and impaneled in accordance with Article 72, Selecting and Impaneling the Jury.

(4) Each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement.

(5) The State must offer evidence.

(6) The defendant may offer evidence and, if he has reserved his opening statement, may precede his evidence with that statement.

(7) The State and the defendant may then offer successive rebuttals as provided in G.S. 15A-1226.

(8) At the conclusion of the evidence, the parties may make arguments to the jury in accordance with the provisions of G.S. 15A-1230.

(9) The judge must deliver a charge to the jury in accordance with the provisions of G.S. 15A-1231 and 15A-1232.

(10) The jury must retire to deliberate, and alternate jurors who have not been seated must be excused as provided in G.S. 15A-1215.

(b) At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 2; 1995 (Reg. Sess., 1996), c. 725, s. 10.)

OFFICIAL COMMENTARY

This section is primarily based upon N.Y. Crim. Proc. Law § 260.30. See also Uniform Rules, Rule 521.

New features in this section include the requirement that the arraignment be out of the presence of prospective jurors and the authorization of opening statements by the parties — as the pleadings will not be read to the jury. See G.S. 15A-1213.

The Commission was aware that requiring arraignments to be held out of the presence of the prospective jurors may cause difficulties in some courthouses, but determined that the objective was desirable enough to be worth the trouble. The Commission thought that jurors hearing the stilted language of indictments and other pleadings and witnessing various motions upon arraignment are likely to get a distorted view of the case. It determined that the initial speech by the judge telling the jurors about the case, under G.S. 15A-1213, plus opening statements of the parties would be a far superior method of telling the jurors about the case and what to look and listen for.

The wording of subdivision (6) is designed to insure that a defendant is allowed to use a reserved opening statement only if he presents evidence. Otherwise, he would in effect be given an additional closing argument.

It should be noted that the order of trial set out in this section is that generally to be followed. It does not preclude a differing order if authorized by the common law or other applicable statutes or rules of court. An example is the defense of confession and avoidance entered by a defendant, which alters the order of proof in the case.

Legal Periodicals. — For article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

CASE NOTES

I. General Consideration.
II. Informing Jurors of Case.
III. Jury Selection.
IV. Opening Statement.

I. GENERAL CONSIDERATION.

Applied in State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981); State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Combs, 182 N.C. App. 365, 642 S.E.2d 491, 2007 N.C. App. LEXIS 696 (2007).

Cited in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667 (1979); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981); State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982); State v. Whitley, 58 N.C. App. 539, 293 S.E.2d 838 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997); State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000); State v. Ackerman, 144 N.C. App. 452, 551 S.E.2d 139, 2001 N.C. App. LEXIS 540 (2001).

II. INFORMING JURORS OF CASE.

The purpose of subsection (b) is to insure that the jurors do not receive a distorted view of the case before them by an initial exposure to the case through the stilted language of indictments and other pleadings. State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997).

Subsection (b) does not prohibit publication during the sentencing proceeding of indictments from cases not currently before the jury. State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997).

Publication to Jury of Issued Citation Was Prejudicial Error. — Pursuant to G.S. 15A-1221(b), the citation's recitation of the charges against the defendant at his trial, phrased in the stilted language found in indictments, gave the jury a distorted view of the case against the defendant. Thus, the defendant satisfied his burden of showing prejudicial error, and the defendant was entitled to a new trial. State v. Jones, 157 N.C. App. 472, 579 S.E.2d 408, 2003 N.C. App. LEXIS 751 (2003).

References to Indictment Short of Reading It Are Permitted. — This section does not prevent the judge from making references to the bill of indictment during remarks or the charge to the jurors; the section proscribes the reading of the indictment to the prospective jurors or the jury. State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

Summarizing Indictments for Jury. — The trial judge did not improperly refer to the bills of indictment returned against defendant while informing prospective jurors about the case where the judge summarized the indictments and explained to the jury the circumstances under which defendant was being tried. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Drawing of Selected Information from Indictment. — Where the trial court merely drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried, the trial court did not commit error. State v. Leggett, 305 N.C. 213, 287 S.E.2d 832 (1982).

G.S. 15A-1221(b) Does Not Prohibit Introduction Into Evidence of Prior Indictments and Judgments. — G.S. 15A-1221(b) did not prohibit prosecutor from submitting into evidence the indictments from the three prior felonies that the State contended made defendant an habitual felon or the judgments from those three prior felony convictions during the habitual felon sentencing phase of the trial. State v. Massey, — N.C. App. —, 672 S.E.2d 696, 2009 N.C. App. LEXIS 146 (2009).

Defendant was not entitled to a new trial because the trial court read the bill of indictment to all the prospective and eventual jurors during jury selection, where the trial court drew from the indictment the name of the defendant, the name of the victim, the date of the crime, and the elements of the charge for which defendant was being tried. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Admonishing Jurors to Maintain Open Mind. — Where the court was simply admonishing the jurors, pursuant to G.S. 15A-1236(a)(3), to maintain an open mind until they conducted their deliberations, the court was instructed them to resist their natural impulses to reach preliminary conclusions based on the quantity of evidence presented by the opening side. The court further informed the jurors that it was their duty to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion. The instruction, in context, contained no expression of opinion about any question to be decided by the jury or about the weight of the evidence. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

III. JURY SELECTION.

Deviation from Prescribed Method of Jury Selection. — Though the trial court deviated from the statutorily prescribed method of jury selection under Article 72 of this Chapter, defendant failed to show that he was prejudiced because he had full opportunity to examine and challenge prospective jurors and because, when the jury was finally constituted, defendant has one peremptory challenge remaining and had exercised no challenges for cause so that the jurors selected obviously met with his approval. State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980).

IV. OPENING STATEMENT.

Purpose of Opening Statement. — An opening statement is for the purpose of making a general forecast of the evidence, not for arguing the case, instructing on the law, or contradicting the other party's witnesses. State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991).

Determination of whether opening statement is proper must be made in light of the purpose thereof. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Scope of Opening Statement. — Subdivision (a)(4) permits each party in a criminal jury trial to make an opening statement but does not define the scope of that statement; however, wide latitude is generally allowed with respect to its scope. State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

Strict Supervision of Defendant's Opening Statement. — While the trial judge might have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice defendant's case to require reversal of his conviction. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Waiver of Right to Make Opening Statement. — By failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right, therefore, his conduct at trial amounted to a waiver of this procedural right. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 220, rehearing denied, 451 U.S. 1012, 101 S. Ct. 2350, 68 L. Ed. 2d 865 (1981).

Mention of Victim's School Honors. — In trial for robbery with a dangerous weapon, trial court did not commit reversible error in allowing assistant district attorney to mention in his opening statement that the victim had graduated second in his high school class and obtained a college scholarship. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Trial judge's error in preventing defense counsel from telling the jury to give attention to all of the witnesses was harmless, where defendant failed to demonstrate prejudice requiring a reversal of his conviction. State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991).

§ 15A-1222. Expression of opinion prohibited.

The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section codifies the traditional North Carolina position requiring strict neutrality on the part of the trial judge. Compare A.B.A. Standards, Function of the Trial Judge § 5.6. A related section dealing with judicial comment on the verdict is G.S. 15A-1239.

Legal Periodicals. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

CASE NOTES

I. General Consideration.
II. Questions by Trial Judge.
III. Statement of Parties' Contentions.
IV. Summary of Evidence.

I. GENERAL CONSIDERATION.

Former Law Essentially Unchanged. — This section and G.S. 15A-1232 repealed and replaced former G.S. 1-180 effective July 1, 1978. The new provisions restate the substance of G.S. 1-180 and the law remains essentially unchanged. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

Section Not Applicable in Absence of Jury. — This section, which forbids the expression of an opinion by the trial court, is inapplicable when the jury is not present during the questioning. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

This section is not applicable to statements made out of the jury's presence. State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136, cert. denied, 326 N.C. 803, 393 S.E.2d 902 (1990).

G.S. 15A-1222 was inapplicable because there as no jury. In re D.M.B., — N.C. App. —, 676 S.E.2d 66, 2009 N.C. App. LEXIS 524 (2009).

Prohibitions Against Expressions of Opinion Mandatory. — The statutory prohibitions against expressions of opinion by the trial court contained in this section and G.S. 15A-1232 are mandatory. State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

The law imposes on the trial judge the duty of absolute impartiality. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

Trial judges must be careful in what they say and do because a jury looks to the court for guidance, etc. — and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury. State v. Sidbury, 64 N.C. App. 177, 306 S.E.2d 844 (1983).

As the standard-bearer of impartiality, the trial judge must not express any opinion, etc. as to the weight to be given to or credibility of any competent evidence presented before the jury. State v. Harris, 308 N.C. 159, 301 S.E.2d 91 (1983).

It is fundamental to the system of justice that each and every person charged with a crime be afforded the opportunity to be tried before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. State v. Harris, 308 N.C. 159, 301 S.E.2d 91 (1983).

The judge may not express, during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

Judge Creates Prejudice by Expressing Opinion. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an opinion. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

Comment Not Expression of Opinion. — The court's comment "you have now convicted this defendant on these three cases," did not amount to an expression of opinion as the jury had in fact just convicted the defendant of three offenses. State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995).

Trial judge's reference to a sentencing condition as an "agreement" did not amount to expressing an impermissible opinion because the reference was made by defense counsel, and the jury was cautioned to examine the evidence in a murder trial carefully before deciding whether or not to believe a co-defendant's testimony. State v. Nevills, 158 N.C. App. 733, 582 S.E.2d 625, 2003 N.C. App. LEXIS 1221 (2003), cert. denied, appeal dismissed, 357 N.C. 581, 589 S.E.2d 361 (2003).

Where a codefendant testified against the defendant pursuant to a plea bargain, the fact that the trial judge had sentenced the codefendant prior to the defendant's trial did not constitute an implied expression to the jury of the court's opinion as to the codefendant's veracity; thus, there was neither plain nor structural error. State v. Frink, 158 N.C. App. 581, 582 S.E.2d 617, 2003 N.C. App. LEXIS 1280 (2003).

Trial judge did not violate G.S. 15A-1222, when after stating the roles of the defense attorney and the prosecution respectively, the trial judge used the first person plural to explain what will go on in the case; although the trial court should not have made an ambiguous comment that could have been interpreted as an acknowledgement that the judge and the prosecution were a team, the trial court was merely commenting on the roles of the attorneys, not a question of fact to be decided by the jury. State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003), appeal dismissed, cert. denied, 357 N.C. 581, 589 S.E.2d 363 (2003).

In response to juror's request to see a poster on the prosecutor's easel, a trial judge's comment that the prosecutor was "painting by numbers" did not constitute an improper expression of opinion on defendant's guilt in violation of G.S. 15A-1222. The trial court was not expressing an opinion on defendant's guilt, but rather explaining for what purpose the State's poster, which at least one juror was unable to see, had been used. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

No Justification for Expression of Opinion. — The fact that an accused may be charged with a despicable crime, and the evidence of guilt may appear to be overwhelming, does not justify the expression of an opinion. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

And it is immaterial how an opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence, or in any other manner. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979); State v. Wilhelm, 59 N.C. App. 298, 296 S.E.2d 664 (1982); 307 N.C. 702, 301 S.E.2d 395 (1983).

It is impermissible for a judge to express an opinion, either explicitly or implicitly, at any time during the course of the trial. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

But not every improper remark by a trial judge requires a new trial. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

While not every improper remark will require a new trial, a new trial may be awarded if the remarks by the trial judge go to the heart of the case. State v. Sidbury, 64 N.C. App. 177, 306 S.E.2d 844 (1983).

A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Not every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Totality of the Circumstances Test. — In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is used. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

A trial court may not express during any stage of a defendant's trial, any opinion in the presence of the jury on any question of fact to be decided by the jury; however, an alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made, and a trial court generally does not impermissibly express an opinion when it makes ordinary rulings during the course of the trial. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Ordinary rulings by the court in the course of the trial do not amount to an impermissible expression of opinion. State v. Welch, 65 N.C. App. 390, 308 S.E.2d 910 (1983).

Trial court generally not impermissibly expressing opinion when it makes ordinary rulings during the course of the trial. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Opinion on Question of Fact. — The trial court committed prejudicial error when it declared in the presence of the jury that the defendant was found by the court to be an expert in the field of general psychiatry and would be allowed to testify, where the defendant testified as his own expert and the question of his expertise was not simply a question of fact but one of the most critical questions to be decided by the jury. Sherrod v. Nash Gen. Hosp., 348 N.C. 526, 500 S.E.2d 708 (1998).

Defendant must show that he was prejudiced by judge's remark allegedly violating this section. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Determination of Prejudice Resulting from Remarks. — Whether an accused was deprived of a fair trial by remarks by the judge during any stage of the trial must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979), superseded by statute as stated in State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (2006), on other grounds.

The judge's comments should be considered in light of all the facts and circumstances. State v. Wilhelm, 59 N.C. App. 298, 296 S.E.2d 664 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 395 (1983).

It does not necessarily follow that every ill-advised comment by the trial judge which may tend to impeach the witness is so harmful as to constitute reversible error. The comment should be considered in light of all the facts and attendant circumstances disclosed by the record. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Expressions which may be erroneous when isolated are not grounds for reversal if, when considered contextually, the charge presents the law fairly and clearly. State v. Lofton, 66 N.C. App. 79, 310 S.E.2d 633 (1984).

A defendant has a right to trial before an impartial judge, and any expression or intimation of an opinion by the judge which prejudices the jury against defendant is grounds for a new trial. The expression, however, must be viewed contextually, and whether a defendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice. State v. Lofton, 66 N.C. App. 79, 310 S.E.2d 633 (1984).

Burden of showing prejudice is on the appellant. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979), superseded by statute as stated in State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (2006), on other grounds.

The burden rests upon the defendant to show that the remarks of the trial judge deprived him of a fair trial. State v. Waters, 87 N.C. App. 502, 361 S.E.2d 416 (1987).

Defendant bears the burden of establishing that the trial judge's remarks were prejudicial. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Rulings on Repetitive Questions. — Absent a showing of manifest abuse, a trial judge's allowance or disallowance of alleged repetitive questions is within his discretion, and his duty to control the conduct and course of a trial. State v. Lednum, 51 N.C. App. 387, 276 S.E.2d 920, cert. denied, 303 N.C. 317, 281 S.E.2d 656 (1981).

The trial court did not express its opinion on questions of fact in the jury's presence and did not abuse its discretion in limiting repetitive questioning. State v. Hester, 343 N.C. 266, 470 S.E.2d 25 (1996).

Remarks in Admitting or Excluding Evidence. — A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. State v. Lednum, 51 N.C. App. 387, 276 S.E.2d 920, cert. denied, 303 N.C. 317, 281 S.E.2d 656 (1981).

Judge may always properly exclude inadmissible evidence; he is prohibited, however, by this section from doing so in a manner which intimates any judicial favoritism. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

Words whereby the trial court sustained objections by the defendant to questions asked by the prosecutor in the presence of the jury, namely, "[w]ell, as phrased, sustained," and "[w]ell, sustained for the moment," did not constitute an improper expression of opinion. State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988).

Inquiry to the jury concerning whether it would prefer to reconvene on Saturday or Monday, which became necessary when the trial judge realized the case could not be completed on Friday, could not be construed as expressing an opinion on any fact involved in the case. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Supervision of Defendants' Opening Statement. — While the trial judge might have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice defendant's case to require reversal of his conviction. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Restriction of Improper Questioning by Counsel. — Scope and manner of examination of witnesses are matters which are ordinarily governed by the trial judge, who may take appropriate measures to restrict improper questioning by counsel. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Instructions Given to Defense Counsel. — When the trial judge decided not to submit a lesser-included offense instruction, contrary to his prior decision announced to counsel, after defense counsel had begun his closing argument, and instructed defense counsel to correct his argument that such an instruction would be submitted to the jury, this was not an impermissible expression of the trial judge's opinion. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Trial judge's comments, admonishing defense counsel for leading witnesses on direct examination and arguing and badgering witness on cross-examination, did not express an opinion as to defendant's guilt, since all of the comments were routinely made in the course of the right and duty the trial judge had to control examination and cross-examination of witnesses, and the questions asked were for clarification purposes. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

Admonishment of Defendant. — Trial judge's admonishment of defendant was not an improper expression of judicial opinion because the jury could not rationally have inferred from the judge's expression that he thought defendant was guilty. State v. Poland, 148 N.C. App. 588, 560 S.E.2d 186, 2002 N.C. App. LEXIS 49 (2002).

Instruction to Defendant Not to Speak to Jury. — Defendant contended that the judge's instruction ordering defendant not to speak to the jury harmed defendant's credibility and biased the jurors; however, the jury could not have reasonably inferred that the trial judge intimated an opinion as to defendant's credibility. State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618, 2002 N.C. App. LEXIS 1636 (2002), cert. denied, 357 N.C. 255, 583 S.E.2d 287 (2003).

Referring to Accused as "Defendant". — The trial court does not impermissibly express its opinion by refusing to grant the defendant's request that he be referred to by his name and not as "the defendant." State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

The trial court's reference to the prosecutor as "our" and/or "your" district attorney did not violate its duty of impartiality nor did it constitute an improper expression of opinion under this section. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Trial court did not err by referring to the prosecution witnesses as "victims;" defendant had not shown undue prejudice arising from the use of the term "victim" so as to justify awarding a new trial because the trial court was not intimating that defendant had committed any crime. State v. Henderson, 155 N.C. App. 719, 574 S.E.2d 700, 2003 N.C. App. LEXIS 19 (2003), cert. denied, appeal dismissed, 357 N.C. 64, 579 S.E.2d 569 (2003).

Characterization of Case as One of "Hurry-and-Wait". — Characterization of the case by the trial judge, in explaining to the jury why they were being sent out of the courtroom after a defense objection, as one of "hurry-and-wait," standing alone, was not a sufficient statement of an "opinion" by the trial judge for the Appellate court to conclude that defendants were prejudiced. State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344, cert. denied, 320 N.C. 172, 358 S.E.2d 58 (1987).

Distribution of Copies of Accomplice's Statements to Individual Jurors. — Fact that the trial judge had copies of accomplice's handwritten statements made for distribution to individual jurors, instead of providing one copy to the 12 jurors and waiting for each one to read the statements and pass them along, was well within his discretion, and the record did not support a finding that defendant was prejudiced by the manner in which the judge chose to publish these exhibits to the jury. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

Statement That Defendant Had "Confessed". — Trial court's statement that the evidence tended to show that defendant had "confessed" that he "committed the crime charged" did not amount to an expression of opinion by the trial court, where evidence had been introduced which in fact tended to show that defendant had confessed to the crime charged, namely, first degree murder, and where the trial court's statement was followed immediately by the instruction: "Now, if you find that the defendant made that confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it." State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

Allegedly improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Instructions must be construed contextually. State v. Butcher, 57 N.C. App. 698, 292 S.E.2d 149 (1982).

Instructions Held Proper When Viewed Contextually. — The trial court's charge did not constitute an impermissible expression of opinion on the evidence where the court referred to the circumstance as "alleged." State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Omission of Word "Alleged" in Instruction. — Trial court's instruction to the jury that "if you are satisfied that the defendant was insane at the time of the robbery with a firearm he would be not guilty by reason of insanity and that would end the case" did not constitute an expression of opinion on a question of fact because of the one omission of the word "alleged" before "robbery with a firearm." State v. Linville, 43 N.C. App. 204, 258 S.E.2d 397 (1979), aff'd, 300 N.C. 135, 265 S.E.2d 150 (1980).

Instruction that the jury is to carefully consider and scrutinize testimony of the defendant, and of those who are closely related to him, taking into consideration the interests that they have in the outcome of this trial, where the court made no similar charge concerning the witnesses for the State and where the court had earlier charged that it was for the members of the jury to consider any interest, bias, or prejudice that any of the witnesses might have, was not an expression of opinion by the court. State v. Powell, 306 N.C. 718, 295 S.E.2d 413 (1982).

Comparative Amount of Time Devoted to Instructions. — Just as the mere fact that the judge may spend more time summarizing the evidence for the State does not amount to an expression of opinion, no expression of opinion arises merely from the comparative amount of time devoted to giving an instruction. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Instruction Calling for Judge to Express an Opinion Properly Refused. — In a trial in which the defendant claimed to have multiple personalities, the trial court could not, as the defense requested, instruct the jury that the person sitting at the defense table was not "James Woodard," but instead was "Johnny Gustud" (the defendant's "alternate personality"). If the judge had done so, he would have impermissibly expressed his opinion as to whether the defendant in fact had multiple personalities. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

A colloquy between the trial judge and the district attorney did not constitute an expression of opinion on any fact to be proved in the case and therefore did not constitute a violation of this section. State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (1993).

Instructions by Trial Court Not Improper. — It was not error for trial court to instruct the jury that assault on a female with intent to commit rape was by definition a felony involving the use or threat of violence to the person. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instructing the jury that the knife allegedly used to commit the assault was a deadly weapon was not error where the evidence presented led to only one conclusion, that the knife was a deadly weapon. State v. Caudle, 172 N.C. App. 261, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005), vacated, in part, on other grounds, 361 N.C. 151 (2006), no error found on remand, 641 S.E.2d 351, 2007 N.C. App. LEXIS 478 (2007).

Comments in Response to Jury Question Not Improper. — Trial court did not violate G.S. 15A-1222 or G.S. 15A-1232 when it responded to the juror's question on acting in concert because the trial court merely instructed the jury to decide the case based on the evidence presented and the law given by the judge; the trial court did not instruct the jury on acting in concert in response to the juror's question, but only after the jury deadlocked was this instruction given. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

Remark About Sentencing Prior to Jury Verdict. — Since it is obvious that a defendant will not be sentenced unless he is first found guilty, a judge's premature remarks about sentencing, in response to an inquiry prior to the time the jury reached a verdict by the foreman to the court as to whether the jury could make an "explanation" of its verdict, assumes that the jury has already reached a guilty verdict, and leaves little doubt that the judge expects the jury to find the defendant guilty. Such an assumption amounts to an unwarranted expression of opinion on defendant's guilt and thereby encourages the rendering of a guilty verdict. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

Remark on Role of Attorneys. — Where the court's comments indicate the roles attorneys play in a criminal prosecution, such comments are not improper expressions of opinion as to the merits of either party's case. State v. Hudson, 54 N.C. App. 437, 283 S.E.2d 561 (1981).

Seating of Attorney. — Where the record reflected that the jury was not present when the decision was made to seat a witness' attorney next to the witness stand, and defendant conceded it was proper and necessary for an attorney to be appointed to advise the witness of his constitutional rights, and defendant suggested no alternative to placing the attorney next to the witness stand and, indeed, did not object to this procedure at trial, the jury could not have interpreted the judge's actions as reflecting on the credibility of this witness and error, if any, was clearly harmless. State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983).

Personal Opinion Not Conveyed. — Where the trial judge alluded only to appropriate sources of evidence, and in no way suggested how such evidence should be considered by the jurors, the judge's statements did not convey any personal opinion. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

Prejudicial Error Not Shown. — The trial judge in a rape case did not commit prejudicial error under this section when he remarked to the jury that he did not want each individual juror to take the time to read exhibits admitted as evidence for the defense, where he did permit defense counsel to read the reports in their entirety to the jury. State v. Howard, 320 N.C. 718, 360 S.E.2d 790 (1987).

The trial court's refusal to allow defendant to use a weapon to demonstrate his testimony was not error where the court could reasonably have concluded that such action might jeopardize the safety of those in the courtroom and the continued presence of the defendant. State v. Ford, 323 N.C. 466, 373 S.E.2d 420 (1988).

Although comments made by the trial court in the presence of the jury in reaction to a delay caused by the temporary absence of a defense witness who left to go to the bathroom were less than exemplary, the comments did not rise to the level of error. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Trial court's comments did not intimate to the jurors that the trial court believed the evidence to justify verdicts of guilty of first-degree murder, which might necessitate the alternate juror's presence at a capital sentencing proceeding. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

Comments made by the trial court held not to express impermissible opinions about the value of defendant's evidence or the ability of defendant's counsel. State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997).

Comments of trial court in sustaining an objection to defendant's insinuation, during closing argument, that there had been fabrications of evidence did not effectively instruct the jury to accept the testimony of a key state witness at face value. State v. Green, 129 N.C. App. 539, 500 S.E.2d 452 (1998), aff'd, 350 N.C. 59, 510 S.E.2d 375 (1999).

Judge did not violate this section when he (1) made comments to show a judicial leaning that a detective acted properly in selecting pictures for a photo lineup; (2) belittled the defendant's line of questioning regarding the victim's statements of her assailant's skin color; (3) referred to the victim as "the victim"; and (4) admonished the jury not to visit the "scene of the crime"; the comments and questions by the trial judge were to clarify testimony or to explain proper procedures to the jury, and, even though the trial court had a propensity to scatter leading questions among its inquiries, such was of minimal effect and did not even rise to the level of non-prejudicial or harmless error. State v. Pickard, 143 N.C. App. 485, 547 S.E.2d 102, 2001 N.C. App. LEXIS 303 (2001), cert. denied, 354 N.C. 73, 553 S.E.2d 210 (2001).

Even if a trial judge's comment that the prosecutor was "painting by numbers" in response to juror's request to see a poster on the prosecutor's easel could possibly be construed as a statement of opinion regarding defendant's guilt, it was not apparent that it would have had any impact on the verdict returned by the jury, and thus the remark would have been at most harmless error. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

Actions of Judge Not Impermissible. — The trial judge did not violate this section by instructing the bailiff to sit between the jury and the witness stand to his right after the defendant took the witness stand. State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815, 2000 N.C. App. LEXIS 1401 (2000).

When New Trial Required. — Where the trial judge's statement prior to trial went to the heart of the trial, assuming the defendant's guilt, a new trial was required. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under G.S. 15A-1233, which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of this section and G.S. 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Trial court's failure to give an agreed upon modified jury instruction was prejudicial because the trial court's error resolved a disputed issue of fact for the jury when it identified the shooter as an accomplice, not an "alleged accomplice," and thus, necessitated a new trial. State v. Castaneda, — N.C. App. —, 674 S.E.2d 707, 2009 N.C. App. LEXIS 367 (2009).

Applied in State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898 (1978); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Cody, 40 N.C. App. 735, 253 S.E.2d 642 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Smith, 41 N.C. App. 600, 255 S.E.2d 210 (1979); State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); State v. McCraw, 300 N.C. 610, 268 S.E.2d 173 (1980); State v. Hawkins, 302 N.C. 364, 275 S.E.2d 172 (1981); State v. Bizzell, 53 N.C. App. 450, 281 S.E.2d 57 (1981); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Hobson, 310 N.C. 555, 313 S.E.2d 546 (1984); State v. Bean, 66 N.C. App. 86, 310 S.E.2d 421 (1984); State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984); State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Williams, 98 N.C. App. 68, 389 S.E.2d 830 (1990); State v. Redfern, 98 N.C. App. 129, 389 S.E.2d 846 (1990); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992); State v. McKoy, 331 N.C. 731, 417 S.E.2d 244 (1992); State v. Long, 113 N.C. App. 765, 440 S.E.2d 576 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995); State v. Campbell, 340 N.C. 612, 460 S.E.2d 144 (1995); State v. Burke, 342 N.C. 113, 463 S.E.2d 212 (1995); State v. Stokes, 174 N.C. App. 447, 621 S.E.2d 311, 2005 N.C. App. LEXIS 2495 (2005).

Cited in State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978); State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978); State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980); State v. Williams, 299 N.C. 652, 263 S.E.2d 774 (1980); State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980); State v. Norwood, 303 N.C. 473, 279 S.E.2d 550 (1981); State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981); State v. Hurst, 304 N.C. 709, 285 S.E.2d 808 (1982); State v. Burgess, 55 N.C. App. 443, 285 S.E.2d 868 (1982); State v. Little, 56 N.C. App. 765, 290 S.E.2d 393 (1982); State v. Reeves, 62 N.C. App. 219, 302 S.E.2d 658 (1983); State v. Griffin, 308 N.C. 303, 302 S.E.2d 447 (1983); State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983); State v. Cook, 65 N.C. App. 703, 309 S.E.2d 737 (1983); State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985); State v. Slone, 76 N.C. App. 628, 334 S.E.2d 78 (1985); Harris-Teeter Supermarkets, Inc. v. Hampton, 76 N.C. App. 649, 334 S.E.2d 81 (1985); State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987); State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987); State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995); State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997); State v. York, 347 N.C. 79, 489 S.E.2d 380 (1997); State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997); State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (1997); State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999); State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Allen, 353 N.C. 511, 546 S.E.2d 372, 2001 N.C. LEXIS 528 (2001); State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002); State v. Thomas, 153 N.C. App. 326, 570 S.E.2d 142, 2002 N.C. App. LEXIS 1188 (2002); State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002); State v. Brinkley, 159 N.C. App. 446, 583 S.E.2d 335, 2003 N.C. App. LEXIS 1536 (2003); In re L.B., 184 N.C. App. 442, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

II. QUESTIONS BY TRIAL JUDGE.

Questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979); State v. Whittington, 318 N.C. 114, 347 S.E.2d 403 (1986).

A judge may not by his questions to a witness intimate an opinion as to whether any fact essential to the State's case has been proved. A judge may ask questions, however, that elicit testimony which proves an element of the State's case so long as he does not comment on the strength of the evidence or the credibility of the witness. State v. Lowe, 60 N.C. App. 549, 299 S.E.2d 466 (1983).

Clarification of Testimony. — The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979); State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980); State v. Whittington, 318 N.C. 114, 347 S.E.2d 403 (1986).

Trial judge may properly question witnesses in order to clarify and promote a proper understanding of the testimony; however, such questions constitute prejudicial error if by their tenor, frequency, or persistence the trial judge expresses an opinion. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

The trial court may direct questions to a witness for the purpose of clarifying his testimony. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

The trial judge did not express an opinion in violation of this section in asking a witness to "describe what this defendant did," since the purpose of the question was to clarify testimony by the witness in which he used the word "they." State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

A trial judge's questions, propounded to a witness to clarify his confusing or contradictory testimony, do not constitute an expression of opinion unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness's credibility, the defendants' guilt, or as to a factual controversy to be resolved by the jury. State v. Yellorday, 297 N.C. 574, 256 S.E.2d 205 (1979); State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

In a prosecution for rape and kidnapping, the trial court did not err in asking leading questions of the seven-year-old victim during the voir dire hearing on defendant's motion to suppress identification testimony since this section does not apply when the jury is not present during questioning, since a child may be asked leading questions concerning delicate matters of a sexual nature, and since the trial court may question a witness to clarify his testimony. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Where the record clearly revealed that victim was confused by questions of both the district attorney and defendant's attorney, and in each instance the judge questioned the victim in an attempt to clear up her confusing testimony, and the questions propounded by the judge in no way expressed any opinion as to the witness' credibility, the defendant's guilt, or as to a factual controversy that was to be resolved by the jury, there was no error. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

The trial judge is permitted to interrogate witnesses, whether called by itself or by a party, under G.S. 8C-1, Rule 614(b), but may not express during any stage of the trial any opinion in the presence of the jury on any question of fact to be decided by the jury. However, in fulfilling the duties of a trial judge to supervise and control the course of a trial so as to insure justice to all parties, the judge may question a witness in order to clarify confusing or contradictory testimony. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Questions by judge to expert witness did not denigrate either defendant's witness or her evidence, but instead helped to develop testimony favorable to the defense and assist the trial court in its task of deciding whether mitigating circumstances which might later be requested by the defense were in fact supported by the evidence. State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994), cert. denied, 516 U.S. 834, 116 S. Ct. 111, 133 L. Ed. 2d 63 (1995).

Trial judge did not err in questioning witnesses where the questions were designed to clarify the sequence of events and the trial court did not state an opinion as to the facts or the witnesses' credibility. State v. Smarr, 146 N.C. App. 44, 551 S.E.2d 881, 2001 N.C. App. LEXIS 789 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 500 (2002).

Trial court's line of questioning to a police detective helped to clarify the witness's testimony and was not prejudicial to defendant. State v. Lorenzo, 147 N.C. App. 728, 556 S.E.2d 625 (2001).

Trial court did not prejudice defendant by asking questions to a doctor concerning the seriousness and permanency of the victim's injuries as he did not express an opinion concerning defendant's guilt, nor did he make any statement tending to discredit or prejudice defendant. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

Trial judge's exchanges with defendant and defendant's witnesses did not constitute improperly expressed opinion; judge acted similarly with plaintiff's witnesses. Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999), rev'd on other grounds, 351 N.C. 166, 522 S.E.2d 73 (1999).

Prejudicial Actions by Judge. — The jury could reasonably infer from the trial court's action in turning his back to defendant and the jury during defendant's testimony that the trial judge did not believe defendant's testimony to be credible and this action was sufficiently prejudicial to require a new pretrial. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Defendant's 16 assignments of error regarding alleged denigration of defense counsel, improper expressions of opinion and improper comments by the trial judge were without merit; the judge merely made appropriate inquiries, supervised and controlled the course of the trial and the scope and manner of witness examination with care and prudence. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

Questioning Held Not Improper. — Questioning by the trial judge was not improper where the judge's inquiry constituted neither an expression of opinion as to the guilt or innocence of the defendant nor a suggestion of alliance with the prosecution. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

No reasonable juror would have interpreted the question "If chosen to sit as a juror will you require the state to satisfy you of the defendant's guilt beyond a reasonable doubt before you find him guilty?" as indicating an opinion of the court. State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995), cert. denied, 517 U.S. 1123, 116 S. Ct. 1359, 134 L. Ed. 2d 526 (1996).

The trial judge's question of a witness regarding his opinion as to the validity of a report on the results of DNA tests performed by another individual did not violate this section. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Trial court's questioning of a witness, concerning the seriousness and permanency of the victim's injuries, did not violate the restrictions imposed by G.S. 15A-1222, and did not prejudice defendant. State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002), appeal dismissed, 357 N.C. 64, 579 S.E.2d 396 (2003), cert. denied, 540 U.S. 928, 124 S. Ct. 338, 157 L. Ed. 2d 231 (2003).

Trial judge did not prejudice defendant under G.S. 15A-1222 when the judge asked questions and clarified the testimony of witnesses; defendant received a fair trial, as the trial judge did not express an opinion upon or bolster the testimony of any witness, and did not prejudice defendant by clarifying the testimony of witnesses. State v. Rushdan, 183 N.C. App. 281, 644 S.E.2d 568, 2007 N.C. App. LEXIS 1045 (2007).

Because none of the questions asked by the trial judge related to any question of fact to be decided by the jury, and defendant did not demonstrate how he was prejudiced by the questions, defendant was not deprived of a fair trial. State v. Ware, 188 N.C. App. 790, 656 S.E.2d 662, 2008 N.C. App. LEXIS 263 (2008).

Remark Held Not Improper. — There was no error where a remark by the court was a mere lapsus linguae that did not prejudice the defendant. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Question Which Does Not Supply Essential Elements of State's Case. — In an armed robbery case, the court does not impermissibly express its opinion by questioning a State witness as to ownership of the store that had been robbed. Such question does not supply elements essential to the State's case, since ownership is irrelevant as long as the evidence shows that the defendant was not taking his own property. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

Where judge's questioning related to witness' expertise and comprised a part of the trial court's ascertainment of his qualifications as an expert witness, since witness' testimony generated some confusion regarding the various locations of his training, the trial court's questions were fairly designed to clarify this testimony and not expression of judge's opinions. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

Court Erred by Asking Question Conveying to Jury It Did Not Believe Witness. — The trial court erred in asking expert witness "Are you telling the truth now or were you telling the truth then?" which clearly conveyed to the jury that the trial court did not believe this witness was being truthful; the trial court had invaded the province of the jury to determine the credibility of the witness. State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996).

III. STATEMENT OF PARTIES' CONTENTIONS.

Must Be Stated Without Undue Stress to Those of Either Side. — When a court undertakes to restate the contentions of the parties, it must fairly present the contentions of both parties without giving undue stress to those of either side. It is sufficient if the contentions are restated with reasonable accuracy. Any minor discrepancies or misstatements in the charge must be brought to the attention of the judge at trial. State v. White, 298 N.C. 430, 259 S.E.2d 281 (1979).

No Reversible Error Found. — Defendant's unpreserved argument was that the prosecutor's closing statement to the jury indicated that the court had decided that the defendant acted with deliberation such that the court should have corrected the statement ex mero motu; however, the statement was not reversible error since (1) it did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) because there was no objection, and therefore no overruling by the court of the defendant's objection, the idea was not solidified in the jurors' minds; (3) the statement did not travel outside the record as prohibited by G.S. 15A-1230(a); (4) so that it would not violate G.S. 15A-1222 and G.S. 15A-1232, the court instructed the jury that the court was impartial and that the jury would be mistaken to believe otherwise; and (5) the court instructed the jury it "may" find premeditation and deliberation, and instructed on what basis the jury could make such a finding. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

An instruction by the trial court stating that the evidence tended to show the existence of a confession to the crime charged was not an impermissible comment invading the province of the jury and its fact-finding function; considering defendant's admissions which tended to show premeditation and deliberation — such as the sheer number of blows with the fire extinguisher, the time between each blow, and the dragging of one victim back into the apartment — the statement did support inclusion of the confession instruction, and the instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

IV. SUMMARY OF EVIDENCE.

Trial judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

Mere fact that judge spends more time summarizing evidence for the State does not amount to an expression of opinion. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

It is a common practice in the courts of this State for a trial judge to read exhibits to the jury. The court's position as neutral governor of trial proceedings prevents this from being anything other than an impartial exposition of evidence, by itself not favorable to any party involved in the proceedings. State v. Harris, 308 N.C. 159, 301 S.E.2d 91 (1983).

Failure to Summarize Nonexculpatory Evidence. — It is not error for court to fail to summarize evidence brought out on cross-examination for defendant where it is not of an exculpatory nature which goes to the establishment of a defense. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held reversible error when not called to the attention of the judge at the time and where the charge substantially complies with the requirements of this section. State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983).

Informing Jury That No Evidence of Justification or Mitigation Has Been Introduced. — It is not error for the trial court simply to inform the jury as to whether or not specific evidence relevant to justification or mitigation has been introduced in a homicide prosecution. This is determined as a matter of law, not of fact, and such an instruction does not therefore invade or interfere with the exclusive province of the jury to decide and weigh the facts presented. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1056, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

§ 15A-1223. Disqualification of judge.

(a) A judge on his own motion may disqualify himself from presiding over a criminal trial or other criminal proceeding.

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

(1) Prejudiced against the moving party or in favor of the adverse party; or
(2) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 6.
(3) Closely related to the defendant by blood or marriage; or
(4) For any other reason unable to perform the duties required of him in an impartial manner.

(c) A motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification.

(d) A motion to disqualify a judge must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time. Good cause includes the discovery of facts constituting grounds for disqualification less than five days before the case is called for trial.

(e) A judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case. (1977, c. 711, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 6.)

OFFICIAL COMMENTARY

The source of this section is Special Advisory Committee of the Florida Supreme Court, Proposed Revision of Florida Criminal Procedure Rules, Rule 3.230 (1972). Compare Uniform Rules, Rule 741.

The Commission directed that the commentary indicate that the rules of evidence applicable to jury trials should not apply in the hearing on disqualification of a judge, so that affidavits otherwise reliable should not be excluded from consideration by virtue of the hearsay rule.

As to the judge's duty to excuse himself when he has any doubt as to his ability to preside impartially or whenever his impartiality can be reasonably questioned, see A.B.A. Standards, Function of the Trial Judge § 1.7.

CASE NOTES

A judge may be disqualified for reasons other than those stated in the statute. State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987).

Burden is on Defendant to Objectively Prove Bias, Prejudice, or Interest. — G.S. 15A-1223 and N.C. Code Jud. Conduct Canon 3, control the disqualification of a judge presiding over a criminal trial and the burden is on the defendant in an appeal to show objectively that grounds exist consisting of substantial evidence that there exists such a personal bias, prejudice, or interest on the part of the judge that he would be unable to rule impartially. The mere fact that a trial judge is intimately familiar with the proceedings does not automatically require his disqualification, so a the same judge who presided over defendant's murder trial was not disqualified form serving as the presiding judge in a retrospective competency hearing. State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71, 2004 N.C. App. LEXIS 413 (2004), appeal dismissed, cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Disposition by Trial Judge of Recusal Motion. — A trial judge should either recuse himself or refer a recusal motion to another judge, if there is sufficient force in the allegations contained in defendant's motion to proceed to find facts, or if a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner. State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

Trial court did not err in declining to recuse itself from defendant's resentencing hearing, as defendant failed to make his motion pursuant to a written motion, the record did not establish "good cause" sufficient to excuse the failure to make the motion in writing, and in any event defendant failed to demonstrate objectively that grounds for disqualification actually existed; statements of the trial court that defendant quoted indicated only that the trial court was refreshing its memory as to defendant's case and did not suggest the trial court had any bias or prejudice against defendant. State v. Moffitt, 185 N.C. App. 308, 648 S.E.2d 272, 2007 N.C. App. LEXIS 1737 (2007).

Failure of Judge to Disqualify Himself Not Error Absent Proof of Bias. — Where the trial judge at the first trial of the defendant, when declaring a mistrial, ruled that the emotional outburst heard by the jury could either consciously or subconsciously prevent them from rendering a verdict solely on the evidence, but there was no evidence in the record elicited by defense counsel or any other party of any prejudice or bias displayed by the presiding judge, and no showing that in the previous trial the judge reacted strongly to the outburst, nor any showing that the judge displayed marked personal feeling toward the defendant, the failure of the trial judge to disqualify himself was not error. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied and appeal dismissed, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 382 (1979).

Where there are no facts to cause a reasonable man knowing all the circumstances to doubt the judge's ability to rule on the motion to recuse in an impartial manner, there can be no error in such judge's failure to schedule a hearing on defendant's motion to recuse. State v. Crabtree, 66 N.C. App. 662, 312 S.E.2d 219 (1984).

Judge Should Have Granted Attorney's Motion to Recuse. — Judge should have granted the attorney's motion to recuse because the criminal contempt with which the attorney was charged was based upon acts so involving the judge, including the attorney's actions in an underlying criminal case in which the attorney unsuccessfully sought the judge's recusal, that the judge's objectivity may reasonably have been questioned. In re Marshall, 191 N.C. App. 53, 662 S.E.2d 5, 2008 N.C. App. LEXIS 1131 (2008).

Trial judge's alleged opinions regarding the crime of driving while impaired did not constitute proper grounds to require the judge to recuse himself. State v. Kennedy, 110 N.C. App. 302, 429 S.E.2d 449 (1993).

Insufficient Evidence to Question Judge's Objectivity. — Where at the hearing on the motion to recuse, defendant produced no evidence of any bias other than her attorney's recollection that the judge had made the statement that "that car is gone" during a forfeiture proceeding, there was not substantial evidence that might reasonably call the judge's objectivity into question. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

When County Wherein Judge Sits Has an Interest in the Proceedings. — Motion for the presiding judge's recusal was properly denied where city presented no affidavits supporting its motion, the record revealed no evidence of personal bias, prejudice or interest on the part of the judge, and the court refused to set a standard that resident superior court judges could not participate in proceedings in which the county where the judge resides, and not the judge himself, has a potential interest in the proceedings. County of Johnston v. City of Wilson, 136 N.C. App. 775, 525 S.E.2d 826, 2000 N.C. App. LEXIS 137 (2000).

Applied in State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980); State v. Sweigart, 71 N.C. App. 383, 322 S.E.2d 188 (1984).

Cited in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989); In re Nakell, 104 N.C. App. 638, 411 S.E.2d 159 (1991); State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993); State v. Love, 177 N.C. App. 614, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006); State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007).

§ 15A-1224. Death or disability of trial judge.

(a) If by reason of sickness or other disability a judge before whom the defendant is being tried is unable to continue presiding over the trial without the necessity of a continuance, he may in his discretion order a mistrial.

(b) If by reason of absence, death, sickness, or other disability, the judge before whom the defendant is being or has been tried is unable to perform the duties required of him before entry of judgment, and has not ordered a mistrial, any other judge assigned to the court may perform those duties, but if the other judge is satisfied that he cannot perform those duties because he did not preside at an earlier stage of the proceedings or for any other reason, he must order a mistrial. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is a fairly elaborate expansion of A.B.A. Standards, Trial by Jury § 4.3. Compare Uniform Rules, Rule 741(e) and (f).

CASE NOTES

Cited in State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493 (1984).

§ 15A-1225. Exclusion of witnesses.

Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The Commission considered several different approaches to this section. One draft simply made the matter of exclusion discretionary with the trial judge. There was a great deal of sentiment within the Commission, however, for specifically allowing the key investigating officer in a complex case to remain beside the prosecutor to aid in the handling of the State's case. Some thought that such an officer should be required to testify first, and not be exempt from exclusion, but more Commission members believed this might distort the orderly presentation of the facts of the case. The Commission considered, and finally rejected as too complex, a draft that defined the "key investigating officer" who could not be excluded. (This draft attempted to distinguish the complex case with a key investigator from a simple "two-officer" case which many members of the Commission thought particularly called for exclusion.)

The Commission's final proposal was flatly to allow the prosecutor to select one witness to remain and assist in the courtroom — in addition to providing that the parent or guardian of a child may remain in the courtroom even though later to be called as a witness.

The General Assembly modified this section, though, to delete the clause relating to a witness to assist the prosecutor. The apparent basis lay in the belief that exclusion should not be prevented in the "two-officer" case, and in addition it was thought inappropriate for the statute to single out the State for a special privilege. It is assumed the judge would exercise his discretion to allow a key investigator, for the State or the defense, to remain in the courtroom to assist in the case — even though later to be called to the stand.

CASE NOTES

A trial judge may order the separation before trial of witnesses who are in the custody of the State. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The aim of sequestration is two-fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid. State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984).

First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid. State v. Johnson, 128 N.C. App. 361, 496 S.E.2d 805 (1998).

While it is true that one of the purposes for requiring sequestration is to prevent witnesses from tailoring their testimony from that of earlier witnesses, in order to show error a defendant must show that the trial court abused its discretion. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

The separation of witnesses is not founded on the idea of keeping the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories, but by separate cross-examination to detect them. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Due process does not automatically require separation of witnesses who are to testify to the same set of facts. State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984).

Presence of Social Worker and Therapist During Rape Victim's Testimony. — The trial court did not abuse its discretion by allowing a social worker and a therapist to remain in the courtroom during the victims' testimony in rape trial. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

Discretion of Court. — A motion to sequester witnesses is addressed to the sound discretion of the trial judge and will not be reviewed on appeal absent a showing of an abuse of discretion. State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984); State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

Sequestration of Only Some Witnesses Not Error. — Because defendant only raised a specific concern regarding the ability of codefendants to hear one another's testimony, it was not error to sequester only codefendants and not other witnesses. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Failure to Make Motion Not Necessarily Ineffective Assistance of Counsel. — Trial counsel's failure to move pursuant to this section for the exclusion of three State's witnesses from the courtroom until each one was called to testify is not evidence of ineffective assistance of counsel. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed, 301 N.C. 726, 276 S.E.2d 286 (1981).

Oral Argument Not Required Before Final Ruling. — Although fundamental fairness would seem to require it, at least when a proper and timely request therefor is made, this section does not specifically mandate the receipt and consideration of oral arguments prior to the entry of final rulings by the trial court. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1056, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Applied in State v. Stanley, 310 N.C. 353, 312 S.E.2d 482 (1984); State v. Batts, 93 N.C. App. 404, 378 S.E.2d 211 (1989); State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

Cited in Davis v. Public Schs., 115 N.C. App. 98, 443 S.E.2d 781; State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

§ 15A-1225.1. Child witnesses; remote testimony.

(a) Definitions:

(1) Child. — For the purposes of this section, a minor who is under the age of 16 years old at the time of the testimony.

(2) Criminal proceeding. — Any hearing or trial in a prosecution of a person charged with violating a criminal law of this State, and any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult.

(3) Remote testimony. — A method by which a child witness testifies in a criminal proceeding outside of the physical presence of the defendant.

(b) Remote Testimony Authorized. — In a criminal proceeding, a child witness who has been found competent to testify may testify, under oath or affirmation, other than in an open forum when the court determines:

(1) That the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and

(2) That the child's ability to communicate with the trier of fact would be impaired.

(c) Hearing Procedure. — Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. Hearings in the superior court division, and hearings conducted under Subchapter II of Chapter 7B of the General Statutes, shall be recorded. The presence of the child witness is not required at the hearing unless ordered by the presiding judge.

(d) Order. — An order allowing or disallowing the use of remote testimony shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony shall do the following:

(1) State the method by which the child is to testify.

(2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the child.

(4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.

(5) State any other condition necessary for taking or presenting the testimony.

(e) Testimony. — The method used for remote testimony shall allow the judge, jury, and defendant or juvenile respondent to observe the demeanor of the child as the child testifies in a similar manner as if the child were in the open forum. The court shall ensure that the defense counsel, except a pro se defendant, is physically present where the child testifies, has a full and fair opportunity for cross-examination of the child witness, and has the ability to communicate privately with the defendant or juvenile respondent during the remote testimony. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. — Nothing in this section shall:

(1) Prohibit the use or application of any other method or procedure authorized or required by statute, common law, or rule for the introduction into evidence of the statements or testimony of a child in a criminal or noncriminal proceeding.

(2) Be construed to require a court, in noncriminal proceedings, to apply the standard set forth in subsection (b) of this section, or to deviate

from a standard or standards authorized by statute, common law, or rule, for allowing the use of remote testimony in noncriminal proceedings.

(g) This section does not apply if the defendant is an attorney pro se, unless the defendant has a court-appointed attorney assisting the defendant in the defense, in which case only the court-appointed attorney shall be permitted in the room with the child during the child's testimony. (2009-356, s. 1.)

Editor's Note. — Session Laws 2009-356, s. 2, provides: "This act becomes effective December 1, 2009, and applies to any hearings or trials held on or after that date. Nothing in this act shall be construed to (i) abrogate any judicial rulings or decisions prior to the effective date of this act that allowed or disallowed witness testimony in any criminal proceeding or (ii) abrogate any judicial rulings that prohibit a psychological evaluation of an unwilling witness."

§ 15A-1225.2. Witnesses with developmental disabilities or mental retardation; remote testimony.

(a) Definitions. — The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. — A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a prosecution of a person charged with violating a criminal law of this State and in any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of the defendant and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of the defendant.

(c) Hearing Procedure. — Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. — An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. — The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. The court shall ensure that the counsel for all parties, except a pro se defendant, is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. The court shall ensure that the defendant or juvenile respondent has the ability to communicate privately with defense counsel during the remote testimony. A party may waive the right to have counsel physically present where the witness testifies. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. — Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. (2009-514, s. 2.)

Editor's Note. — Session Laws 2009-514, s. 3, provides: "This act becomes effective December 1, 2009, and applies to any hearings or trials held on or after that date. Nothing in this act shall be construed to abrogate any judicial rulings or decisions prior to the effective date of this act that allowed or disallowed witness testimony in any criminal proceeding or abrogate any judicial rulings that prohibit a psychological evaluation of an unwilling witness."

§ 15A-1226. Rebuttal evidence; additional evidence.

(a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.

(b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The source of this section is N.Y. Crim. Proc. Law § 260.30, paragraph 7.

CASE NOTES

There is no constitutional right to have a case reopened. State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

There is no constitutional right to have one's case reopened; the decision to reopen a case and hear further evidence is within the trial court's discretion. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed, 305 N.C. 306, 290 S.E.2d 707 (1982).

This section is clear authorization for a trial judge, within his discretion, to permit a party to introduce additional evidence at any time prior to the verdict; the judge may also permit a party to offer new evidence which could have been offered in the party's case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal. State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989).

Court has discretionary power to permit introduction of additional evidence after a party has rested. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

Discretion to Allow Additional Evidence Any Time Prior to Verdict. — Pursuant to subsection (b) of this section, the trial judge is authorized in his discretion to permit any party to introduce additional evidence at any time prior to verdict. State v. Riggins, 321 N.C. 107, 361 S.E.2d 558 (1987).

In a murder prosecution, the trial court's allowance of psychiatric testimony on rebuttal was not an abuse of discretion as defendant "opened the door" to such evidence by introducing evidence on the issue of his capacity to formulate the intent to kill, and his counsel had the opportunity to fully cross-examine and re-cross-examine the witness. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

The trial court has the discretion to allow either party to recall witnesses to offer additional evidence even after jury arguments. State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

Reopening of Voir Dire Examination. — Where, after presentation of evidence and arguments of counsel on voir dire on defendant's motion to suppress any statements she made to any investigating officer, but before the court ruled on the motion, the State moved to reopen the evidence for the limited purpose of offering testimony with respect to the nature of the rights furnished by the investigating officer to the defendant under Miranda, the court did not abuse its discretion in reopening the voir dire examination. State v. Stroud, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

Reopening Case to Allow Stipulated Evidence. — The trial court did not err in granting the State's motion to reopen its case in order to enter stipulated evidence concerning the results of a medical examination of the rape victim, since defendant could not have been surprised by the admission of the evidence, and there was therefore no prejudice to him. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Reopening of Case to Allow Defendant to Testify. — When the jury rendered its verdict convicting defendant of felonious possession of stolen goods and misdemeanor possession of stolen goods, the trial court lost its discretion to grant defendant's request to reopen the case so defendant could testify, and the court properly denied defendant's request to reopen the case. State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003).

Double jeopardy principles are not applicable to evidence introduced at the rebuttal phase of trial. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

In the absence of a procedure which prevents the defendant from having an opportunity to challenge or rebut new evidence offered by the State, allowing the State to present new evidence on rebuttal does not violate defendant's right to due process. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Rebuttal of Testimony as to Defendant's Character. — Where defendant put his character in issue by having witnesses testify concerning his reputation for peacefulness, and only then did the prosecutor, in accordance with G.S. 8C-1, Rules 404(a)(1) and 405(a), cross-examine witnesses about specific instances of conduct by defendant, in an effort to rebut their prior testimony as to defendant's character for peacefulness, the answers to the prosecutor's questions were properly admitted. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Trial judge did not err in allowing the State to recall victim after the close of defendant's evidence, where the State requested a bench conference less than 15 minutes after learning that the victim wished to testify after having heard defendant's voice as he testified on the stand, and the trial judge allowed defendant's request for a recess, tendered the victim for voir dire examination, and entered into the record extensive findings of fact. State v. Torian, 316 N.C. 111, 340 S.E.2d 465, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 76 (1986).

Refusal to Reopen Case Held Not Error. — Where defendant was given an opportunity to present evidence, was available, and could have been called to testify on his own behalf, but defendant did not move to reopen his case, but only moved for a mistrial, the trial judge did not abuse his discretion by refusing to allow defendant to reopen his case and testify and by denying defendant's motion for a mistrial. State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

Where defendant, after resting defendant's case, moved to reopen the evidence to allow a child witness to rebut defendant's son's testimony that the victim had a bad bicycle wreck, corroborating defendant's story as to why the victim's buttocks were bruised, the trial court did not abuse its discretion under G.S. 15A-1226(b) in denying the motion; the trial court was permitted to exclude the testimony on grounds of undue delay, waste of time, or needless presentation of cumulative evidence under G.S. 8C-1-403, as defendant could have asked defendant's son before trial whether anyone else had seen the victim wreck on the bicycle and could have cross-examined the son about this, and the child's testimony was cumulative and would have only possibly served to corroborate defendant's testimony or facts brought to the jury's attention during the son's cross-examination. State v. Phillips, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

In a prosecution of defendant for first-degree statutory rape, the trial court did not abuse its discretion by refusing to reopen the trial to permit defendant to introduce additional evidence; because evidence about defendant's work schedule had already been admitted, defendant failed to show how he was prejudiced by the trial court's refusal to allow a witness to testify about driving defendant to and from work. State v. Hoover, 174 N.C. App. 596, 621 S.E.2d 303, 2005 N.C. App. LEXIS 2467 (2005), cert. denied, 360 N.C. 488, 632 S.E.2d 766 (2006), appeal dismissed, 360 N.C. 540, 634 S.E.2d 543 (2006).

Discretion Not Abused in Reopening

Case. — Trial court did not abuse its discretion by allowing the state to reopen its case and to present additional evidence of defendant's release date after the parties had rested, but before the case was presented to the jury, pursuant to G.S. 15A-1226(b). State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

Playing an audiotape for the jury during its deliberations on a machine different from the one used during the State's case-in-chief was not new evidence for purposes of G.S. 15A-1226(a) because defendant did not allege that the tape was altered and the jury's request that the tape be played three separate times and that the jurors change seats to give each juror a chance to sit as close as possible to the tape recorder suggested that the new machine did nothing to enhance the tape's clarity. State v. Brice, 167 N.C. App. 72, 604 S.E.2d 356, 2004 N.C. App. LEXIS 2054 (2004).

Reversible Error Not Shown. — The trial court did not commit reversible error when, at the request of the jury, it allowed a State witness to retake the stand and testify as to the date of a photographic lineup without the court acknowledging to the jury that the witness' earlier testimony as to the date thereof had been different. State v. Riggins, 321 N.C. 107, 361 S.E.2d 558 (1987).

Scope of Testimony. — Where witnesses' testimony on redirect examination went beyond the scope of her testimony during direct and cross-examination but the testimony was relevant and otherwise admissible and after its admission, the trial court provided the defendant an opportunity to recross-examine the witness, the trial court did not abuse its discretion. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Applied in State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979); State v. Yancey, 58 N.C. App. 52, 293 S.E.2d 298 (1982); State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983); State v. Ziglar, 308 N.C. 747, 304 S.E.2d 206 (1983); State v. Bellamy, 64 N.C. App. 454, 308 S.E.2d 88 (1983); State v. Smith, 72 N.C. App. 630, 325 S.E.2d 295 (1985); State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Cited in State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986); State v. Davis, 317 N.C. 315, 345 S.E.2d 176 (1986); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993); State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

§ 15A-1227. Motion for dismissal.

(a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times:

(1) Upon close of the State's evidence.
(2) Upon close of all the evidence.
(3) After return of a verdict of guilty and before entry of judgment.
(4) After discharge of the jury without a verdict and before the end of the session.

(b) Failure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time as provided in subsection (a).

(c) The judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed.

(d) The sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial, as provided in G.S. 15A-1446(d)(5). (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (b) is new and changes a rule which the Commission believed had little utility.

The Commission believed the practice of reserving decision on a motion is little followed at present in North Carolina — and ought not to be encouraged. It therefore amended a draft provision based on the procedure of another jurisdiction, authorizing reservation of decision on the motion to dismiss, to bar such a procedure. This decision is reflected in subsection (c). Compare A.B.A. Standards, Trial by Jury, § 4.5.

Subsection (d) will allow appeal whether or not a motion has been made or renewed, and thus constitutes a change in the law. The phrase "all evidence" in that subsection, however, indicates that the reviewing court must consider the evidence of the defendant as well as that of the State in determining the question of sufficiency. In this respect the subsection represents a continuation of the rule presently followed by the Supreme Court of North Carolina.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

CASE NOTES

I. General Consideration.
II. Question Presented.
III. Evidence on Motion.
  A. In General.
  B. Substantial Evidence.
  C. Defendant's Evidence.
IV. Appeal from Ruling on Motion.
  A. In General.
  B. Introduction of Evidence at Trial by Defendant.

I. GENERAL CONSIDERATION.

Section 15-173 Compared. — Both G.S. 15-173 and this section allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. Section 15-173 provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in this section, its enactment did not create a new type of motion to challenge the sufficiency of the evidence. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

A defendant's motion to dismiss under subdivision (a)(1) of this section for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under G.S. 15-173. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Motion for Dismissal Similar to Motion for Nonsuit. — A motion for dismissal pursuant to this section tests the sufficiency of the evidence to sustain a conviction. In that respect it is identical to a motion for judgment as in the case of nonsuit under G.S. 15-173. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. Both motions were known to the law for many years prior to the enactment of this section. The motion for dismissal referred to in this section is the same motion for dismissal referred to in G.S. 15-173. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both G.S. 15-173 and this section. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

The defendant's motion to dismiss for insufficiency of the evidence is tantamount to a motion for nonsuit. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

A motion to dismiss under this section is substantively identical to a motion for nonsuit under G.S. 15-173. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Applicability of Cases Dealing with Motion for Nonsuit. — Controlling cases dealing with the sufficiency of evidence to withstand a motion for judgment as in the case of nonsuit are equally applicable to the sufficiency of the evidence to withstand a motion for dismissal pursuant to this section. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

A motion for dismissal under this section is identical to a motion to dismiss the action, or for judgment as in the case of nonsuit, under G.S. 15-173 in this respect: both statutes allow counsel to make a motion challenging the sufficiency of the evidence at the close of the State's evidence or at the close of all the evidence. Hence, cases dealing with the sufficiency of the evidence to withstand the latter motion made under the older statute, G.S. 15-173, are applicable when ruling on motions made under this section, the more recent statute. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Cases pertaining to the sufficiency of the evidence under G.S. 15-173 are also applicable to motions made pursuant to this section. State

v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Duty of Trial Court and Jury. — It is for the trial court to determine whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. The trial court having found that such evidence has been introduced, it is solely for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

The trial court must decide whether there is substantial evidence of each element of the offense charged. State v. Jackson, 74 N.C. App. 92, 327 S.E.2d 270 (1985).

Court Need Not Exclude Every Reasonable Hypothesis of Innocence. — The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985); State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986); State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

When the motion calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. However, inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference. State v. Davis, 74 N.C. App. 208, 328 S.E.2d 11, writ denied, 313 N.C. 510, 329 S.E.2d 406 (1985).

Preference for Submission to Jury in Borderline Cases. — In borderline or close cases, courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the 12 and to avoid unnecessary appeals. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Defendants' motion must be denied if the State has offered substantial evidence against defendant of every essential element of the crime charged. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

If there is substantial evidence to support a finding that the offense has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. State v. Cunnings, 46 N.C. App. 680, 265 S.E.2d 923, aff'd, 301 N.C. 374, 271 S.E.2d 277 (1980); State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

If there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein has been committed, and that the defendant committed it, the case is properly for the jury. State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

If there is substantial evidence-whether direct, circumstantial, or both-to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Ruling on Motion Which Is Based on All Counts. — The State's argument that where a motion to nonsuit is not limited to a particular count but is addressed to all counts, the motion cannot be allowed where there is sufficient evidence to support any count was without merit. State v. Taylor, 37 N.C. App. 709, 246 S.E.2d 834, cert. denied, 295 N.C. 737, 248 S.E.2d 866 (1978).

Timing of Request for Relief. — Trial court did not have authority to grant criminal defendant's motion to dismiss felony child abuse charges pursuant to G.S. 15A-1227, which was contained in defendant's motion for appropriate relief, as that statute requires that the motion be made before the end of the session and the session had been adjourned by the time defendant filed her motion for appropriate relief. State v. Allen, 144 N.C. App. 386, 548 S.E.2d 554, 2001 N.C. App. LEXIS 437 (2001).

G.S. 15A-1227 provides that a motion for dismissal for insufficiency of the evidence to sustain a conviction may not be made earlier than upon close of the State of North Carolina's evidence. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Failure to Move for Dismissal Does Not Constitute Ineffective Representation. — Defense counsel's failure to move for dismissal on the grounds of insufficient evidence at the close of all the evidence did not prejudice the defendant and did not constitute ineffective representation because the sufficiency of the evidence is reviewable on appeal without regard to whether a motion was made at trial. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed, 301 N.C. 726, 276 S.E.2d 286 (1981).

Effect of Dismissal. — A motion to dismiss pursuant to this section tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under G.S. 15-173. Therefore, following such dismissal defendant cannot again be placed in jeopardy upon these same charges, and the State has no right of appeal from the judgment entered. State v. Ausley, 78

N.C. App. 791, 338 S.E.2d 547 (1986).

Evidence sufficient to overrule motion to dismiss is also sufficient to overrule motion for directed verdict, since both motions have the same legal effect. State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984).

Denial of Motion to Dismiss Held Improper. — Trial court erred in denying defendant's motion to dismiss that part of the indictment that charged his violation of the drug paraphernalia statute by possessing "drug paraphernalia, to wit: a can designed as a smoking device" as no evidence existed in the record or was shown at trial to support that assertion. As a result, the State's motion to amend the indictment to charge that the possession involved "drug paraphernalia, to wit: a brown paper container" was impermissible because it substantially altered the charge set forth in the indictment. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

Applied in State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Adams, 46 N.C. App. 57, 264 S.E.2d 126 (1980); State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981); State v. Keyes, 64 N.C. App. 529, 307 S.E.2d 820 (1983); State v. Reber, 71 N.C. App. 256, 321 S.E.2d 484 (1984); State v. Durham, 74 N.C. App. 201, 328 S.E.2d 304 (1985); In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989); State v. Outlaw, 96 N.C. App. 192, 385 S.E.2d 165 (1989); State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991); State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991); State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993); State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999); State v. Simpson, 187 N.C. App. 424, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

Cited in State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009);

State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979); State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981); State v. Boyd, 61 N.C. App. 238, 300 S.E.2d 578 (1983); State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985); State v. Kinch, 314 N.C. 99, 331 S.E.2d 665 (1985); State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985); State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77 (1985); State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); State v. Harris, 319 N.C. 383, 354 S.E.2d 222 (1987); State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988); State v. Young, 103 N.C. App. 415, 406 S.E.2d 3 (1991); State v. Barnes, 110 N.C. App. 473, 429 S.E.2d 765 (1993); State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995); State v. Williams, 154 N.C. App. 176, 571 S.E.2d 619, 2002 N.C. App. LEXIS 1397 (2002); State v. Robledo, — N.C. App. —, 668 S.E.2d 91, 2008 N.C. App. LEXIS 2011 (2008).

II. QUESTION PRESENTED.

Test of Sufficiency of Evidence. — Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984); State v. Greene, 74 N.C. App. 21, 328 S.E.2d 1 (1985); State v. Davis, 74 N.C. App. 208, 328 S.E.2d 11 (1985); State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

In considering a motion to dismiss, it is the duty of the court to ascertain if there is substantial evidence of each essential element of the offense charged. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

The trial court must determine as a question of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged. State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982).

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of all elements of the offense charged so any rational trier of fact could find beyond a reasonable doubt that defendant committed the offense. State v. Thompson, 306 N.C. 526, 294 S.E.2d 314 (1982); State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986).

In ruling upon the defendant's motion to dismiss, the trial court is limited solely to the function of determining whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Tate, 58 N.C. App. 494, 294 S.E.2d 16, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982), aff'd, 307 N.C. 464, 298 S.E.2d 386 (1983).

In ruling upon the defendant's motion to dismiss or for judgment as in the case of nonsuit, the trial court is limited solely to the function of determining whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Callihan, 47 N.C. App. 360, 267 S.E.2d 28 (1980); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

In a motion to dismiss, the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. State v. Thomas, 65 N.C. App. 539, 309 S.E.2d 564 (1983); State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986); State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

Upon defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) that defendant was the perpetrator of the offense. If there is such substantial evidence, the motion must be denied. However, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion should be allowed. In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Malloy, 309 N.C. 176, 305 S.E.2d 718 (1983).

When a defendant moves under subdivision (a)(2) of this section or under G.S. 15-173 for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

The question presented on defendant's motion to dismiss is whether, upon consideration of all the evidence, whether competent or incompetent, in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was a perpetrator of that crime. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

When a defendant moves for dismissal based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged, and evidence of defendant being the one who committed the crime. State v. Moore, 87 N.C. App. 156, 360 S.E.2d 293 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 664 (1988).

Sufficiency, Not Weight, of Evidence Is Test. — The trial court in considering motions for nonsuit or for dismissal pursuant to this section is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

The trial court's function is to determine whether the evidence allows a reasonable inference to be drawn as to the defendant's guilt of the crimes charged. In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

The standard of review under any provision of G.S. 15A-1227 was an inquiry into whether there was substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of defendant being the perpetrator of the offense. State v. Scott, 356 N.C. 591, 573 S.E.2d 866, 2002 N.C. LEXIS 1263 (2002).

Test Same Whether Evidence Is Circumstantial or Direct. — The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn from the evidence and the test is the same whether the evidence is circumstantial or direct. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Davis, 74 N.C. App. 208, 328 S.E.2d 11, writ denied, 313 N.C. 510, 329 S.E.2d 406 (1985).

The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both. That test is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. If so the evidence is substantial and the defendant's motion to dismiss must be denied. State v. Malloy, 309 N.C. 176, 305 S.E.2d 718 (1983).

Test of sufficiency of the evidence to sustain a conviction is the same whether the evidence is direct, circumstantial or both: Whether the jury may infer defendant's guilt beyond a reasonable doubt from the circumstances. State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987),

cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988).

III. EVIDENCE ON MOTION.

A. In General.

What Evidence Must Show to Survive Motion. — The evidence, considered in the light most favorable to the State and indulging every inference in favor of the State, must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. State v. Thomas, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

Substantial Evidence Must Be Shown. — The amount of evidence required as to each essential element in order to withstand motions for judgment as in the case of nonsuit or for dismissal is controlled by the "substantial evidence" or "more than a scintilla of evidence" test. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

To withstand a motion to dismiss, there must be substantial evidence of all material elements of the offense. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979); State v. Murphy, 49 N.C. App. 443, 271 S.E.2d 573 (1980); State v. Seufert, 49 N.C. App. 524, 271 S.E.2d 756 (1980), cert. denied, 301 N.C. 726, 276 S.E.2d 289 (1981).

Viewing the evidence in the light most favorable to the State, the trial court must determine whether there is "substantial evidence" to support each element of the offense. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983); State v. Capps, 77 N.C. App. 400, 335 S.E.2d 189 (1985); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

In order to withstand a motion to dismiss, the State's evidence as to each element of the offense charged must be substantial. Substantial evidence in this context means more than a scintilla. State v. Thomas, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged. State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

To withstand defendant's motion to dismiss, the State is required to show substantial evidence of each of the essential elements of the crime. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983); State v. James, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

In order to overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense and that the defendant was the perpetrator of the offense. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Trial court properly denied defendant's motion for dismissal because the evidence, although mostly circumstantial and expert opinion, was sufficiently substantial regarding defendant's indictment for voluntary manslaughter and fraudulently setting fire to a dwelling house; therefore, the issues were properly submitted to the jury. State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003), cert. denied, 357 N.C. 660, 590 S.E.2d 853 (2003).

Reasonable Inference Warrants Sending Case to Jury. — If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Tate, 58 N.C. App. 494, 294 S.E.2d 16, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982), aff'd, 307 N.C. 464, 298 S.E.2d 386 (1983).

If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture, the case should be submitted to the jury. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

If the trial court determines that a reasonable inference of defendant's guilt can be drawn from the evidence, then the defendant's motion to dismiss should be denied and the case should be submitted to the jury. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Evidence Must Be More Than Seeming or Imaginary. — The requirement that the State's evidence of each element be "substantial" is simply a requirement that it be existing and real, not just seeming or imaginary. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Greene, 74 N.C. App. 21, 328 S.E.2d 1, modified and aff'd, 314 N.C. 649, 336 S.E.2d 87 (1985); State v. Davis, 74 N.C. App. 208, 328 S.E.2d 11 (1985); State v. Spangler, 314 N.C. 374, 333 S.E.2d 722 (1985).

Suspicion Insufficient to Withstand Motion. — Upon defendant's motion for dismissal, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. This is true even though the suspicion so aroused by the evidence is strong. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss should be allowed. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

It is immaterial whether the evidence is direct, circumstantial, or both. State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983); State v. James, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

Record Devoid of Evidence Even to Raise Suspicion. — Where the record was devoid of any evidence which even raised a suspicion or conjecture as to defendant's guilt, it certainly did not contain the substantial evidence of all material elements of the offense necessary to withstand a motion to dismiss. State v. Lanier, 50 N.C. App. 383, 273 S.E.2d 746, cert. denied, 302 N.C. 632, 280 S.E.2d 445 (1981).

Incompetent Evidence May Be Considered. — For purposes of a motion to dismiss, incompetent evidence may be considered. Thus, assuming arguendo that a witness was improperly qualified as an expert, his testimony would still support denial of the motion to dismiss. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Evidence Must Be Considered in Light Most Favorable to State. — In considering a motion for judgment as in the case of nonsuit or a motion for dismissal pursuant to this section, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980); State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923, aff'd, 301 N.C. 374, 271 S.E.2d 277 (1980); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980); State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980); State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303; 301 N.C. 403, 273 S.E.2d 448 (1980), aff'd in part and rev'd in part, 304 N.C. 471, 284 S.E.2d 487 (1981); State v. Murphy, 49 N.C. App. 443, 271 S.E.2d 573 (1980); State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981); State v. Gray, 56 N.C. App. 667, 289 S.E.2d 894, cert. denied, 306 N.C. 388, 294 S.E.2d 214 (1982); State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982); State v. Daniels, 59 N.C. App. 442, 297 S.E.2d 150 (1982); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982); State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983); State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983); State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983); State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984); State v. Capps, 77 N.C. App. 400, 335 S.E.2d 189 (1985); State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

In ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case — they are for the jury to resolve. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983); State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987); State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

In passing upon a motion to dismiss pursuant to this section, all of the evidence admitted, whether competent or incompetent, is viewed in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983); State v. Jackson, 74 N.C. App. 92, 327 S.E.2d 270 (1985).

In ruling upon defendants' motion to dismiss, trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Parrish, 73 N.C. App. 662, 327 S.E.2d 613 (1985); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985); State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

When a defendant moves for dismissal in a criminal action, the trial judge must consider the evidence in the light most favorable to the State, take it as true, and give to the State the benefit of every reasonable inference to be drawn therefrom. If there is evidence, direct or circumstantial or both, from which a jury could find that the offense charged had been committed and that defendant committed it, the motion to dismiss should be denied. State v. Simmons, 57 N.C. App. 548, 291 S.E.2d 815 (1982).

Upon a motion to dismiss made pursuant to this section, the trial court must consider evidence in the light most favorable to the State, giving the State the benefit of every reasonable intendment and every reasonable inference which may be drawn therefrom. Even so, the State is required to produce substantial evidence to prove the allegations in the bill of indictment. In other words, the evidence must be existing and real, not just seeming or imaginary. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652 (1983).

In making its determination on the sufficiency of the evidence pursuant to a motion to dismiss under this section, the trial court must consider the evidence in the light most favorable to the State. The State is entitled to every reasonable inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered by the trial court in ruling on the motion. State v. Malloy, 309 N.C. 176, 305 S.E.2d 718 (1983).

When defendant moves under subdivision (a)(2) of this section or under G.S. 15-173 for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. The trial court must determine as a matter of law whether the state has offered substantial evidence of all elements of the offense charged so any rational trier of fact could find beyond a reasonable doubt that the defendant committed the offense. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

When a defendant moves for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give it all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

Evidence Favorable to State Considered as Whole. — In passing on a motion to dismiss or for judgment as in the case of nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially necessary in a case when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

In ruling on the motion, evidence favorable to the State is to be considered as a whole in determining its sufficiency. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Court is to consider all evidence actually admitted, which is favorable to the State, whether competent or incompetent. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Spangler, 314 N.C. 374, 333 S.E.2d 722 (1985).

All Evidence Favorable to State Must Be Accepted as True. — All evidence admitted during the trial, whether competent or incompetent, which is favorable to the State must be taken as true, and contradictions or discrepancies therein must be resolved in the State's favor. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980); State v. Capps, 77 N.C. App. 400, 335 S.E.2d 189 (1985).

Only evidence favorable to the State is considered in a motion to dismiss, and contradictions and discrepancies in the evidence are for the jury. State v. Gray, 56 N.C. App. 667, 289 S.E.2d 894, cert. denied, 306 N.C. 388, 294 S.E.2d 214 (1982).

All Evidence Introduced Must Be Considered. — Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Contradictions and discrepancies do not warrant dismissal of case. They are for the jury to resolve. State v. Spangler, 314 N.C. 374, 333 S.E.2d 722 (1985); State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Inconsistencies in the state's evidence were for the jury to weigh and consider. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Evidence of Motive and Opportunity. — When the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test. State v. Bell, 65 N.C. App. 234, 309 S.E.2d 464 (1983), aff'd, 311 N.C. 299, 316 S.E.2d 72 (1984).

Evidence of either motive or opportunity alone is insufficient to carry a case to the jury. State v. Bell, 65 N.C. App. 234, 309 S.E.2d 464 (1983), aff'd, 311 N.C. 299, 316 S.E.2d 72 (1984).

Sufficiency of Fingerprint Evidence. — When the State relies on a fingerprint found at the scene of the crime, in order to withstand a motion to dismiss, there must be substantial evidence of circumstances from which the jury can find that the fingerprint could have been impressed only at the time the crime was committed. State v. Berry, 58 N.C. App. 355, 293 S.E.2d 650 (1982), aff'd, 307 N.C. 467, 298 S.E.2d 386 (1983).

The rule in a case involving fingerprint evidence is that a motion for dismissal or nonsuit is properly denied if, in addition to testimony by a qualified expert that the fingerprints at the scene of the crime match those of the accused, there is substantial evidence of circumstances from which a jury could find that the fingerprints were impressed at the time the crime was committed. State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

Defendant's motion to dismiss is properly denied if there is substantial evidence of each essential element of the offense charged and that defendant committed the offense. State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

Where the evidence showed that after a child had finished urinating, defendant entered the restroom stall he occupied, closed the door, and molested the child, as defendant effectively restricted the child's ability to leave the stall and removed him from the view of others in the restroom who might hinder the commission of the offense, the evidence was sufficient to allow a jury to find that defendant confined the child within the stall for the purpose of facilitating defendant's taking indecent liberties with him, in violation of G.S. 14-39, and the trial court properly denied defendant's motion to dismiss for insufficient evidence. State v. Shue, 163 N.C. App. 58, 592 S.E.2d 233, 2004 N.C. App. LEXIS 264 (2004), cert. denied, 358 N.C. 380, 597 S.E.2d 773 (2004), cert. dismissed, notice of appeal dismissed, — N.C. —, 623 S.E.2d 38 (2005).

Where there was no evidence that defendant had intended to molest an eight-year-old boy when he tried to grab his arm in a bathroom stall, his subsequent molestation of the child's younger brother in same bathroom was not proof of such intent and the charge of taking indecent liberties with the eight-year-old should have been dismissed for insufficient evidence. State v. Shue, 163 N.C. App. 58, 592 S.E.2d 233, 2004 N.C. App. LEXIS 264 (2004), cert. denied, 358 N.C. 380, 597 S.E.2d 773 (2004), cert. dismissed, notice of appeal dismissed, — N.C. —, 623 S.E.2d 38 (2005).

B. Substantial Evidence.

"Substantial Evidence" Defined. — Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923, aff'd, 301 N.C. 374, 271 S.E.2d 277 (1980); State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Pryor, 59 N.C. App. 1, 295 S.E.2d 610 (1982); State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983); State v. Jackson, 74 N.C. App. 92, 327 S.E.2d 270 (1985); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

"More than a scintilla of evidence" test and "substantial evidence" test are in reality only one test which is most frequently designated the "substantial evidence test." State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Anything more than a scintilla of evidence is "substantial evidence." State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Existence of Substantial Evidence Is a Question of Law. — Whether the State offered substantial evidence to withstand a motion to dismiss for insufficiency of the evidence is a question of law for the trial court. State v. Seufert, 49 N.C. App. 524, 271 S.E.2d 756 (1980), cert. denied, 301 N.C. 726, 276 S.E.2d 289 (1981); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

What is substantial evidence is a question of law for the court; what the evidence proves or not is a question for the jury. State v. Bradley, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

Substantial Evidence Established. — Trial court did not err in denying defendant's motion to dismiss pursuant to G.S. 15A-1227(a)(2), as there was sufficient evidence to convict defendant of possession of cocaine pursuant to G.S. 90-95 where an officer testified that, while surveilling defendant, the officer witnessed defendant possessing a bag of crack cocaine and passing the bag to defendant's girlfriend, on whose person the bag was later found in a search; this evidence was sufficient to persuade a rational juror to accept the conclusion that defendant possessed the cocaine recovered from the girlfriend. State v. Peoples, 167 N.C. App. 63, 604 S.E.2d 321 (2004).

The trial court erred in dismissal of defendant's conviction for habitual driving while impaired under G.S. 20-138.5 because the state presented evidence that: (1) defendant was traveling at a speed in excess of sixty miles per hour; (2) defendant's vehicle had no motor vehicle tags; (3) defendant did not immediately stop after the arresting officer activated his red and blue lights and did not do so until after the officer accelerated to keep up with the vehicle and activated his airhorn more than once; (4) defendant did not stop in the rightmost lane of the four-lane highway, but rather stopped at a

'T' intersection in such a manner that defendant's and the officer's cars blocked the intersection; (5) defendant left his vehicle and started toward the officer's vehicle before being ordered to return to his vehicle; (6) upon approaching defendant's vehicle, the officer smelled a strong odor of alcohol; (7) the officer observed an open container of beer in the passenger area of defendant's vehicle; (8) defendant's coat was wet from what appeared to the officer to be beer waste; (9) defendant's speech was slurred; (10) defendant refused to take the ALCO-SENSOR test; and (11) defendant refused the Intoxilyzer test. Substantial evidence existed for each essential element of DWI, and viewing the evidence in a light most favorable to the State, revealed a reasonable inference of defendant's guilt based on direct and circumstantial evidence presented by the state, which was sufficient to support the jury's verdict of guilty. State v. Scott, 356 N.C. 591, 573 S.E.2d 866, 2002 N.C. LEXIS 1263 (2002).

Motion to dismiss was properly denied where the evidence showed that defendant drove through an apartment complex in a borrowed car with victim's brother, exited the vehicle in a certain area and returned to the vehicle after gunshots, and the brother fabricated a story to police to avoid identification, there was sufficient evidence to support a finding of conspiracy to commit murder. State v. Brewton, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Trial court did not err in denying a juvenile's motion to dismiss a charge that he committed a violation of North Carolina's Ethnic Intimidation Statute, G.S. 14-401.14 at the close of all the evidence, as the State presented sufficient evidence that he: (1) sent an E-mail to the African-American victim, which contained racial slurs and was signed "KKK," and directly communicated an intent to harm her; and (2) testified that he sent the E-mail to the victim in protest of her alleged differing treatment against him as compared with others who were African-American. Thus, the State met its burden in showing that the E-mail was sent to the victim for racially motivated reasons. In re B.C.D., 177 N.C. App. 555, 629 S.E.2d 617, 2006 N.C. App. LEXIS 1073 (2006).

Evidence that defendant kidnapped the victim to facilitate the armed robbery, which could not have occurred without the kidnapping, was sufficient to support the denial of defendant's motion to dismiss the kidnapping charge. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Denial of defendant's motion to dismiss the charge of assault with a deadly weapon on a government official was proper because the state presented substantial evidence from which a jury could have found that defendant's act of submerging the deputy in the river was likely to produce death or great bodily harm, thus supporting the conclusion that "hands and water" were in this case a deadly weapon. State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29, 2007 N.C. App. LEXIS 1978 (2007).

Trial court did not err when it denied defendant's motion to dismiss the embezzlement charges against defendant because the State of North Carolina presented substantial evidence of defendant's agency or fiduciary relationship with the vendors who contracted with defendant sufficient to survive a motion to dismiss on that element. Additionally, the State also presented evidence sufficient to survive the motion to dismiss on the issue of intent as the State presented evidence that defendant received money on behalf of the vendors, did not pay them when it was due, and was experiencing personal financial problems. State v. Newell, 189 N.C. App. 138, 657 S.E.2d 400, 2008 N.C. App. LEXIS 427 (2008).

State submitted substantial evidence to show both that defendant, a salon's massage therapist, had sexual contact with two female clients through the use of force and against their will, and, thus, committed two sexual batteries in violation of G.S. 14-27.5(a)(1), and that defendant while working at the salon was practicing massage therapy without a license in violation of G.S. 90-634(a)(1). As a result, dismissal of those charges on defendant's motion was not warranted. State v. Viera, 189 N.C. App. 514, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (2008).

Improperly Admitted Evidence Can Constitute Substantial Evidence Overcoming a Motion to Dismiss. — Although hearsay statements were improperly admitted by the trial court, the statements had to be considered in a review of the evidence on appeal of a denial of defendant's motion to dismiss, and since the testimony tended to show that defendant knew he was purchasing stolen property, substantial evidence was presented to support the inference that defendant knew the items were stolen; since all the essential elements of the crime of possession of stolen goods in violation of G.S. 14-71.1 were supported by substantial evidence, the trial court did not err in denying defendant's motions to dismiss. State v. Morton, 166 N.C. App. 477, 601 S.E.2d 873, 2004 N.C. App. LEXIS 1739 (2004).

C. Defendant's Evidence.

Defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, when not in conflict with the State's evidence, it may be used to explain or clarify the evidence offered by the State. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

If defendant does present evidence, it is disregarded on his motion to dismiss except to the extent that it is favorable to the State. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Court must consider defendant's evidence which explains or clarifies that offered by the State. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Court must consider defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Evidence Held Sufficient to Withstand Motion to Dismiss. — Trial court properly denied defendant's motions to dismiss pursuant to G.S. 15A-1227 in a prosecution for felony child abuse of defendant's minor daughter in violation of G.S. 14-318.4(a); with respect to G.S. 14-318.4, when an adult had exclusive custody of a child for a period of time during which the child suffered injuries that were neither self-inflicted nor accidental, there was sufficient evidence to create an inference that the adult intentionally inflicted those injuries, and in the instant case defendant had exclusive custody of the child during the period when the child's injuries occurred, and testimony to two doctors indicated that the injures to the child were intentionally inflicted. State v. Liberato, 156 N.C. App. 182, 576 S.E.2d 118, 2003 N.C. App. LEXIS 75 (2003).

There was sufficient evidence from testimony of an accident reconstructionist and from a witness who was involved in a multi-car collision caused by defendant swerving into another lane of traffic to avoid a car which stopped in front of her to find that the State had shown that both defendant and the victim who died in the accident were driving particular cars, which supported the conviction for misdemeanor death by a motor vehicle in violation of G.S. 20-141.4 and which justified the denial of a motion to dismiss under G.S. 15A-1227. State v. Glover, 156 N.C. App. 139, 575 S.E.2d 835, 2003 N.C. App. LEXIS 78 (2003).

Victim's testimony that the defendant hit the victim in the head with a wine bottle that broke upon impact and that the defendant then hit the victim and cut the victim a few times, along with the victim's testimony that the defendant also started hitting the other victim and swinging the end of the bottle so that the other victim also received cuts, constituted substantial evidence that the defendant committed assault with a deadly weapon so as to withstand the defendant's motion to dismiss. State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380, 2003 N.C. App. LEXIS 187 (2003), cert. denied, 357 N.C. 254, 583 S.E.2d 43 (2003).

IV. APPEAL FROM RULING ON MOTION.

A. In General.

Necessity of Objecting, etc., at Trial. — Although G.S. 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, this statute is negated by N.C.R.A.P., Rule 10(b)(3), which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit at trial. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Question on Review of Grant of Motion to Dismiss. — Court of Appeals erred by applying the proof beyond a reasonable doubt standard of review in determining whether the trial court properly dismissed a habitual DWI charge under G.S. 15A-1227(a)(3) after the return of a verdict of guilty but before entry of judgment; the appropriate standard of review is whether there is substantial evidence of each essential element of the offense charged or of a lesser offense included therein, and of defendant's being the perpetrator of such offense. State v. Scott, 356 N.C. 591, 573 S.E.2d 866, 2002 N.C. LEXIS 1263 (2002).

Question on Review of Denial of Motion. — In reviewing the denial of a motion to dismiss, the evidence adduced at trial must be examined in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is "substantial" if a reasonable person would consider it sufficient to support the conclusion that the essential element exists. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

The reviewing court must examine the evidence to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Circumstantial Evidence Sufficient to Support Denial of Motion. — Denial of defendant's motion to dismiss based upon insufficiency of the evidence was proper where there was sufficient circumstantial evidence whereby a reasonable inference of defendant's guilt could be drawn from the evidence; among other things, there were witnesses who testified that defendant was in the area of the crime at the relevant time and defendant told a cell mate that "I didn't mean to kill him, I didn't mean to. I was just going to rob him." State v. Bowman, — N.C. App. —, 644 S.E.2d 596, 2007 N.C. App. LEXIS 1099 (2007).

Trial Court's Failure to Rule on Defen-

dant's Motion to Dismiss Was Prejudicial. — Trial court's failure to rule on defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the state's evidence, as required by G.S. 15A-1227(c), prejudiced defendant because the only evidence of defendant's involvement in the robbery was hearsay testimony that was admitted for impeachment, not substantive, purposes. State v. Batchelor, 190 N.C. App. 369, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

Motion to dismiss which is improperly phrased will not destroy reviewability on appeal. State v. Taylor, 37 N.C. App. 709, 246 S.E.2d 834, cert. denied, 295 N.C. 737, 248 S.E.2d 866 (1978).

When Motion for Dismissal Not Ground for Appeal. — Defendant's argument that the trial court erred in denying his motion to dismiss the charge of possession of stolen property was not properly before the appellate court where he had offered evidence following the trial court's denial of his motion for dismissal at the close of the State's evidence and thus, under G.S. 15A-1227(a)(1), he could not urge the motion as a ground for appeal. State v. Southards, 189 N.C. App. 152, 657 S.E.2d 419, 2008 N.C. App. LEXIS 403 (2008).

State's Right to Appeal. — The State of North Carolina had the right to appeal the trial court's order grant of a defense motion dismissing an impaired driving charge after the jury had found the defendant guilty, because a reversal would only result in reinstatement of the jury's verdict, and not a new trial. State v. Scott, 146 N.C. App. 283, 551 S.E.2d 916, 2001 N.C. App. LEXIS 859 (2001), cert. granted, 355 N.C. 221, 560 S.E.2d 360 (2002), cert. denied, 537 U.S. 833, 123 S. Ct. 141, 154 L. Ed. 2d 50 (2002).

No Prejudice Shown. — When defendants moved to dismiss charges at the close of all the evidence, a trial court's reservation of a ruling on defendants' motions, which was contrary to G.S. 15A-1227(c), requiring the court to rule immediately, did not create reversible error or violate defendants' rights under U.S. Const., Amends. V and XIV, or N.C. Const., Art. I, § 19, because no prejudice was shown, as required by G.S. 15A-1443; it was more likely that the trial court would have denied the motions had the court not deferred the court's ruling, and the evidence was sufficient to withstand the motions to dismiss. State v. Hernandez, 188 N.C. App. 193, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

B. Introduction of Evidence at Trial by Defendant.

Waiver of Motion at Close of State's Evidence. — Having elected to offer evidence defendant waived her motion to dismiss at the close of the State's evidence, and proper consideration is thereafter upon her motion to dismiss made at the close of all the evidence. State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, cert. denied, 449 U.S. 960, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

By preventing evidence at trial, defendant held to have waived his right to assert the denial of his motion for dismissal made at the close of the State's evidence as error on appeal. State v. Powell, 74 N.C. App. 584, 328 S.E.2d 613 (1985).

Under this section, if defendant introduces evidence following the denial of his motion for nonsuit, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Effect of Subsection (d) on Waiver of Appeal Under § 15-173. — Under G.S. 15-173, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of subsection (d) of this section and G.S. 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Although defendant, under G.S. 15-173, waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, pursuant to subsection (d) of this section and G.S. 15A-1446(d)(5), defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979), cert. denied, 304 N.C. 589, 290 S.E.2d 709 (1981).

§ 15A-1228. Notes by the jury.

Except where the judge, on the judge's own motion or the motion of any party, directs otherwise, jurors may make notes and take them into the jury room during their deliberations. (1977, c. 711, s. 1; 1993, c. 498, s. 1.)

OFFICIAL COMMENTARY

This section was hotly debated. Some trial attorneys believed that jurors who carefully watched the demeanor of witnesses, not taking notes, are often better judges of the truth of testimony than their fellow jurors assiduously taking notes — who would only have a record of what the witness *said*. Others in the Commission championed the "modern" position that everyone in our society takes notes, and that it would be foolish to prohibit jurors from doing so. In favor of the taking of notes, see A.B.A. Standards, Trial by Jury § 4.2. See also State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974).

The Commission finally offered a compromise draft which allowed notes to be taken unless a party objected. To keep one side from objecting in the middle of a trial as a stratagem to alter the courtroom dynamics, the Commission's draft required the objection to taking notes to be made before any evidence was offered. The General Assembly, however, removed the restriction on the right to object.

CASE NOTES

Judge May Act in Absence of Objection by Counsel. — This statute does not limit the authority of the trial judge to control the taking of notes by the jury during the course of the trial in the absence of objection by counsel. State v. McNeil, 46 N.C. App. 533, 265 S.E.2d 416, cert. denied, 300 N.C. 560, 270 S.E.2d 114 (1980).

The failure to instruct under this section does not entitle a defendant to a new trial unless he can show some effect thereof on the jury's deliberations. State v. Durham, 74 N.C. App. 121, 327 S.E.2d 312 (1985).

The issue of whether jurors are allowed to take notes is a discretionary decision made by the trial court since G.S. 15A-1228 no longer contains the mandatory requirement that the trial court instruct jurors not to take notes upon the motion of either party. State v. Crawford, 163 N.C. App. 122, 592 S.E.2d 719, 2004 N.C. App. LEXIS 307 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 867 (2004).

Cited in State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

§ 15A-1229. View by jury.

(a) The trial judge in his discretion may permit a jury view. If a view is ordered, the judge must order the jury to be conducted to the place in question in the custody of an officer. The officer must be instructed to permit no person to communicate with the jury on any subject connected with the trial, except as provided in subsection (b), nor to do so himself, and to return the jurors to the courtroom without unnecessary delay or at a specified time. The judge, prosecutor, and counsel for the defendant must be present at the view by the jury. The defendant is entitled to be present at the view by the jury.

(b) A judge in his discretion may permit a witness under oath to testify at the site of the jury view and point out objects and physical characteristics material to his testimony. The testimony must be recorded. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The provision authorizing the taking of testimony at the scene of the view by the jury is an innovation. Although the defendant has a constitutional right to be present, it is believed that he can waive this right even if testimony is taken at the place of the view — so long as the defendant's counsel is there to cross-examine as appropriate and otherwise represent the defendant's interests.

CASE NOTES

Jury Assembled as a Single Body Not Required. — There is no requirement, constitutional or otherwise, that the defendant in a capital case be in the presence of all members of the jury, assembled as a single body, throughout a jury view of the scene of the crime. State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993).

Where members of the jury were permitted to roam freely about the home where a murder was committed and were not held together as a body to inspect the premises, defendant's state constitutional rights to be present at all stages of his capital trial were not violated. State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993).

Discretion of Trial Court. — The decision to permit a jury view is vested in the discretion of the trial judge. His decision will not be disturbed absent an abuse of discretion. State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987).

The trial court's decision of whether to permit the jury to view a crime scene will not be disturbed absent an abuse of discretion. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

Order for Jury View Upheld. — Order drafted jointly by district attorney and defense counsel and entered with only a general objection to the jury view itself, which, while not reciting the language of the statute verbatim, contained sufficient precautionary language to insure that defendant's right to an impartial jury was not impaired, including orders that the jury be accompanied by two deputies, that the jurors not be allowed to talk among themselves, and that no one be allowed to speak with the jury, was sufficient to comply with the requirements of subsection (a) of this section. State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987).

Judge's reason for allowing the jury view of a restaurant where murders occurred was valid where judge wanted to allow jurors an improved understanding of the size, dimensions, and configuration of the restaurant. State v. French, 342 N.C. 863, 467 S.E.2d 412 (1996).

Jury View Appropriate. — A jury view of the police vehicle that defendant shot during incident was well within the court's discretion and the evidence was relevant as defendant's intent when he fired shots into the vehicle was at issue. State v. Tucker, 347 N.C. 235, 490 S.E.2d 559 (1997), cert. denied, 523 U.S. 1061, 118 S. Ct. 1389, 140 L. Ed. 2d 649 (1998).

Crime Scene Tampering. — Trial court had no duty to question witnesses about tampering with a crime scene prior to a jury view, where the court was fully informed of all relevant facts and considered the defendant's arguments when making its decision to permit a jury view. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

Applied in State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408, 2004 N.C. App. LEXIS 128 (2004).

Cited in Williams v. Bethany Volunteer Fire Dep't, 307 N.C. 430, 298 S.E.2d 352 (1983).

§ 15A-1230. Limitations on argument to the jury.

(a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

(b) Length, number, and order of arguments allotted to the parties are governed by G.S. 84-14. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Although this section does no more than codify provisions that have long been in the case law and codes of ethics, it nevertheless engendered lengthy debate within the Commission. An original draft more closely modeled on A.B.A. Standards, Function of the Trial Judge § 5.10, was modified to reflect certain language in North Carolina State Bar, Code of Professional Responsibility, DR7-106(C).

As for subsection (b), it should be noted that in another action for 1977 General Assembly created a specific rule on order of argument in the sentencing phase of a capital case. In this separate penalty proceeding, the defendant is always given the right to the last argument. G.S. 15A-2000(a)(4).

Editor's Note. — Section 84-14, referred to in this section, was recodified as G.S. 7A-97.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

The right to closing argument is substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

The permissible scope of counsel's closing argument to the jury is not unlimited and the trial judge may limit the argument of counsel within his discretion. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

When, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of G.S. 84-14 (see now 7A-97(a)) allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

In a capital case as many as three counsel on each side may argue for as long as they wish and each may address the jury as many times as he desires. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If in a non-capital case defendant elects to present evidence, he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by G.S. 84-14 (see now 7A-97). State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If defendant in a non-capital case does not present evidence, he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant by stipulation waived her opening argument, the failure of the trial judge to allow both of the defendant's counsel to make the closing argument was prejudicial error in the non-capital as well as the capital charges against her. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Discretion of Trial Judge. — The control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge, and his rulings thereon will not be disturbed in the absence of gross abuse of discretion. State v. Woods, 56 N.C. App. 193, 287 S.E.2d 431, cert. denied, 305 N.C. 592, 292 S.E.2d 13 (1982).

Control of the arguments of counsel is within the sound discretion of the trial judge. State v. Paul, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

Control of the arguments of counsel rests primarily in the discretion of the presiding judge. State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982).

Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury. State v. Riddle, 311 N.C. 734, 319 S.E.2d 250 (1984).

Trial court did not abuse its discretion in denying defendant's request to argue that the victim's husband shot the victim, as it was not a matter in issue at the trial because there was no such evidence presented at trial. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

Trial court did not abuse its discretion in sustaining the State's objections. Defense counsel violated G.S. 15A-1230 by listing several specific murderers and several general types of murder with which he urged the jury to compare the instant murder; defendant was not prohibited from arguing that the circumstances of his case — regardless of the circumstances of other cases — did not warrant imposition of the death penalty. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Generally, counsel is allowed wide latitude in the scope of jury arguments. State v. Hill, 347 N.C. App. 275, 493 S.E.2d 264 (1997).

The prosecutor's assertion that defendant's self-defense claim was "vomit on the law of North Carolina" constituted a permissible expression of the state's position that, in light of the overwhelming evidence of defendant's guilt, the jury's determination that defendant acted in self-defense would be an injustice. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

The prosecutor's characterizations of defendant as "this thing" and as "cowardly" did not constitute abusive and impermissible references to defendant where the victim was physically smaller and weaker than defendant and naked and defenseless at the time of the killing and where the prosecutor only referred to him once as "this thing." State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Trial counsel is allowed wide latitude in his argument to the jury and may argue the law and the facts in evidence and all reasonable inference drawn from them. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. State v. Hill, 347 N.C. App. 275, 493 S.E.2d 264 (1997).

Defendant's Eighth Amendment rights were not violated when the trial court allowed the prosecutor to argue that an aggravating circumstance of two of defendant's murders, of an elderly husband and his blind, elderly wife, was the fact that the murders were especially heinous, atrocious, and cruel. Under G.S. 15A-1230(a), the prosecutor had a right to argue on the basis of his analysis of the evidence any conclusion or position as long as the record contained sufficient evidence from which the scenario was reasonably inferred. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

Prosecutors are granted wide latitude in the scope of their argument. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

The State is allowed to draw the jury's attention to the fact that the defendant failed to produce evidence which contradicts the State's case and it is permissible for the prosecutor to draw the jury's attention to the failure of the defendant to produce exculpatory testimony from witnesses available to defendant. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

When Impropriety Should Be Brought to Court's Attention. — Ordinarily, an impropriety in counsel's jury argument should be brought to the attention of the trial court before the case is submitted to the jury, in order that the impropriety might be corrected; this rule does not apply, however, when the impropriety is so gross that it cannot be corrected. State v. Woods, 56 N.C. App. 193, 287 S.E.2d 431, cert. denied, 305 N.C. 592, 292 S.E.2d 13 (1982); State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983).

Remarks Held Not to Necessitate Ex Mero Motu Correction. — Remarks by prosecutor during summation were improper in that they equated an adverse ruling regarding the admission of certain evidence with an effort on defendant's part to obscure the truth; however, they were not of the magnitude or character to require that the verdict be set aside, as improprieties during closing arguments, left unchallenged by defendant, must be gross indeed for it to be held that the trial court abused its discretion in not recognizing and correcting ex mero motu the comments regarded by defendant as offensive only on appeal. State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

The prosecutor's argument that if defendant was found not guilty, "justice in Halifax County will be dead[,]" was not an improper argument. This argument was a hyperbolic expression of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

The prosecutor's uncivil and at times testy remarks, which abused the rules set out in this section and to which the defendant failed to object, while unnecessary personal invective, were not so egregious as to compel the court to intervene and did not jeopardize the fairness of defendant's sentencing hearing. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Prosecutor was not improperly vouching for the State's witness in closing argument, but was merely giving the jury reasons to believe the State's witnesses who had given prior inconsistent statements and were previously unwilling to cooperate with investigators; furthermore, even if the appellate court were to assume, without deciding, that the prosecutor's argument did constitute improper vouching for State witnesses, the argument was not so grossly improper as to require the trial court to intervene ex mero motu. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

Trial court did not err in failing to intervene ex mero motu to prohibit the prosecutor's statements during closing arguments when the prosecutor stated to the jury that no evidence could be presented to them without a determination that it was proper for them to hear and that whether a statement was trustworthy and credible remained a fact for the jury to decide as the defendant failed to show that the prosecutor's comments infected the trial with unfairness and thus rendered the conviction fundamentally unfair. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

On appeal from defendant's convictions for first-degree murder and robbery with a firearm, the state supreme court encouraged counsel to base their arguments to a jury solely upon the secular law and the facts, but held that a prosecutor's use of Biblical references during the prosecutor's argument to the jury in favor of the death penalty were not so grossly improper that the trial court erred by failing to intervene ex mero motu. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Record indicated that, although the prosecutor repeatedly asked the jury to imagine what the victims were thinking before they were killed by defendant, he never asked the jury to put themselves in the victims' positions, and the state supreme court rejected defendant's claim that he was unfairly prejudiced by the prosecutor's closing argument during the sentencing phase of his trial on two counts of first-degree murder. State v. Jones, 358 N.C.

330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Prosecutor's closing argument regarding the credibility of the State's witnesses versus the defense witnesses was proper and did not require ex mero motu correction by the trial court. State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

An instruction by the trial court stating that the evidence tended to show the existence of a confession to the crime charged was not an impermissible comment invading the province of the jury and its fact-finding function; considering defendant's admissions which tended to show premeditation and deliberation — such as the sheer number of blows with the fire extinguisher, the time between each blow, and the dragging of one victim back into the apartment — the statement did support inclusion of the confession instruction, and the instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Defendant's unpreserved argument was that the prosecutor's closing statement to the jury indicated that the court had decided that the defendant acted with deliberation such that the court should have corrected the statement ex mero motu. However, the statement was not reversible error since (1) it did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) because there was no objection, and therefore no overruling by the court of the defendant's objection, the idea was not solidified in the jurors' minds; (3) the statement did not travel outside the record as prohibited by G.S.15A-1230(a); (4) so that it would not violate G.S. 15A-1222 and G.S. 15A-1232, the court instructed the jury that the court was impartial and that the jury would be mistaken to believe otherwise; and (5) the court instructed the jury it "may" find premeditation and deliberation, and instructed on what basis the jury could make such a finding. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Remarks made by a prosecutor during closing arguments of defendant's murder trial did not violate the standards of G.S. 15A-1230(a), as the prosecutor's remarks on defendant's alleged actions in the killing of his girlfriend were inferences that reasonably could be drawn from the evidence presented, and the prosecutor's expression of opinion on defendant's possible theory of the case was harmless error. State v. Anderson, 175 N.C. App. 444, 624 S.E.2d 393, 2006 N.C. App. LEXIS 191 (2006), cert. denied, — N.C. —, 632 S.E.2d 492 (2006).

Prosecutor's remarks in closing argument were improper because the remarks demeaned the integrity of a witness and improperly injected the prosecutor's opinion as to the character of witnesses, but the trial court's failure to correct the remarks ex mero motu did not entitle defendant to a new trial since defendant did not object to the remarks; defendant did not show the comments were extreme and calculated to prejudice the jury. State v. Thompson, 188 N.C. App. 102, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

Unless the defendant objects, the trial court is not required to interfere ex mero motu unless the arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Argument as Reasonable Inference from the Record. — Where a prosecutor referred to the fact that, when arrested, defendant was found in the woods fifty yards from the place at which he and two witnesses were standing when the police arrested the witness about ninety minutes earlier, the prosecutor's argument that this action demonstrated a consciousness of guilt was a reasonable inference from the record. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Defendant's claim that during closing arguments, the prosecutors made comments suggesting that they knew about other murders that were less egregious than the killing committed by defendant, and that those comments represented the improper personal opinions and extra-record knowledge of the prosecutors, lacked merit and did not amount to gross impropriety, as the comments were within acceptable comments under G.S. 15A-2000(e)(9); the prosecutors drew reasonable inferences about the degree of brutality that defendant displayed in committing the murder and they explained those inferences to the jury for purposes of a finding that the killing was "especially heinous, atrocious, or cruel." State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Prosecutor's statement that "if one has a disposition toward murder. . ." did not amount to misconduct because, viewed in the context of the arguments being made, the prosecutor properly argued the evidence that was presented and all reasonable inferences that could have been drawn from that evidence. State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007), review denied, appeal dismissed, 362 N.C. 366, 663 S.E.2d 431 (N.C. 2008).

Immediate Instruction Cures Impropriety. — Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured. State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982).

Defendant Must Show Prejudice for New Trial. — As a general rule, improper argument of counsel is cured by the court's action in cautioning counsel to confine argument to matters in evidence and cautioning the jury not to consider it. Defendant is entitled to a new trial only if the impropriety is shown to be prejudicial. State v. Paul, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

While the defendant contended that the prosecutor improperly referred to matters outside the record, appealed to the jury's passion and prejudice, inserted his personal opinion into the argument, and engaged in name-calling and other improper theatrics, the defendant failed to carry the burden of establishing that any impropriety due to the prosecutor's statements and physical conduct during closing argument resulted in prejudice to the defendant such that the defendant's conviction was a denial of due process. State v. Nance, 157 N.C. App. 434, 579 S.E.2d 456, 2003 N.C. App. LEXIS 750 (2003).

Even though the information shown on panels during the State's closing argument was outside of the record, the trial court did not abuse its discretion by denying defendant's motion for a mistrial because defendant failed to show how the error prejudiced the result of the trial; nor did the trial court abuse its discretion by denying defendant the lesser remedy of a curative instruction. State v. Rashidi, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), aff'd, 360 N.C. 166, 622 S.E.2d 493 (2005).

Appellate Review. — When a party fails to object to a closing argument the appellate court must decide whether the argument was so improper as to warrant the trial judge's intervention ex mero motu. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

In a case where the defendant fails to object to the State's closing argument the standard of review is one of gross impropriety. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

When a prosecutor becomes abusive and injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate, and it becomes the duty of the trial judge to intervene to stop improper argument. State v. Riddle, 311 N.C. 734, 319 S.E.2d 250 (1984).

Prosecutor's name-calling directed at defendant in closing argument required reversal of the death penalty imposed. State v. Jones, 355 N.C. 117, 558 S.E.2d 97, 2002 N.C. LEXIS 12 (2002).

Argument of Prior Misconduct as Substantive Evidence of Guilt Held Cured by Instruction. — While it is proper to refer to evidence of prior acts of misconduct in the arguments on the issue of credibility, it is improper for the prosecutor to argue defendant's prior misdeeds for purposes other than mere impeachment, that is, attempting to use these prior acts as substantive evidence of defendant's guilt. But, where each time defendant objected to the challenged remarks, the objections were sustained and the trial judge carefully instructed the jury that they were to consider the evidence of defendant's past behavior only as he would explain in his charge, and the judge then later gave a complete and accurate instruction relating to the jury's consideration of defendant's prior acts of misconduct, the remarks did not constitute prejudice to defendant such that the trial judge was required to declare a mistrial on his own motion. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

The prosecutor's remarks were not abusive and were not an attempt to place before the jury his personal beliefs or opinions where the prosecutor's references to defendants as wolves and a wolfpack were made to illustrate by way of analogy how concert of action led to each of the defendants' responsibility for the victim's murder. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

Prosecutor's Remarks Justified by Brutality of Crime. — Considering the brutality of the crime and that the state was seeking a recommendation of death, prosecutor's statements such as "Sitting over there is probably one of the most brutal, vicious murderers in the history of (this) County" and "Is there ever a murder enough to call for the death penalty if this isn't one?" were not grossly improper; the jury would have understood the prosecutor's remarks to address the severity of the crime before them. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Reconstruction of Trial Record. — Because the defendant failed to cooperate with the trial court to provide the appellate court with a reconstructed record of the state's closing argument, which the trial court failed to record, the appellate court was precluded from reviewing the defendant's argument that the state made improper remarks and referred to matters outside the trial record. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

Argument as to Obscenity of Pictures. — It was not reversible error for one of the prosecutors to argue to the jury as to obscenity of pictures showing anal intercourse. This argument was within the latitude allowed counsel in stating contentions and arguing reasonable inferences to be drawn from the evidence. The trial court did not err in overruling the defendant's objection to this portion of the argument. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

Where prosecutor's argument was not an expression of an opinion but, instead, a statement that the prosecutor would be unable to form an opinion as to what was obscene if the material before the jury was not, at most it amounted to a rhetorical statement implying that the state's evidence was overwhelming and contending that the jury should find the magazines in question obscene. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

It was not prejudicial error for the prosecuting attorney to argue that medical expert was paid for testifying when there was no evidence that the medical expert had been paid anything because it is well known that physicians are paid for their work, and the fact that the medical expert might have been paid need not imply that he would not testify truthfully; therefore, the defendant did not show there was a reasonable possibility there would have been a different result if the argument had not been made. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Reference to Witnesses' Show of Emotion. — Viewed in context, a reference to a witness' show of emotion on the stand was not a bid for sympathy but instead a small portion of counsel's lengthy discussion of credibility issues; this discussion encouraged an assessment of the relative credibility of each and every witness based on many factors, including demeanor on the witness stand. The demeanor of witnesses was a matter before the jury and may have legitimately been argued to them, and in the absence of a contemporaneous objection by defendant, the court did not find that the prosecutor's remarks warranted intervention by the trial judge. State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Improper Argument of Facts Outside Record. — Defense counsel acted improperly where he urged the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

The prosecutor violated this section where he stated to the jury that the court had found the witness' statements to be trustworthy and reliable; this portion of the prosecutor's argument was not part of the evidence presented to the jurors, but was a second-hand statement or revelation of the trial judge's legal determination or opinion on the evidence made during a hearing properly held outside the jury's presence. State v. Allen, 353 N.C. 511, 546 S.E.2d 372, 2001 N.C. LEXIS 528 (2001).

Prosecutor's reference, in closing argument in a death penalty case, to the Columbine school shootings and the Oklahoma City bombing were improper references to events outside the record which, by implication, urged the jurors to compare defendant's acts with infamous acts of others and attempted to lead the jurors away from the evidence by appealing to their sense of passion and prejudice. State v. Jones, 355 N.C. 117, 558 S.E.2d 97, 2002 N.C. LEXIS 12 (2002).

Arguments Outside Record Were Not Improper. — District attorney's statement that ninety-five percent (95%) of murderers would be free if intoxication was defense was obvious hyperbole related to the fact that voluntary intoxication is generally no defense to crime and his statement that politicians have talked about building new stretch of road was related to well-known fact it is difficult to travel on mountain roads that are covered with snow. State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989).

Argument As to Guilt of Another. — There was no abuse of discretion in the denial of defendant's request to argue that another person shot the victim; where there was no evidence presented at trial that pointed directly or indirectly to the guilt of the other person, it was not a matter in issue, within the meaning of G.S. 15A-1230(a). State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002), appeal dismissed, 357 N.C. 64, 579 S.E.2d 396 (2003), cert. denied, 540 U.S. 928, 124 S. Ct. 338, 157 L. Ed. 2d 231 (2003).

Use of Widely Held Opinions Was Proper. — Although prosecutor did express his opinions that county should be decent, safe and law-abiding, that drug abuse is bad, that young people should be warned about drug abuse, and that a person's home is his castle, the opinions were ones which are widely held, and it was not error to allow prosecuting attorney to use them as premises for his argument. State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989).

Replay of Videotaped Statements. — Trial court did not abuse its discretion by disallowing replay of excerpts from videotaped statements during defendant's closing argument, as the two-hour videotape containing these statements was shown to the jury during the trial in its entirety. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Argument Held Improper. — Defendant, who alleged an insanity defense following shootings, was entitled to a new trial, pursuant to G.S. 15A-1443, because the appellate court could not say beyond a reasonable doubt that the prosecutor's argument, which was improper and prejudicial because of misleading characterizations and improper inferences, did not contribute to defendant's conviction. State v. Millsaps, 169 N.C. App. 340, 610 S.E.2d 437, 2005 N.C. App. LEXIS 617 (2005).

Argument Held Not Improper. — A prosecutor's argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Where a prosecutor stated that a murder was "a first degree murder of one of the most heinous kind I have ever come into contact with" and that defendant frightened him, these infusions of the prosecutor's personal opinion were improper, but they were not so grossly improper as to require a new trial. The evidence supported the characterization of the murder as heinous. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

A statement that defendant frightened the prosecutor was not, standing alone, so prejudicial as to make a fair trial impossible. The trial court remedied any possible prejudice from these statements by admonishing the jurors to disregard any personal opinions any attorney may have expressed during closing argument. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

State's closing argument was proper in that references to defendant's psychiatrist's examination were aimed at questioning psychiatrist's ability to make a meaningful and accurate diagnosis of defendant based on spending 90 minutes with defendant. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

Trial court did not abuse its discretion in overruling defendant's objections to the State's closing arguments since the State did not go outside the scope of the evidence. State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 469 (2003).

Under G.S. 15A-1230(a), the following vivid analogies were consider proper in a prosecutor's closing comments in a capital murder case involving two defendants who allegedly acted in concert: (1) comparing the defendants to animals hunting their prey, and following the leader of the pack, and (2) if you are going to try the devil you have to go to hell to get to get your witnesses (referring to a co-participant who pleaded guilty to the murder for a reduced sentence to testify for the State). State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Prosecutor's recitation of only a portion of the especially heinous, atrocious, or cruel (HAC) aggravating circumstance pattern jury instruction during closing arguments did not constitute gross error but aided the jury in understanding what had been held to be the types of murders in which HAC could be found and thus, was not erroneous. State v. McNeill, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006).

Defendant's objection to a prosecutor's closing argument, in which the prosecutor stated that defense counsel's job was "to defend [and] not to explain, not to be even, not to be fair," was properly overruled, as: (1) the prosecutor neither used abusive, vituperative, and opprobrious language, nor did the prosecutor's comments amount to an offensive personal reference about defense counsel; (2) the prosecutor's statements attempted to explain the role of defense counsel, but did not attack defense counsel; (3) when considered within the context of the prosecutor's entire closing argument, the statements did not violate G.S. 15A-1230(a) or defendant's due process rights under the Fourteenth Amendment and N.C. Const., Art. I, § 19; and (4) defendant failed to show how the prosecutor's statements prejudiced defendant. State v. Brown, 182 N.C. App. 277, 641 S.E.2d 850, 2007 N.C. App. LEXIS 574 (2007).

Prosecutor's closing arguments to the jury, in which the prosecutor advocated that the jury return a binding recommendation of death, did not express the prosecutor's personal desires, opinions, or beliefs, but were well within the "wide latitude" of what was permissible. State v. Murrell, 362 N.C. 375, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

Prosecutor's comments regarding a codefendant's emotional state and motive for speaking with defendant's sister was brief and would have had little bearing on the jury's ultimate determination of guilt; the comment in no way rose to the character of impermissible forms of closing arguments delineated by the General Assembly. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Permissible Inferences. — Where there was sufficient evidence adduced to support an inference that the victim was either standing with his back turned to defendant or was attempting to flee when he was shot and the medical examiner testified that the victim was shot three times, once in the abdomen and twice in the back, the State acted properly in arguing permissible inferences from this evidence. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

Impropriety Cured. — Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Where defendant objected to the prosecutor's statement that "because of his age, no matter what you do, Johnny Small won't stay in prison forever," because the trial court immediately instructed the jury to disregard that portion of the prosecutor's argument, the impropriety was cured. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Applied in State v. King, 299 N.C. 707, 264 S.E.2d 40 (1980); State v. Potter, 69 N.C. App. 199, 316 S.E.2d 359 (1984); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993); State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005); State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

Cited in State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980); State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981); State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990); State v. Oxendine, 330 N.C. 419, 410 S.E.2d 884 (1991); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997); State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004); State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

§ 15A-1231. Jury instructions.

(a) At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge.

(b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

(c) After the arguments are completed, the judge must instruct the jury in accordance with G.S. 15A-1232.

(d) All instructions given and tendered instructions which have been refused become a part of the record. Failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13). (1977, c. 711, s. 1; 1983, c. 635.)

OFFICIAL COMMENTARY

This section is believed by the Commission essentially to codify present practice, but the provision for a recorded conference under subsection (b) is new. Compare A.B.A. Standards, Trial by Jury § 4.6(c). It is noteworthy, however, that the Commission deleted that subsection's bar of right of appeal on failure to give an instruction unless one is tendered and a bar of right of appeal as to erroneous instructions unless objection is entered.

Cross References. — As to requests for special instructions, see G.S. 1-181.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

Subsection (d) Unconstitutional. — N.C.R.A.P., Rule 10(b)(2) and this section are in conflict. N.C.R.A.P., Rule 10(b)(2), however, is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under N.C. Const., Art. IV, § 13(2). Therefore to the extent that this section is inconsistent with N.C.R.A.P., Rule 10(b)(2), the statute must fail. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

Unrecorded Conference Required Absent Request. — If either party to the trial desires a recorded instruction conference, subsection (b) of this section requires that party to make such a request to the trial judge. Absent such a request, subsection (b) is silent and Gen. Rules Prac., Rule 21 supplements the statute by requiring the trial court to hold an unrecorded conference. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Unrecorded Conference Without Defendant. — Where the trial court held an informal charge conference in the absence of the jury and off the record, but defendant could not show how he was materially prejudiced by the failure to record testimony there was no error. State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995).

Purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980), cert. denied, 305 N.C. 762, 292 S.E.2d 577 (1982).

Trial judge has wide discretion in presenting the issues to the jury. This responsibility cannot be delegated to or usurped by counsel. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Defendant cannot prohibit giving an instruction to the jury by failing to request it. Regardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Subordinate and Nonessential Features of Case. — The trial judge may in his discretion instruct on the subordinate and nonessential features of a case without requests by counsel. The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Requests for special instructions must be in writing and must be submitted before the beginning of the charge by the court. State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980), cert. denied, 305 N.C. 762, 292 S.E.2d 577 (1982).

The judge is not required to compose the words of a request for a special instruction. State v. Webster, 71 N.C. App. 321, 322 S.E.2d 421 (1984).

When defendant orally requested an instruction that it was legal to possess a controlled substance pursuant to a prescription, his claim on appeal that the trial court did not give this instruction could not be considered because the instruction was not submitted to the trial court in writing, as required by G.S. 15A-1231(a), and the substance of the proposed instruction was not contained in the appellate record. State v. Sanders, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005).

Requested Instruction Must at Least Be Given in Substance. — Although a trial judge is not required to give requested instructions verbatim, he is required to give the requested instruction at least in substance if it is a correct statement of the law and supported by the evidence. State v. Corn, 307 N.C. 79, 296 S.E.2d 261 (1982).

When defendant testifies and also offers evidence of his good character, he is entitled to have the jury consider his character evidence both as bearing upon credibility as a witness and as substantive evidence bearing directly upon the issue of his guilt or innocence. A court is not required to charge on this feature of the case, however, unless the defendant requests it. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

Correction of Instruction. — Although the trial judge did not instruct the jury in his original instruction that they could consider the purpose of facilitating flight, that omission was error favorable to the defendant where the indictment and the evidence both supported the instruction, and it was therefore not error for the trial judge to correct his instruction before the jury rendered its verdict on the kidnapping charge, as the State was entitled to the instruction and the instruction did not in any way change any instructions discussed at the charge conference. State v. Mason, 317 N.C. 283, 345 S.E.2d 195 (1986).

Test of Sufficiency. — Where the judge's charge fully instructs the jury on all the substantive areas of the case, and defines and applies the law thereto, it is sufficient. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Failure to Record Bench Conferences

and In-Chamber Proceedings. — Although trial court's partial denial of defendant's motion for complete recordation, insofar as it precluded recordation of bench conferences and in-chamber proceedings relating to jury instructions, may have constituted error under the applicable statutes, defendant was not prejudiced as a result thereof. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The trial court invited defense counsel to state its objections to the court's proposed instructions and defense counsel took full advantage of its opportunity to do so. Thus, defendant failed to demonstrate how he was materially prejudiced by two earlier unrecorded charge conferences. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

A defendant is required to show he was materially prejudiced by any unrecorded jury instruction conference in order to be entitled to a new sentencing hearing. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

In a death penalty case, when the trial court did not record the charge conference, as required by G.S. 15A-1231(b), the supreme court did not consider whether this required that harmless error review or plain error review be applied to defendant's argument, raised initially on appeal, that the trial court erred by providing jury instructions, at sentencing, that allowed double-counting of evidence and elements between statutory aggravating circumstances. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Where defendant makes a timely written request for a listing in writing on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form. Absent such a request, the failure of the trial court to list in writing such mitigating circumstances on the form is not error. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990), holding that this rule shall only be applied prospectively to all capital cases tried after the certification date of the court's opinion.

Failure to Submit Nonstatutory Mitigating Factor in Writing. — Because failure to submit a nonstatutory mitigating circumstance is subject to a harmless error analysis, a fortiori, failure to include such circumstances in writing on the form is also subject to the harmless error rationale. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where only two mitigating circumstances were put in writing on the issues and recommendation form, and the nonstatutory mitigating circumstances which defendant requested to be put in writing on the form were only named orally by the trial court to the jury, the mitigating circumstances were not susceptible of equal consideration by the jury, and the jury could easily have believed that the unwritten circumstances were not as worthy as those in writing. Thus, as there was a reasonable possibility that had the error not occurred, a different result would have been reached at the sentencing hearing, the case would be remanded for a new sentencing hearing. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where defendant did not submit in writing either of his proposed modifications to the pattern jury instructions for premeditation and deliberation, it was not error for the trial court to fail to charge as requested. State v. McNeill, 346 N.C. 233, 485 S.E.2d 284 (1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998).

Error Not to Instruct Jury on Willfulness Where it was Element of Crime. — Defendant was entitled to a new trial on the charge of damaging a computer or a computer network under G.S. 14-455(a), because the jury was not instructed that it had to find that defendant acted "willfully" and the error was not harmless where the jury could have found that defendant intended only to delete files that defendant believed defendant's supervisor had consented to and thus, that defendant acted without authorization, but not willfully. State v. Ramos, — N.C. App. —, 668 S.E.2d 357, 2008 N.C. App. LEXIS 2025 (2008).

Refusal to Give Instruction Held Proper. — Where defendant charged with misdemeanor death by motor vehicle failed to show that there was a "sudden emergencies" exception to G.S. 20-146 that allowed for a jury instruction on sudden emergency, and where defendant also failed to establish that the emergency that necessitated her sudden action of swerving into another lane of traffic in order to avoid a car that stopped short in front of her was not created by negligence on her part, there was no entitlement to such an instruction under G.S. 15A-1231. State v. Glover, 156 N.C. App. 139, 575 S.E.2d 835, 2003 N.C. App. LEXIS 78 (2003).

Applied in State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983); State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983); State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); State v. Moser, 74 N.C. App. 216, 328 S.E.2d 315 (1985); State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990); State v. Phillips, 328 N.C. 1, 399 S.E.2d 293; State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995); State v. Washington, 131 N.C. App.

156, 506 S.E.2d 283 (1998); State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

Cited in State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981); State v. Hargrove, 60 N.C. App. 174, 298 S.E.2d 402 (1982); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995); State v. Pyatt, 125 N.C. App. 147, 479 S.E.2d 218 (1997); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence. (1977, c. 711, s. 1; 1985, c. 537, s. 1.)

OFFICIAL COMMENTARY

This section restates the substance of G.S. 1-180, which is repealed concurrently with the amendment of this section. The Commission found to be unnecessary the proviso in G.S. 1-180 requiring the judge to "give equal stress to the State and defendant in a criminal action" because this is a duty imposed on the judge by general requirements of fairness to the parties; it is not necessary that it be explicitly stated.

Cross References. — For similar provisions relating to civil actions, see G.S. 1A-1, Rule 51.

Legal Periodicals. — For case law survey as to expression of opinion by trial judge, see 44 N.C.L. Rev. 1065 (1966); 45 N.C.L. Rev. 981 (1967).

For comment on North Carolina jury charge, present practice and future proposals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

For note on judges' remarks in the absence of a jury as a violation of this section, see 13 Wake Forest L. Rev. 259 (1977).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

I. General Consideration.
II. Expression of Opinion.
  A. In General.
  B. Remarks Concerning Parties.
  C. Remarks Concerning Witnesses.
  D. Remarks Concerning Counsel.
  E. Questioning of Witnesses.
  F. Rulings on Witnesses and Evidence.
  G. Weight and Credibility of Testimony, etc.
  H. Determination of Prejudice.
III. Jury Instructions.
  A. In General.
  B. Contentions of Parties.
  C. Explanation of Law.
    1. Defining Terms Used in Instructions.
    2. Failure of Defendant to Testify.
    3. Lesser and Included Offenses.

    4. Defenses.
    5. Duty to Reach Verdict.
    6. Punishment.
  D. Summary of Evidence.
  E. Subordinate Features of Case.
  F. Instructions as to Particular Offenses.
  G. Miscellaneous Instructions.
  H. Objections to Instructions.
  I. Error in Instructions.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the cases below were decided under this section as it read prior to its amendment in 1985, or under former G.S. 1-180.*

This section no longer requires trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law. They may, however, elect to do so through the exercise of their discretion. State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

Purpose. — This section is designed to make effectual the right of every litigant to have his cause considered with the cold neutrality of the impartial judge and the equally unbiased mind of a properly instructed jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Comment Held Not Improper Expression of Opinion on Evidence. — Judge did not violate G.S. 15A-123 when, prior to the State's publication of exhibits including bank records of defendant's company, he commented to the jury that he recognized that some people were better with numbers than others and then stated that they could look at the documents for as long as they wanted, that they were not responsible for understanding everything or even anything, and that if any one of them needed any assistance that they could ask. The judge's comment was not encouragement to the jury to ignore evidence, but rather to let the jury know they could take their time with the exhibits and that it was not necessary to completely and immediately comprehend everything in the bank records prior to jury deliberations; thus, the comment on the exhibits was not an improper expression of opinion on the weight of the evidence. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

Applied in State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898 (1978); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979); State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979); State v. Cody, 40 N.C. App. 735, 253 S.E.2d 642 (1979); State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979); State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979); State v. Hoskins, 42 N.C. App. 108, 256 S.E.2d 290 (1979); State v. Horton, 44 N.C. App. 343, 260 S.E.2d 780 (1979); State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980); State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980); State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981); State v. Wright, 304 N.C. 349, 283 S.E.2d 502 (1981); State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Bishop, 55 N.C. App. 211, 284 S.E.2d 720 (1981); State v. Corn, 307 N.C. 79, 296 S.E.2d 261 (1982); State v. Thompson, 307 N.C. 125, 296 S.E.2d 297 (1982); State v. Gooch, 307 N.C. 253, 297 S.E.2d 599 (1982); State v. Thompson, 57 N.C. App. 142, 291 S.E.2d 266 (1982); State v. Robertson, 57 N.C. App. 294, 291 S.E.2d 302 (1982); State v. Baldwin, 59 N.C. App. 430, 297 S.E.2d 188 (1982); State v. Myrick, 60 N.C. App. 362, 299 S.E.2d 439 (1983); State v. Battle, 61 N.C. App. 87, 300 S.E.2d 276 (1983); State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983); State v. Davis, 61 N.C. App. 735, 301 S.E.2d 709 (1983); State v. Churchill, 62 N.C. App. 81, 302 S.E.2d 290 (1983); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983); State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Bean, 66 N.C. App. 86, 310 S.E.2d 421 (1984); State v. Godwin, 67 N.C. App. 731, 314 S.E.2d 265 (1984); State v. Snyder, 70 N.C. App. 335, 319 S.E.2d 668 (1984); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984); State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984); State v. Clark, 71 N.C. App. 55, 322 S.E.2d 176 (1984); State v. Taylor, 80 N.C. App. 500, 342 S.E.2d 539 (1986); State v. Drayton, 323 N.C. 585, 374 S.E.2d 262 (1988); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Liner, 98 N.C. App. 600, 391 S.E.2d 820 (1990); State v. McKoy, 331 N.C. 731, 417 S.E.2d 244 (1992); State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000); State v. Boyd, 154 N.C. App. 302, 572 S.E.2d 192 (2002); State v. Little, 163 N.C. App. 235, 593 S.E.2d 113, 2004 N.C. App. LEXIS 376

(2004); State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005).

Cited in State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979); State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Patton, 45 N.C. App. 676, 263 S.E.2d 796 (1980); State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821 (1980); State v. Hart, 44 N.C. App. 479, 261 S.E.2d 250 (1980); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Oliver, 52 N.C. App. 483, 279 S.E.2d 19 (1981); State v. Charles, 53 N.C. App. 567, 281 S.E.2d 438 (1981); State v. Rhodes, 54 N.C. App. 193, 282 S.E.2d 809 (1981); State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981); State v. Murray, 55 N.C. App. 94, 284 S.E.2d 525 (1981); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Cass, 55 N.C. App. 291, 285 S.E.2d 337 (1982); State v. Williams, 56 N.C. App. 204, 287 S.E.2d 418 (1982); State v. Little, 56 N.C. App. 765, 290 S.E.2d 393 (1982); State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885 (1982); State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983); State v. Covington, 317 N.C. 127, 343 S.E.2d 524 (1986); State v. Blake, 83 N.C. App. 77, 349 S.E.2d 78 (1986); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Bullock, 320 N.C. 780, 360 S.E.2d 689 (1987); State v. Mabe, 85 N.C. App. 500, 355 S.E.2d 186 (1987); State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Autry, 101 N.C. App. 245, 399 S.E.2d 357 (1991); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Jeffries, 333 N.C. 501, 428 S.E.2d 150 (1993); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (1994); State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997); State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. McHone, 174 N.C. App. 289, 620 S.E.2d 903, 2005 N.C. App. LEXIS 2391 (2005); State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007).

II. EXPRESSION OF OPINION.

A. In General.

Section Applies Throughout Trial. — This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. State v. Cook, 162 N.C. 586, 77 S.E. 759 (1913); State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and, while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954); State v. Lewis, 32 N.C. App. 471, 232 S.E.2d 472, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

This section proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the trial or in its instructions to the jury. Bailey v. Hayman, 220 N.C. 402, 17 S.E.2d 520 (1941); Hyder v. Asheville Storage Battery Co., 242 N.C. 553, 89 S.E.2d 124 (1955).

This section forbids the judge's expression of an opinion before the jury at every stage of the trial process. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

This section prohibits any opinion or intimation of the judge at any time during the trial which is calculated to prejudice the parties in the eyes of the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

The provisions of this section may be violated at any stage of the trial by comments on the testimony of a witness, by remarks which tend to discredit a witness, by imbalancing the evidence in the charge to the jury or by any other means which intimates an opinion of the trial judge in a manner which would deprive an accused of a fair and impartial trial before the jury. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

But this section relates only to expressions of opinion during trial of case. State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

Statement of the court, made prior to the time the case was called for trial, indicating that judge would not try the case until defendants were apprehended, did not violate this section, since this section relates only to the expression of opinion during the trial of the case. State v. Lippard, 223 N.C. 167, 25 S.E.2d 594, cert. denied, 320 U.S. 749, 64 S. Ct. 52, 88 L. Ed. 2d 445 (1943).

Trial begins within the purview of this section when prospective jurors are called to be examined touching their fitness to serve on the trial jury. This being so, it is a violation of the section for the judge to communicate his opinion on the facts in the case to the trial jury by his remarks or questions to prospective jurors during the selection of the trial jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

Section Not Confined to Charge. — In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial which is calculated to prejudice either of the parties. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977); State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

Although this section refers in terms to the charge, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

This section does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968); State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

This section applies not only to the charge of the court, but also prohibits the court at a jury trial from expressing an opinion on the evidence or the veracity of the witnesses at any time during the trial in any manner, or in any form, by word of mouth or by action, and prohibits the trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

Section Not Applicable to Hearing Where No Jury Present. — The provisions of this section prohibiting a court from giving an opinion on the evidence in the presence of the jury are obviously not applicable in a hearing where no jury is present. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

The provisions of this section prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Section Cannot Be Extended Beyond Its Terms. — This section, being a restriction upon the almost universal rule, cannot be extended beyond its terms. State v. Baldwin, 178 N.C. 687, 100 S.E. 348 (1919); State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Section Applies to Opinion as to Issues. — The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends. Long v. Byrd, 169 N.C. 658, 86 S.E. 574 (1915).

Right to Impartial Judge and Properly Instructed Jury. — Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966); State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Section imposes a duty of absolute impartiality on the trial judge. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972); State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

It is the duty of the trial judge at all times to be absolutely impartial. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

This section requires that the judge maintain absolute impartiality until the verdict has been rendered because the jury, out of great respect for him, is easily influenced by his slightest suggestion. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

Judge to Abstain from Prejudicial Conduct or Language. — The judge must abstain from conduct or language which tends to prejudice the accused or his cause with the jury. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966); State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971);

State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

Every person charged with a crime has a right to trial before an impartial judge and an unprejudiced jury, and any intimation or expressed opinion by the judge at any time during the trial which prejudices the jury against the accused is ground for a new trial. State v. Arnold, 284 N.C. 41, 199 S.E.2d 423 (1973).

Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. To accord this right the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

As a result of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

Judge Not to Invade Province of Jury. — The respective functions of the judge and jury in criminal trials are clearly demarcated by this section; by that demarcation the trial judge is denied the right, in any manner or in any form, to invade the province of the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

Motive of Judge Immaterial. — The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. May, 292 N.C. 644, 235 S.E.2d 178, reconsideration denied, 293 N.C. 261, 247 S.E.2d 234, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

The effect on the jury of the remark and not the judge's motive in making it is determinative. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Trial judge's questions about the numerical division of the jury do not constitute a per se violation of N.C. Const., Art. I, § 24. Rather, the proper analysis is whether, in considering the totality of the circumstances, the inquiry was coercive. State v. Bussey, 321 N.C. 92, 361 S.E.2d 564 (1987).

In the totality of the circumstances, judge's inquiry as to the numerical division of the jury was not coercive of the jury's verdict. State v. Bussey, 321 N.C. 92, 361 S.E.2d 564 (1987).

Prejudice to Litigant Is Reversible Error. — Any opinion or intimation of the judge at any time during the trial which prejudices a litigant in the eyes of the jury is reversible error. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

Expression of Opinion Is Ground for New Trial. — Any intimation or expression of opinion by the trial court which prejudices the jury against the accused is ground for a new trial. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Section Forbids Intimation of Opinion. — This section forbids the judge to intimate his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946); State v. Wallace, 251 N.C. 378, 111 S.E.2d 714 (1959); State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); State v. Hewitt, 19 N.C. App. 663, 199 S.E.2d 729 (1973); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

The trial judge is forbidden by this section to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

This section forbids a judge to express to the jury his opinion on the facts of the case he is trying. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The expression by the court in the presence of the jury of an opinion concerning a fact to be found by the jury is forbidden by this section.

State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

This section forbids any intimation of the trial judge's opinion in any form whatsoever. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

Prohibitions Against Expression of Opinion Mandatory. — The statutory prohibitions against expressions of opinion by the trial court contained in G.S. 15A-1222 and this section are mandatory. State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed. State v. Morrison, 63 N.C. App. 125, 303 S.E.2d 849 (1983).

Whether Directly or Indirectly Conveyed. — It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to the trial of his case before a neutral judge and an unbiased jury. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. This section forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial, this section forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967); State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Because of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly. State v. Morrison, 63 N.C. App. 125, 303 S.E.2d 849 (1983).

Opinion May Be Expressed by Manner, Emphasis, or Tone. — The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again the same result may follow the use of language or from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947), citing State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946); State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of this section. State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Rhinehart, 209 N.C. 150, 183 S.E. 388 (1936).

If the judge intimates an opinion by his manner of stating the evidence, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial, he violates this section. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

Even if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice. If so, a new trial must be allowed. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Section Covers Any Opinion Calculated to Prejudice Jury. — This section has been construed to include any opinion or even a intimation of the judge, at any time during the trial, calculated to prejudice either of the parties with the jury. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

Section Prohibits Remarks Which Deny Accused a Fair Trial. — An expression of opinion prohibited by this section occurs when the judge's remarks imbalance the evidence in a manner which deprives the accused of a fair and impartial trial. State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303, cert. denied, 292 N.C. 468, 233 S.E.2d 397 (1977).

A person charged with a crime is entitled to a trial by an impartial judge, and any expression or intimation of an opinion by the judge during the course of the trial which prejudices the jury against a defendant warrants a new trial. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Judge Must Not Discredit or Prejudice Accused. — The judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973).

Slightest Intimation Carries Great Weight with Jury. — The slightest intimation from a judge as to the strength of the evidence, or as to credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947), citing State v. Ownby, 146 N.C. 677, 61 S.E. 630 (1908); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953); State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973); State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

The slightest intimation from the judge as to the weight, importance, or effect of the evidence has great weight with the jury, and, therefore, the Supreme Court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

Cumulative Effect of Errors. — It is possible that several errors, harmless in and of themselves, may combine to form an expression of opinion. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Opinion on One Count Applies to Others. — Where the verdict of the jury has acquitted the defendant under a count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes error. State v. Sparks, 184 N.C. 745, 114 S.E. 755 (1922).

Unsupported Assumptions of Evidence. — A court's expressions of opinion are particularly harmful if they include assumptions of evidence entirely unsupported by the record. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Assumption of Fact Controverted by Plea of Not Guilty. — The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968); State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970); State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971); State v. Cates, 24 N.C. App. 65, 210 S.E.2d 100 (1974).

An expression of opinion or assumption by the trial court that all the essential elements of the offenses charged, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant was prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Declaration That Evidence Tends to Show Fact Beyond Reasonable Doubt. — The credibility of the evidence is always for the jury and the judge may never declare that all the evidence tends to show any fact beyond a reasonable doubt. State v. Kimball, 261 N.C. 582, 135 S.E.2d 568 (1964).

Court May Not Intimate Whether Fact Has Been Proven or Not. — Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968); State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970); State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

The judge may not make a statement or ask a defendant or a witness questions tending to impeach him or to cast doubt on his credibility or which intimate that a fact has or has not been established. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

No judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved. Speed v. Perry, 167 N.C. 122, 83 S.E. 176 (1914); State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925); State v. Mitchell, 193 N.C. 796, 138 S.E. 166 (1927), citing State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

It is error for the trial judge to intimate that controverted facts have or have not been established, or to place before the jury in a statement of contentions matter which they should not take into consideration in arriving at a verdict. State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

Expression of Legal Theory in Relation to Verdict Form. — Where verdict form submitted to jury proposed two possible verdicts, "Guilty of Murder in the First Degree by Aiding and Abetting," or "Not Guilty," expression of legal theory upon which first degree murder conviction would rest did not place undue emphasis on that choice amounting to expression of opinion of trial judge since G.S. 15A-1237 requires that jury will be given verdict form setting out permissible verdicts recited by judge in his instructions. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

Opinion as to Guilt Is Error. — It is error for the trial judge to express or imply, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of any witness. It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979); State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Exceptions After Verdict. — Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950). But see State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

Inadvertent Expression of Opinion. — The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed, and this is so even when such expression of opinion is inadvertent. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Where the trial court merely advised the jurors that the recollection of others differed from his own recollection of the evidence and that, in any event, the jurors should rely entirely on their own recollections of the evidence, the trial court did not impermissibly express an opinion as to the evidence. State v. Sowell, 80 N.C. App. 465, 342 S.E.2d 541, rev'd on other grounds, 318 N.C. 640, 350 S.E.2d 363 (1986).

General Comment on Cases Such as Defendant's. — Comments made by a trial judge concerning cases involving marijuana, coming shortly before the defendant's marijuana case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

Interrogating Prospective Jurors as to Scruples Against Capital Punishment. — Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions the jurors that he did not mean to compare the case at issue with the other cases. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Where the judge, in questioning several prospective jurors who had been challenged by the state for cause when they had stated that they had conscientious scruples against capital punishment, inadvertently over-stepped his self-appointed bounds and unintentionally expressed an opinion on the facts adverse to the defendant, the defendant was granted a new trial. State v. McSwain, 15 N.C. App. 675, 190 S.E.2d 682 (1972).

Language Subject to Misapprehension. — When there is a conflict of testimony which leaves a case in doubt before the jury, and the judge uses language which may be subject to misapprehension and is calculated to mislead, the Supreme Court will order a venire de novo. State v. Rogers, 93 N.C. 523 (1885).

Setting Out the Parties Contentions. — This statute does not prohibit the judge from setting out the parties' contentions; however, when the judge does so, he must give equal stress to the contentions of the State and the defendant. State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

Remarks Made in Mere Pleasantry. — Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921).

There was no error where a remark by the court was a mere lapsus linguae that did not prejudice the defendant. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Reprimand of Spectators. — A reprimand of spectators is not a violation of this section. State v. Robertson, 121 N.C. 551, 28 S.E. 59 (1897).

Control of Examination and Cross-Examination. — It is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination, but in doing so the court must not intimate any opinion either of the witness or his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

Assuming Role of Prosecutor. — Where on several occasions while defendant's counsel was cross-examining the State's witnesses, the trial judge either sustained objections by the solicitor (now prosecutor) or interposed his own objections to block legitimate lines of cross-examination, and where, after the State's witness had completed his testimony as to results of the breathalyzer test, the trial judge asked questions of the witness to bring out the fact that the breathalyzer test had been approved for use in this State since 1965 and to bring before the jury that the witness had given the test to persons suspected of driving under the influence of intoxicants many times, the trial judge, temporarily at least, abandoned his role as an impartial jurist and assumed the role of the prosecutor, and in so doing he violated the provisions of this section. State v. Medlin, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

Judge Sustaining His Own Objections. — The trial judge expressed an opinion in violation of this section when he sustained his own objections to seven questions propounded by defense counsel to one State's witness and to nine questions propounded by defense counsel to another State's witness, and told defense counsel on two occasions after sustaining his own objections, "You know better than that." State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Sustaining Numerous Objections of State. — A trial court did not express an opinion on the credibility or guilt of defendant in sustaining the prosecutor's objections on 10 occasions to questions propounded to the defendant on direct examination, the ruling in each instance being the customary ruling, "Objection sustained," and the rulings being interspersed with six others overruling objections by the prosecutor. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

Sustained and systematic failure to rule upon objections may indicate an opinion by the trial judge in violation of this section. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Remark That Witness Has Fully Answered Question. — Where the same witness has several times fully answered a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the credibility of the witness. State v. Mansell, 192 N.C. 20, 133 S.E. 190 (1926).

Where court was of the opinion that State's witness on cross-examination by defendant's counsel had answered interrogations sufficiently, and that witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial, the remark was not an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his questions were complete, in the discharge of the court's right and duty to control the cross-examination. State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946).

Trial judge's statement that a question put to the witness had been previously answered did not amount to an expression of opinion on the evidence. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971).

The trial judge did not express an opinion in favor of the State by sustaining objections to defendants' questions and saying to defense counsel, "He has answered your question." This was not in any way a disparaging or critical remark but merely a statement of fact. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

Statement That Testimony Is Corroborative. — A recitation that the testimony of a witness corroborated the testimony of another witness is not an expression of opinion. State v. Mitchell, 193 N.C. 796, 138 S.E. 166 (1927).

Statement that court would strike evidence unless it corroborated witness, and failure to strike it out, was not expression of opinion on weight of evidence. State v. Starnes, 218 N.C. 539, 11 S.E.2d 553 (1940).

Trial judge's remark, "Who cares?", after a question asked by defendant's counsel was harmless error and not a prejudicial expression of opinion. State v. Tew, 38 N.C. App. 33, 247 S.E.2d 40 (1978).

Taking Witness into Custody in Presence of Jury. — Where the court audibly told the defendant's chief witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain view of the jury, the incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constituted a violation of this section. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967).

If a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

In the prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, was held to be prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. State v. McNeill, 231 N.C. 666, 58 S.E.2d 366 (1950).

Taking Witness into Custody Out of Presence of Jury. — The fact that the trial court ordered a State's witness to be taken into custody and charged with perjury does not constitute an expression of opinion to the prejudice of defendants in violation of this section when the trial court's action took place out of the presence of the jury. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Taking Defendant into Custody During Course of Trial. — There is no prejudicial error so long as the discretion of the trial judge to insure the presence of a defendant by ordering him into custody during the course of trial is not exercised in a manner which would convey to the jury, either expressly or implicitly, the slightest intimation that the court had any opinion regarding defendant's credibility as a witness or the strength of his case. State v. Collins, 19 N.C. App. 553, 199 S.E.2d 491 (1973), rehearing denied, 285 N.C. 664, 207 S.E.2d 758 (1974).

Characterizing Permissible Inference as "Deep Presumption". — In characterizing the permissible inference raised by former G.S. 18-11 as "a deep presumption," the trial judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by this section. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Where Court Is Merely Identifying Exhibits. — A remark of the court that it would allow the introduction of fingerprints as found at the scene of the alleged offense and the fingerprints of defendant for the purpose of identification will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene, it being obvious that the court was merely identifying the exhibits offered by the State. State v. Hooks, 228 N.C. 689, 47 S.E.2d 234 (1948).

Remarks Made in Directing Nonsuit of One of Several Defendants. — It is error for the judge in the presence of the jury, to nonsuit one of several defendants upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. State v. Sullivan, 193 N.C. 754, 138 S.E. 136 (1927).

Remarks During Former Trial of Codefendant. — The remarks of the judge in sentencing a prisoner during the previous week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. State v. Baldwin, 178 N.C. 687, 100 S.E. 348 (1919).

Question as to Verdict. — The question of the court as to whether the verdict of guilty referred to first degree burglary held to be an inquiry and not an expression of opinion. State v. Walls, 211 N.C. 487, 191 S.E. 232, cert. denied, 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494 (1937).

Comments Held Harmless. — Trial court's comments did not intimate to the jurors that the trial court believed the evidence to justify verdicts of guilty of first-degree murder, which might necessitate the alternate juror's presence at a capital sentencing proceeding. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

Statement After Verdict Excusing Jurors for Term. — When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, it cannot be construed as an expression of opinion forbidden by this section though one of the same jurors sat upon this case. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Apology for Excusing Jury to Conduct Voir Dire Hearing. — Where the jury was excused so that the court could conduct a voir dire hearing, and, shortly after the jury returned, it became necessary to excuse the jury again for the same reason, the trial court's statement, "Ladies and gentlemen, step into your room. I hate to bother you," was simply an apology for having to excuse the jury so soon after their return to the courtroom and did not tend to reflect an opinion that defendant's position was unsound and not worthy of the inconvenience being imposed upon the jury. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

B. Remarks Concerning Parties.

Strength or Weakness of Party's Case. — It is error to intimate an opinion as to the relative strength or weakness of a party's case, or the credibility of his witnesses, or to make any statement such as to invoke sympathy for the prosecuting witness, thereby bolstering that testimony. State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

Character of Accused. — It was held to be error for a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf"; the true rule being that in all cases a good character is to be considered. State v. Henry, 50 N.C. 65 (1857).

Judge's Statement That Defendant Had "Confessed". — Trial court's statement that the evidence tended to show that defendant had "confessed" that he "committed the crime charged" did not amount to an expression of opinion by the trial court, where evidence had been introduced which in fact tended to show that defendant had confessed to the crime charged, namely, first degree murder, and where, additionally, the trial court's statement was followed immediately by the instruction: "Now, if you find that the defendant made that confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it." State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

Trial court did not err by referring to the prosecution witnesses as "victims;" defendant had not shown undue prejudice arising from the use of the term "victim" so as to justify awarding a new trial because the trial court was not intimating that defendant had committed any crime. State v. Henderson, 155 N.C. App. 719, 574 S.E.2d 700, 2003 N.C. App. LEXIS 19 (2003), cert. denied, appeal dismissed, 357 N.C. 64, 579 S.E.2d 569 (2003).

Comment on Failure to Produce Witnesses. — A judge expressed an opinion as to the credibility and probative value of the defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

Remark That Prisoner Would Escape. — A remark of the judge before trial began, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts. State v. Jacobs, 106 N.C. 695, 10 S.E. 1031, rehearing denied, 107 N.C. 772, 11 S.E. 962 (1890).

Remark That Defendant Had Reason to Escape. — Colloquy between the trial court and the defense counsel in which the court stated, as the jury was leaving the courtroom, that the defendant ought to be kept in jail overnight, and in which the court also stated, in the absence of the jury, that the defendant "has got more reason to run now than he ever had," was not prejudicial. State v. Wood, 9 N.C. App. 706, 177 S.E.2d 449 (1970), cert. denied, 277 N.C. 459, 178 S.E.2d 226 (1971).

Reference by court to defendants as "three black cats in a white Buick" was prejudicial error affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

Instruction Properly Refused. — In a trial in which the defendant claimed to have multiple personalities, the trial court could not, as the defense requested, instruct the jury that the person sitting at the defense table was not "James Woodard," but instead was "Johnny Gustud" (the defendant's "alternate personality"). If the judge had done so, he would have impermissibly expressed his opinion as to whether the defendant in fact had multiple personalities. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

C. Remarks Concerning Witnesses.

Remark Which Impeaches Witness. — Where questions propounded by the court have the effect of impeaching witnesses they are in violation of this section and defendants' exceptive assignments of error thereto must be sustained. State v. Winckler, 210 N.C. 556, 187 S.E. 792 (1936).

The trial judge expressed an opinion in violation of this section when he interrogated defendant's witness and tended to impeach defendant's witness or cast doubt on his credibility by his line of questioning. State v. Pinkham, 18 N.C. App. 130, 196 S.E.2d 290 (1973).

This section prohibits any ridicule that casts aspersions on the testimony of a witness and thus damages his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

Remark Complimentary to Witness. — A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is impaneled, is not forbidden by this section. State v. Howard, 129 N.C. 584, 40 S.E. 71 (1901), appeal dismissed, 191 U.S. 126, 24 S. Ct. 49, 48 L. Ed. 121 (1903).

Remark That Witness Was "Admirably Lucid". — The expression of the opinion of the court as to the "admirably lucid" testimony of a medical expert witness constituted reversible error. State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916).

Remark Tending to Invoke Sympathy for Witness. — In a prosecution for carnal knowledge of a female child, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you have not been caught," was held to violate this section, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947).

Intimation Judge Believed Witness to Have Been a Victim of Abuse. — Where the inescapable implication of the court's reply to the jury's request to rehear testimony of child was that the trial judge believed the minor child to have been a victim of sexual assault, as the court suggested that recounting his testimony would be "very traumatic" and "injurious" to victim, the court violated this section. State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995).

Remarks as to Character of Witness. — In prosecution for having carnal knowledge of female child, the disparagement of the defendant's witness and the expression of opinion that prosecutrix was not a delinquent, though inadvertently made in the presence of the jury, entitles defendant to another hearing. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946).

Comments on Witness' Voice or Memory. — The expression, "This witness has the weakest voice or the shortest memory of any witness I ever saw," is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925).

Remark Concerning Emotion of Witness. — On a trial for rape a remark by the judge concerning the mother of the prosecutrix, that "some allowance must be made for the woman, as she is overcome with emotion," was held not to be error. State v. Laxton, 78 N.C. 564 (1878).

Clarification of Witness' Statement. — The trial judge did not make statements in the presence of the jury tending to add to the probative force of a witness' testimony thereby expressing an opinion as to the credibility of the witness, where the trial judge merely clarified what a witness had already stated, that he did not recognize either defendant, but knew one defendant by name. State v. Aleem, 49 N.C. App. 359, 271 S.E.2d 575 (1980).

Intimation That Witness Committed Perjury. — Any intimation by the judge in the presence of the jury that a witness had committed perjury is a violation of this section and constitutes reversible error. State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

When Perjury References Prejudicial. — The principal determinative questions are whether acts or reference regarding perjury, by whomsoever made, have the effect either of stifling the free presentation of all the legitimate testimony available, or of prevailing the unprejudiced consideration of all the testimony given, either of which may be sufficient to constitute reversible error. State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

Inadvertent comment that defendant's testimony was incredible and therefore defendant should not be considered a credible witness was a violation of this section. State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965).

Remark That Some Witnesses Were Eyewitnesses. — Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eyewitnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eyewitnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by this section. State v. Boswell, 195 N.C. 496, 142 S.E. 583 (1928).

Judge's cautionary remark to a witness to prevent his implicating defendant in other crimes was appropriate and in no way amounted to an expression of opinion on the evidence. State v. Roberts, 28 N.C. App. 194, 220 S.E.2d 627 (1975).

Defendant Not Prejudiced by Remarks During Cross-Examination of State's Witness. — Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. State v. Puett, 210 N.C. 633, 188 S.E. 75 (1936).

Remark on Grant of Witness' Motion for Directed Verdict of Not Guilty. — A trial court's statement to the jury that motions for directed verdicts of not guilty had been entered by all four defendants and had been granted only as to two defendants, one of whom was about to testify for the other defendants, was not an expression of opinion. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971), appeal dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972).

D. Remarks Concerning Counsel.

Remarks to Both Counsel to Ensure Orderly Trial. — Remarks of the trial court clearly addressed to both the district attorney and defendant's counsel for purposes of ensuring an orderly trial could not prejudice the jury against the accused and did not, therefore, constitute error. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Remarks Belittling Counsel. — Remarks from the bench which tend to belittle and humiliate counsel, or which suggest that counsel is not acting in good faith, reflect not only on counsel but on the defendant as well and may cause the jury to disbelieve all evidence adduced in defendant's behalf. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

When remarks from the bench tend to belittle and humiliate counsel, defendant's case can be seriously prejudiced in the eyes of the jury. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is error for the judge to make any remarks which tend to belittle or humiliate defendant's cause or his counsel before the jury. State v. Hewitt, 19 N.C. App. 666, 199 S.E.2d 695 (1973).

While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Defendant's 16 assignments of error regarding alleged denigration of defense counsel, improper expressions of opinion and improper comments by the trial judge were without merit; the judge merely made appropriate inquiries, supervised and controlled the course of the trial and the scope and manner of witness examination with care and prudence. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

Chastisement of Counsel. — Where there is no reason to believe that jurors were informed of the fact that counsel had been chastised or rebuked by the trial court, no error is committed. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Admonitions by court to counsel upon improper questioning of witnesses have repeatedly been held not prejudicial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

Admonition to defense counsel to refer to his client as defendant, or by his full name rather than by his first name, was made in order to preserve the trial judge's conception of dignity and decorum in the courtroom, and did not constitute an opinion or partiality toward either defendant or the State. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976), aff'd, 292 N.C. 461, 233 S.E.2d 554 (1977).

Question as to Fairness of Objection. — Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

E. Questioning of Witnesses.

Court can ask questions of the witness for the purpose of clarifying his testimony. State v. McLamb, 13 N.C. App. 705, 187 S.E.2d 458, cert. denied, 281 N.C. 316, 188 S.E.2d 899 (1972); State v. Laws, 16 N.C. App. 129, 191 S.E.2d 416 (1972); State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975); State v. White, 37 N.C. App. 394, 246 S.E.2d 71 (1978).

A trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Hood, 13 N.C. App. 170, 184 S.E.2d 916 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 926 (1972); State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514 (1972); State v. Wooten, 15 N.C. App. 193, 189 S.E.2d 579, appeal dismissed, 281 N.C. 763, 191 S.E.2d 360 (1972); State v. Wright, 16 N.C. App. 562, 192 S.E.2d 655 (1972), cert. denied, 282 N.C. 584, 193 S.E.2d 746 (1973); State v. Williams, 17 N.C. App. 31, 193 S.E.2d 478 (1972); State v. McMillan, 19 N.C. App. 721, 200 S.E.2d 339 (1973); State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976), reconsideration denied, 293 N.C. 261, 247 S.E.2d 234 (1977); State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979); State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Questions which serve only to clarify and promote a proper understanding of the testimony of the witnesses do not amount to an expression of opinion by the judge. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969).

The trial court did not express an opinion in asking questions of State's witnesses, where each question was designed to clarify the testimony of each witness as to location of the defendant and the deceased at the time the homicide occurred. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

It is proper, and often necessary, that judges ask questions of witnesses which are designed to obtain a proper understanding and clarification of the witnesses' testimony. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

A trial judge is justified in propounding competent questions in order to develop some relevant fact. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

In the exercise of his duty to supervise and control the course of a trial so as to insure justice for all parties, the court may interrogate a witness for the purpose of clarifying his testimony. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

While this section prohibits the judge from expressing an opinion as to what has or has not been proven by the testimony of a witness, it is not improper, and is sometimes necessary, for the judge to ask questions of a witness in order to get the truth before the jury. State v. Coble, 20 N.C. App. 575, 202 S.E.2d 303, appeal dismissed, 285 N.C. 236, 204 S.E.2d 21 (1974).

But Examination Must Be Conducted with Care. — While it is proper and may on occasion become necessary for the trial judge to interrogate a witness for the purpose of clarifying and promoting a better understanding of the witness' testimony, such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge, they tend to convey the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Bridges, 19 N.C. App. 567, 199 S.E.2d 477 (1973).

It is sometimes necessary for the purpose of clarification for a trial judge to question a witness, and such questions are proper so long as they are asked with care and in a manner which avoids prejudice to either party. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

It is proper for the court to ask a witness questions for the purpose of clarifying the witness' testimony, but in so doing the court should be careful not to express an opinion on the facts or impeach or discredit the witness. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, but the law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

The presiding judge, in order to make for better understanding or clarification of what a witness has said or intended to say, or to develop some relevant fact overlooked, is entirely justified in propounding competent questions to a witness, but in doing so care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952).

Questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

Questions Expressing Opinion Are Prohibited. — The statutory proscription against the trial judge expressing an opinion prohibits the court from asking questions at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

There are times in the course of a trial, when it becomes the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked. But the trial judge should not by word or mannerism convey the impression to the jury that he is giving it the benefit of his opinion on the facts. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Such Questions Constitute Error. — If by their tenor, their frequency, or by the persistence of the trial judge they tend convey to the jury in any manner at any stage of the trial the impression of judicial leaning, examinations of witnesses by the judge violate the purpose and intent of this section and constitute prejudicial error. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Wright, 16 N.C. App. 562, 192 S.E.2d 655 (1972), cert. denied, 282 N.C. 584, 193 S.E.2d 746 (1973).

Questioning of witness by judge, going beyond an effort to obtain a proper understanding and clarification of the witness' testimony, held to have conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant. State v. McRae, 240 N.C. 334, 82 S.E.2d 67 (1954).

Where questions appeared to be beneficial rather than prejudicial to defendant's case, since they tended to exculpate rather than inculpate her, and where the questions were restricted to statements previously testified to by defendant, there was no error by trial judge in such questions. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

Frequent Interruptions and Prolonged Questioning Prohibited. — It is not improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony as long as the trial judge does not engage in frequent interruptions and prolonged questioning. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

The trial judge may not express an opinion to the jury in violation of this section by extensively questioning defendant and his witnesses. State v. Bond, 20 N.C. App. 128, 201 S.E.2d 71 (1973).

Question Which Assumes Fact. — Where the State relied upon testimony that tracks had been followed from the scene of the crime to the defendant's room, but did not prove them to be the defendant's, the expression of the court, "You tracked the defendant to whose house?" was held prejudicial, and especially so as the evidence of the State was circumstantial. State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

In rape prosecution, the trial judge's asking the prosecuting witness "... you were in the car when you were raped?" was held to be a prejudicial opinion of the court on the facts. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Questioning by Judge for Impeachment Purposes Are Prohibited. — It is improper for a trial judge to ask questions for the purpose of impeaching a witness. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971).

It is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel including the district solicitor (now district attorney), but it is never the privilege of the trial judge. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952).

As Are Questions Tending to Impeach. — In the trial of criminal actions the court may ask a witness questions designed to obtain a proper understanding and clarification of the witness' testimony or to bring out some fact overlooked, but the court may not ask a defendant or a witness questions tending to impeach him or to cast doubt upon his credibility. State v. Pinkham, 18 N.C. App. 130, 196 S.E.2d 290 (1973); State v. Bond, 20 N.C. App. 128, 201 S.E.2d 71 (1973).

Judge's Questioning of Defendant Held to Be Cross-Examination. — In a prosecution of two defendants for discharging firearms into an occupied building, the trial judge's questioning of the defendants amounted to cross-examination and constituted an expression of opinion on the credibility of defendants' testimony, where the questions included the following: (1) "At the time you fired your shotgun you knew there was someone in the club, didn't you?"; (2) "If you thought there was trouble brewing outside, why didn't you stay in your house rather than get your gun and go out and get in it?"; and (3) "What have you been tried and convicted for?". State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971).

F. Rulings on Witnesses and Evidence.

Remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

Ruling a Witness Expert. — The ruling finding a witness to be an expert in his field could not have been understood by the jury as anything other than a ruling upon the qualification of the witness to testify as to his opinions. The general practice in the courts of this State has never been for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert, and therefore the judge did not express an opinion as to the credibility of this witness contrary to this section. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

The trial court did not express an opinion as to the credibility of witnesses for the State by ruling, in the presence of the jury, that each was an expert in the field of his testimony. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, vacated on other grounds, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972), modified, 283 N.C. 99, 195 S.E.2d 33 (1973).

The trial court committed prejudicial error when it declared in the presence of the jury that the defendant was found by the court to be an expert in the field of general psychiatry and would be allowed to testify, where the defendant testified as his own expert, and the question of his expertise was not simply a question of fact but one of the most critical questions to be decided by the jury. Sherrod v. Nash Gen. Hosp., 348 N.C. 526, 500 S.E.2d 708 (1998).

Jury Need Not Be Excused for Ruling on Expert. — Where the court's ruling could not be interpreted by the jury as anything other than a holding that the witness was qualified to testify concerning his expert opinion in his field, it was not necessary for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, vacated on other grounds, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972), modified, 283 N.C. 99, 195 S.E.2d 33 (1973).

Exclusion of Evidence so as to Intimate Favoritism Prohibited. — Judge may always properly exclude inadmissible evidence; he is prohibited, however, by this section from doing so in a manner which intimates any judicial favoritism. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

Denying Jury Request to See Photographs During Deliberations. — Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under G.S. 15A-1233 which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of G.S. 15A-1222 and this section which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Comment Before Jury on Objection to State's Request for Instructions. — It was not prejudicial error for the trial judge to comment before the jury that the defendants' lawyers had objected to the State's request to give additional instructions on intent, where, while it may have been better practice to have simply noted the objections in the record, the defendants have failed to establish how they might have been prejudiced by the court's remarks, the judge's comments did not convey to the jury the "impression of judicial leaning." State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Opinion as to the Existence of a Material Fact. — Challenged instruction of the trial court which constituted an indirect statement that the apartment and the common areas of sorority house constituted a single "dwelling house" for purposes of application of the burglary statute violated this section by expressing an opinion as to the existence of a material fact. State v. Merritt, 120 N.C. App. 732, 463 S.E.2d 590 (1995).

G. Weight and Credibility of Testimony, etc.

Weight and Sufficiency of Evidence Are Questions for Jury. — Whether there be any evidence is a question for the judge. Whether it is sufficient evidence is a question for the jury. State v. Moses, 13 N.C. 452 (1830); State v. Hardee, 83 N.C. 619 (1880).

It is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. In re Will of Bergeron, 196 N.C. 649, 146 S.E. 571 (1929).

The question of the admissibility of evidence is for the judge; whether there is evidence and its weight and credibility are for the jury. State v. Perry, 3 N.C. App. 356, 164 S.E.2d 629 (1968), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

The weight and credibility of the evidence must be left strictly to the jury. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

As Are Discrepancies and Contradictions. — Discrepancies and contradictions in the evidence are for the jury and not for the court. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

And Credibility of Witnesses. — No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1843). See State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946); State v. McNeill, 231 N.C. 666, 58 S.E.2d 366 (1950).

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950).

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952); State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965). See State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The credibility of witnesses, the weight and sufficiency of testimony, are matters peculiarly within the province of the jury to consider and pass upon. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

It is for the jury and not for the judge to say how the testimony of a witness is affected by other testimony. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

The sound rule that no judge at any time is permitted to cast doubt upon the testimony of a witness is firmly fixed in this jurisdiction. The judge must exercise great care to see that nothing he does or says during the trial can be understood by the jury as an expression of an opinion on the facts or conveys an impression of judicial meaning. State v. Battle, 18 N.C. App. 256, 196 S.E.2d 536 (1973).

A trial judge has the right and duty to control the examination of witnesses and to ask questions tending to clarify the witness' testimony for the jury, but in doing so, the judge must refrain from impeaching or discrediting a witness or demonstrating any hostility toward the witness. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

And Diverse Inferences. — If diverse inferences may be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the case should be submitted to the jury for final determination. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

And Final Decision of Facts Rests with Jury. — The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced. State v. Maxwell, 215 N.C. 32, 1 S.E.2d 125 (1939).

When evidence is competent for one purpose, but not for another, the party against whom it is offered is entitled, upon request, to have the jury instructed to consider it only for the purposes for which it is competent. State v. Foster, 63 N.C. App. 531, 306 S.E.2d 126 (1983).

Opinion as to Weight of Evidence Prohibited. — A judge is prohibited by this section from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904).

It is a violation of this section for a judge at any time in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact. State v. Browning, 78 N.C. 555 (1878).

A trial court is prohibited from expressing an opinion upon the weight and credibility of the evidence during trial or during the course of instructions to the jury. Moreover, a trial court should state the facts to the jury and avoid drawing conclusions for members of the jury. State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414, modified and aff'd, 318 N.C. 330, 348 S.E.2d 805 (1986).

An instruction by the trial court stating that the evidence tended to show the existence of a confession to the crime charged was not an impermissible comment invading the province of the jury and its fact-finding function; considering defendant's admissions which tended to show premeditation and deliberation — such as the sheer number of blows with the fire extinguisher, the time between each blow, and the dragging of one victim back into the apartment — the statement did support inclusion of the confession instruction, and the instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Defendant's unpreserved argument was that the prosecutor's closing statement to the jury indicated that the court had decided that the defendant acted with deliberation such that the court should have corrected the statement ex mero motu; however, the statement was not reversible error since (1) it did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) because there was no objection, and therefore no overruling by the court of the defendant's objection, the idea was not solidified in the jurors' minds; (3) the statement did not travel outside the record as prohibited by G.S. 15A-1230(a); (4) so that it would not violate G.S. 15A-1222 and G.S. 15A-1232, the court instructed the jury that the court was impartial and that the jury would be mistaken to believe otherwise; and (5) the court instructed the jury it "may" find premeditation and deliberation, and instructed on what basis the jury could make such a finding. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Expression of Opinion by Judge Is Error. — It is error for the trial judge to indicate to the jury in any manner his opinion as to the credibility of a witness, or as to the weight to be given his testimony. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, vacated on other grounds, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972), modified, 283 N.C. 99, 195 S.E.2d 33 (1973).

H. Determination of Prejudice.

Remarks Must Be Prejudicial. — Unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remark or conduct of the court, it cannot be treated as error. State v. Browning, 78 N.C. 555 (1878).

A remark or question by the court during the progress of the trial, even though it amounts to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950).

To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant. State v. Puett, 210 N.C. 633, 188 S.E. 75 (1936);

State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. Raynor, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he has been deprived of a fair trial by such remarks is upon the defendant. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

All expressions of opinion do not warrant a new trial. A remark made by the judge in the presence of the jury does not entitle defendant to a new trial if the statement, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

Test for Determining Prejudice. — The trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Carter, 233 N.C. 581, 65 S.E.2d 9 (1951); Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961), rev'd on other grounds, 310 F.2d 904 (4th Cir. 1962).

Harmless Error. — The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968); State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1970); State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972); State v. Wooten, 15 N.C. App. 193, 189 S.E.2d 579, appeal dismissed, 281 N.C. 763, 191 S.E.2d 360 (1972).

Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973).

Not every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

Burden of Proving Remark Harmful. — A defendant who contends that the trial court's remarks amount to an expression of opinion in the presence of the jury must show more than the possibility of unfair influence; it must appear with ordinary certainty that the court's language, when fairly interpreted, was likely to convey an opinion to the jury and could reasonably have had an appreciable effect on the result of the trial. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974).

Whether an accused was deprived of a fair trial by remarks by the judge during any stage of the trial must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979), superseded by statute as stated in State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (2006), on other grounds.

Petitioner has the burden of showing that the judge's remarks constituted prejudicial error. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961), rev'd on other grounds, 310 F.2d 904 (4th Cir. 1962).

Possibility of Unfair Influence Insufficient. — It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were capable of a construction from which his opinion on the weight of testimony might be inferred; but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was likely to convey to the jury his opinion on the weight of the testimony. State v. Jones, 67 N.C. 285 (1872).

It is not sufficient to show by a critical examination that the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

The bare possibility that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

Showing That Opinion May Be Inferred Is Insufficient. — Showing that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred is insufficient to show prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

What Remarks to Jurors Presumed Correct on Appeal. — The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are prima facie presumed on appeal to be correct. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Record on Appeal Must Show How Opinion Intimated. — If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts, the record must allege the tone, emphasis or manner. State v. Wilson, 76 N.C. 120 (1877).

Remark Considered in Light of Circumstances. — The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971); State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975); State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

The question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. Raynor, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

When an objectionable opinion statement purportedly has been made and possibly violates this section, that remark, standing by itself, may not necessarily constitute reversible error. To establish reversible error, courts must consider the remark in the light of the circumstances under which it was made. State v. Rhodes, 28 N.C. App. 432, 221 S.E.2d 730, rev'd on other grounds, 290 N.C. 16, 224 S.E.2d 631 (1976).

Statements of the judge must be considered in the context of the entire record, since the test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Removal of Prejudicial Impression by Subsequent Explanation. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterward say to them by way of atonement or explanation. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Once the trial judge has given, in the presence of the jury, the slightest intimation, directly or indirectly, or his opinion concerning a fact to be found by the jury or concerning the credibility of testimony given by a witness, such error cannot be corrected by instructing the jury not to consider the expression by the court. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Once the trial judge expresses an opinion as to the facts before the jury, the resulting prejudice to the defendant is virtually impossible to cure. The prejudice is not removed by the judge's instructing the jury not to consider the remarks. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

Error committed by the court in expressing an opinion on the facts is virtually impossible to cure. State v. Clanton, 20 N.C. App. 275, 201 S.E.2d 365 (1973).

Ordinarily, an expression of opinion cannot be cured by instructing the jury to disregard it. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

When Equal Protection Clause Violated. — The equal protection clause of U.S. Const., Amend. XIV is not violated by prejudicial remarks of the judge unless there is shown to be an element of intentional or purposeful discrimination and the burden of showing this is on the accused. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961), rev'd on other grounds, 310 F.2d 904 (4th Cir. 1962).

III. JURY INSTRUCTIONS.

A. In General.

Section Essentially Same as Former § 1-180. — While this section restates the substance of former G.S. 1-180, the language requiring the judge to "give equal stress to the State and defendant in a criminal action" has been omitted. Even so, as indicated by the official commentary, what was heretofore explicit is now implicit and the law remains essentially unchanged. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Section 15A-1222 and this section repealed and replaced former G.S. 1-180 effective July 1, 1978. The new provisions restate the substance of former G.S. 1-180 and the law remains essentially unchanged. State v. Herbin, 298

N.C. 441, 259 S.E.2d 263 (1979).

Purpose. — This section requires the judge to explain the law but give no opinion on the facts. The purpose of the section is to secure the right of every litigant to have his cause considered by an impartial judge and an unbiased jury. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

The trial court must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law thereto, and refrain from expression of an opinion whether a fact has been proved. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Section Mandatory. — The provisions of this section are mandatory, and a failure to comply is prejudicial error. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976); State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

And Failure to Observe Requires New Trial. — This section requires that the judge shall declare and explain the law arising on the evidence given in the case. This is a substantial right of litigants. Failure to observe it is error for which the injured party is entitled to a new trial. State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961); State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

The statute creates a substantial legal right; its provisions are mandatory and failure to comply with them is prejudicial error for which a new trial must be ordered. State v. Pryor, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

Strict Observance of Section Required. — The Supreme Court of North Carolina has consistently endeavored to maintain the integrity of this section by requiring strict observance of its provisions. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Section establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that no judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Object of Instructions. — The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943).

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948); State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and declare and explain the law arising on the evidence. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Regardless of the particular words employed by the trial judge, an instruction is adequate if it accurately presents the applicable principles of law. State v. Bogle, 90 N.C. App. 277, 368 S.E.2d 424, rev'd on other grounds, 324 N.C. 190, 376 S.E.2d 745 (1988).

Court, Not Counsel, to Instruct Jury. — It is the function of the court, not of the counsel for either party, to instruct the jury as to the law arising on the evidence. State v. Jackson, 284 N.C. 321, 200 S.E.2d 626 (1973).

Required Explanation. — All that is required of a charge by this section is that the essential evidence offered at the trial be stated in a plain and correct manner, together with an explanation of the law arising thereon. State v. Fleming, 202 N.C. 512, 163 S.E. 453 (1932); In re Beale, 202 N.C. 618, 163 S.E. 684 (1932).

This section requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. State v. Best, 265 N.C. 477, 144 S.E.2d 416 (1965).

This section requires a statement of the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969); State v. Vickers, 22 N.C. App. 282, 206 S.E.2d 399, further review denied, 285 N.C. 668, 207 S.E.2d 760 (1974); State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. State v. Graham, 194 N.C. 459, 140 S.E. 26 (1927). See State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944).

Nothing more is required than a clear instruction that applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

Where the court recounted the evidence of the State and defendant, and the jury was then instructed what they would have to find from the evidence in order to find the defendant guilty or not guilty of the various charges, this satisfies the requirements of this section. State v. Benton, 42 N.C. App. 228, 256 S.E.2d 279 (1979), aff'd, 299 N.C. 16, 260 S.E.2d 917 (1980).

This section is complied with where the court fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto. State v. McLean, 234 N.C. 283, 67 S.E.2d 75 (1951).

The requirement of this section is met by presentation of the principal features of the evidence relied on, respectively, by the prosecution and defense. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971); State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Although the judge's charge need not, and indeed should not, encompass every fragment of evidence offered by the State and defendant, it is required to segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

Concerning the necessity of declaring and explaining the law it has been held in quite a number of cases that nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652 (1983).

The court is required to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652 (1983).

In instructing the jury, the trial court must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law and refrain from expressing an opinion as to whether or not a fact has been proved. State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991).

Duty of Judge. — It is the duty of the judge, in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Jones, 87 N.C. 547 (1882); State v. Rogers, 93 N.C. 523 (1885); State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691; 410 U.S. 987, 93 S. Ct. 1516, 36 L. Ed. 2d 184 (1973); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

The trial judge is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which, upon the evidence, they may reasonably find to be true. State v. Matthews, 78 N.C. 523 (1878).

This section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. State v. Fulford, 124 N.C. 798, 32 S.E. 377 (1899).

Discretion of Court. — In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

The trial judge has wide discretion in presenting the issues to the jury. This responsibility cannot be delegated to or usurped by counsel. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969); State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303; 301 N.C. 403, 273 S.E.2d 448 (1980), aff'd in part and rev'd in part on other grounds, 304

N.C. 471, 284 S.E.2d 487 (1981).

This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924); State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Every substantial feature of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue. State v. Best, 31 N.C. App. 389, 229 S.E.2d 202 (1976); State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto and states the contentions of the parties, it complies with this section. State v. Middleton, 25 N.C. App. 632, 214 S.E.2d 248 (1975); State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979).

The presiding judge in his charge to the jury must declare and explain the law arising on the evidence relating to each substantial feature of the case. State v. Everette, 284 N.C. 81, 199 S.E.2d 462 (1973); State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); State v. Hockett, 309 N.C. 794, 309 S.E.2d 249 (1983).

Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under this section. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976).

And Failure to Do So Is Prejudicial. — The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965); State v. Neagle, 29 N.C. App. 308, 224 S.E.2d 274, cert. denied, 290 N.C. 665, 228 S.E.2d 456 (1976).

It is prejudicial error when the court fails to instruct the jury on a substantial feature of the case arising on the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973); State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

Even Absent Request. — Under this section it is obligatory for the trial judge to charge the jury as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any special prayer for instruction to that effect. State v. Brady, 236 N.C. 295, 72 S.E.2d 675 (1952).

The trial court is required to charge the law upon all substantial features of the case arising on the evidence, even though there is no request for special instructions. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974); State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

Judge is required to declare and explain the law arising on the evidence. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980), cert. denied, 305 N.C. 762, 292 S.E.2d 577 (1982); State v. Jones, 52 N.C. App. 606, 279 S.E.2d 9 (1981); State v. Locklear, 60 N.C. App. 428, 298 S.E.2d 766 (1983).

It is the duty of the judge, under the provisions of this section, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946).

This section requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law. State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

Not upon Hypothetical Facts. — This section requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. State v. Street, 241 N.C. 689, 86 S.E.2d 277 (1955); State v. Campbell, 251 N.C. 317, 111 S.E.2d 198 (1959).

Merely hypothetical instructions are erroneous, and should not be indulged in, as they proceed on an assumption of facts. State v. Benton, 19 N.C. 196 (1836); State v. Collins, 30 N.C. 407 (1848); State v. Murph, 60 N.C. 129 (1863); Johnson v. Bell, 74 N.C. 355 (1876).

The law should be applied to the particular facts in evidence and not to a set of hypothetical facts. State v. Williams, 299 N.C. 652, 263 S.E.2d 774 (1980).

Nor upon Subject Not Supported by Evidence. — This section requires the trial judge to clarify and explain the law arising on the evidence, and a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial. State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974); State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

To determine whether an instruction should be given, the court must consider whether there is any evidence in the record which would convince a rational trier of fact to convict the defendant of the offense. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

In determining whether an instruction

requested by defendant is supported by evidence, and therefore should be given, at least in substance, the evidence must be interpreted in the light most favorable to him. In making this determination the trial judge is concerned only with the sufficiency of the evidence; its credibility is for the jury to determine, not the court. State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Instruction on Law Not Presented by Evidence. — It is prejudicial error to instruct in regard to law not presented by the evidence. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Circumstantial Evidence. — A jury instruction as to the effect of circumstantial evidence should be given only when there is no direct evidence. If either the State or the defendant elicits direct evidence bearing on any issue for the jury's determination, then such an instruction is not appropriate. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

Unnecessary Averment Need Not Be Charged. — If an averment in an indictment is not necessary in charging the offense to the jury, it may be disregarded. State v. Lewis, 58 N.C. App. 348, 293 S.E.2d 638 (1982), cert. denied, 311 N.C. 766, 321 S.E.2d 152 (1984).

Requirement Arises Absent Request. — The judge is required to declare and explain the law arising on the evidence without being requested to do so. State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

When Defendant Entitled to Instruction. — Where evidence is in the record defendant is entitled to have the law arising thereon explained and applied by the judge. State v. Anderson, 222 N.C. 148, 22 S.E.2d 271 (1942).

This section requires the trial judge to apply the law to the various factual situations presented by the conflicting evidence, thus where defendant's testimony, if the jury found it to be true, would entitle him to a verdict of not guilty, he was entitled to have the legal effect of his evidence explained to them. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Since expert testimony regarding defendant's ability to form the specific intent to kill was before the jury, defendant was entitled to a jury instruction on this element of the crimes in question. State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

Failure to Explain Law Regarding Defendant's Evidence Is Error. — Where the court failed to explain and declare the law arising on the evidence presented by the defendant, this constituted prejudicial error. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Not Duty of Witness to Explain Law and Legal Terms. — It is the duty of the trial judge, not defendant's expert medical witness, to explain the law and define legal terms such as "intent." State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

General Statement of Legal Principles Not Sufficient. — The requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

The mandate of this section is not met by a statement of the general principles of law, without application to the specific facts involved in the issue. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

In charging the jury, the stating of abstract principles of law is not sufficient. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

It has been held to be error to charge on an abstract principle of law not supported by the evidence. Kuyrkendall v. Clarke's Disct. Dep't Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

Where the instruction that the trial court gave was a general statement to the jury on intent and the method of proving that defendant had formed the specific intent to kill, and where defendant's requested instruction would have allowed the jury to focus on defendant's mental condition as it pertained to his ability to premeditate and deliberate, in light of the centrality of the issue of defendant's state of mind, it was error not to give defendant's instruction, and defendant was entitled to a new trial. State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

Merely Stating Party's Contentions Insufficient. — It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. State v. Herbin, 232 N.C. 318, 59 S.E.2d 635 (1950).

Essential Elements of Offense Must Be Charged. — The trial judge has great discretion in the manner in which he charges the jury, but he must explain every essential element of the offense charged. State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

Instructions Must Be Based on Reasonable View of Evidence. — A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

When instructions which are not based upon a state of facts presented by some reasonable view of the evidence are prejudicial to the accused, he is entitled to a new trial. State v.

Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, nor upon a supposed state of facts. State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Test of Sufficiency. — Where the judge's charge fully instructs the jury on all the substantive areas of the case, and defines and applies the law thereto, it is sufficient. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Trial court need not instruct the jury with any greater particularity than is necessary to enable the jury to apply the law to the substantive features of the case arising on the evidence when the defendant makes no request for additional instructions. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

Equal Stress Must Be Given. — Implicit in the duty imposed by general requirements of fairness to the parties is the requirement that the judge give equal stress to the State and the defendant in a criminal action. State v. Pryor, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

Failure by the trial judge to give equal stress to opposing parties in charging the jury is a violation of this section. Such a violation is prejudicial error necessitating a new trial. State v. Tate, 58 N.C. App. 494, 294 S.E.2d 16, cert. denied and appeal dismissed, 306 N.C. 750, 295 S.E.2d 763 (1982), aff'd, 307 N.C. 464, 298 S.E.2d 386 (1983).

Instruction on Obligations of Counsel, Court and Jury. — An instruction that "it is the business of counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

Duty to Consider Evidence. — The trial judge correctly instructed the jury; "It is your duty to remember and consider all of the evidence whether called to your attention by counsel or the court or not, for all of the evidence is important." State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

In resolving whether an instruction should be given, the facts are to be interpreted in the light most favorable to the defendant. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

Charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976).

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, appeal dismissed, 288 N.C. 733, 220 S.E.2d 352 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977); State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments. State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981).

One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A charge to the jury must be read and considered in its entirety and not in detached fragments. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

A charge must be read contextually, and when this is done, if it is manifest that the jury understood that each element had to be proved by evidence establishing the same beyond a reasonable doubt, then there is no error. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

It is well-settled that the charge of the court to the jury will be construed contextually, and segregated portions will not be held prejudicial error where the charge as a whole is free from objection. State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

A charge must be construed as a whole, and isolated portions of a charge will not be held to be prejudicial where the charge as a whole is correct and free from objection. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

On appeal, a charge to a jury must be read and considered in its entirety. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Defendant cannot be permitted to select portions of the charge — even though objectionable when standing alone — and assign errors to them if those portions can be readily explained by reference to the charge in its entirety, and the charge in its entirety appears to be without prejudicial error. State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

The charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from any prejudice to defendant. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

The jury charge must be read as a whole and construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. State v. Laws, 16 N.C. App. 129, 191 S.E.2d 416 (1972).

A charge must be considered contextually as a whole. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

And in Context of Trial. — The judge's words in a charge may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977); State v. Gadsden, 300 N.C. 345, 266 S.E.2d 665 (1980).

It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, appeal dismissed, 288 N.C. 733, 220 S.E.2d 352 (1975).

Instructions must be construed contextually. State v. Butcher, 57 N.C. App. 698, 292 S.E.2d 149 (1982).

Instructions must be construed contextually and isolated portions will not be held prejudicial when the charge as a whole is correct. State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), discretionary review denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582, aff'd, State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980).

Expression Which, Standing Alone, Is Erroneous. — The fact that some expressions in the charge, standing alone, might be considered erroneous will afford no ground for reversal. State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976).

If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971).

Particularity of Explanation. — The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965); State v. Thacker, 5 N.C. App. 197, 167 S.E.2d 879 (1969); State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Ambiguous Charge. — New trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury may have acted upon the incorrect part of the charge, or to phrase it differently, since it cannot be known which instruction was followed by the jury. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitled defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and an incorrect charge. State v. Carver, 286 N.C. 179, 209 S.E.2d 785 (1974).

It must be assumed on appeal of two conflicting instructions to the jury that the jury was influenced by that portion of the charge which is incorrect. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Specific Prayers for Instructions. — If defendant desires fuller instructions as to the evidence or contentions, he should so request. His failure to do so precludes him from assigning this as error on appeal. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Instruction Need Not Be Given Exactly as Requested. — The court is not required to give a requested instruction in the exact language of the request, and when the request is correct in itself and supported by the evidence in the case, it suffices if the requested instruction is given in substance. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980).

The trial court is not required to give instructions in the language of the prayers, provided the instructions given are correct and cover the various phases of the testimony. State v. Wilcox, 132 N.C. 1120, 44 S.E. 625 (1903).

If a request is made for a specific instruction which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel, must charge the jury in substantial conformity to the prayer. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

The trial court did not err by failing to give requested instructions where defendant submitted an exhaustive list of definitions which was repetitious at best, but rather, it was sufficient that the court gave the requested instructions in substance. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

It is sufficient if a trial judge gives a requested instruction in substance, and not the exact words requested by the defendant, when the instruction is proper based on the evidence. State v. Locklear, 60 N.C. App. 428, 298 S.E.2d 766 (1983).

Where defendant's requested instruction stressed that the intent to kill must be formed in a "cold state of blood," and the instructions given emphasized this by stating that the intent to kill must have been formed "in a cool state of mind" and not "during some suddenly aroused passion," they were, in substance, the same; therefore, the court did not err in refusing to give defendant's instruction verbatim. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court is not required to adopt the very words used by an appellate opinion in setting forth the law on a particular subject. State v. Vaughan, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650, cert. denied, 461 U.S. 943, 103 S. Ct. 2120, 77 L. Ed. 2d 1301 (1983).

Substantial Compliance with Request Sufficient. — The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. State v. Booker, 123 N.C. 713, 31 S.E. 376 (1898).

Request for Further Elaboration on Particular Point. — Where the trial court instructs the jury on a particular point, a party desiring further elaboration on that point must make a timely request for special instructions. State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

When the trial judge has instructed the jury correctly and adequately on the essential features of the case but defendant desires more elaboration on any point or a more detailed explanation of the law, then he should request further instructions. Otherwise, he cannot complain. State v. Everette, 284 N.C. 81, 199 S.E.2d 462 (1973).

This section only requires that the trial court state the evidence to the extent necessary to explain the application of the law to the evidence. It is incumbent upon defense counsel who desires more extensive instructions on the evidence to request them at trial. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935).

Where the court in its charge substantially complies with this section, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain. State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944); Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it. State v. Johnson, 193 N.C. 701, 138 S.E. 19 (1927); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939).

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions on any point, or a more detailed and complete statement of his contentions to aptly make request therefor. State v. Caudle, 208 N.C. 249, 180 S.E. 91 (1935).

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, whether such charge should be given being in the sound discretion of the trial court. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

Where the trial court determined that the instruction as given adequately explained the law defining felony murder, twice offered to charge them again on this subject and the foreman refused both offers, the error was harmless. State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

Court May Summarize Evidence in Its Discretion. — Although a trial court is not required to state, recapitulate, or summarize the evidence or to explain the application of law to the evidence, the court is free to do so in its discretion; however, in so doing, the trial court must be vigilant not to express an opinion as to the quality of the evidence or as to the credibility of a witness. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

When a person is on trial for a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. This calls for instructions as to the law upon all substantial features of the case. State v. Fain, 229 N.C. 644, 50 S.E.2d 904 (1948); State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

It is not sufficient merely for the court to read a statute bearing on the issue in controversy and leave the jury unaided to apply the law to the facts. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

Ordinarily, the reading of the pertinent statute, without further explanation, is not sufficient. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

It is not sufficient for the court merely to read the statute under which the accused stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

But Reading Statute and Pointing Out Material Parts Is Proper. — The act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants did not amount to a peremptory instruction of guilt, and the instruction was in keeping with the court's duty to declare and explain the law of the case. State v. Butler, 269 N.C. 733, 153 S.E.2d 477 (1967).

Where the court, in charging the jury, read the statute upon which the indictment was based and pointed out the material part of the statute which applied to the charge against the defendant, this instruction was in keeping with the requirements of this section which makes it the duty of the judge to declare and explain the law of the case. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

Judge Not Relieved of Duty by Remarks of Prosecutor as to Verdict State Seeks. — The solicitor's (now prosecutor's) statement at the beginning of the trial that he would ask for a verdict of guilty of rape with a recommendation of life imprisonment, or guilty of an attempt to commit rape, did not relieve the court of its mandatory duty under this section to declare and explain to the jury the law arising on the evidence given in the case. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

Reading Indictment to Jury Complies with Section. — If the indictment fully describes the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to aptly tender a request therefor. State v. Gore, 207 N.C. 618, 178 S.E. 209 (1935).

Explanation Must Cover Any Authorized Finding. — It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence. State v. Jones, 87 N.C. 547 (1882).

Matters No Longer an Issue Before Jury. — It is not incumbent upon the trial judge to charge with regard to the law on something that is no longer an issue before the jury. The statute only requires the court to state only such evidence as is necessary to explain and apply the law to the facts in the case. State v. Phillips, 5 N.C. App. 353, 168 S.E.2d 704 (1969).

Court has no duty to tell the jury that it has no opinion in the case. State v. Burbank, 59 N.C. App. 543, 297 S.E.2d 602 (1982).

Where the evidence is simple, direct and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with this section. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

Section Must Be Followed Where Issues Are Complex. — The section does not require the judge to charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirement of the statute. State v. Reynolds, 87 N.C. 544 (1882).

Defendant cannot prohibit the giving of an instruction by failing to request it. Regardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Instruction That Offense Is Felony Involving Violence. — It was not error for trial court to instruct the jury that assault on a female with intent to commit rape is by definition a felony involving the use or threat of violence to the person. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction That Guilt Is Established. — This section prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive province of the jury. State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941).

Opinion as to Guilt of Defendant. — In prosecution for rape and crime against nature, the trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her," intimating to the jury that it was his opinion that the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

Statement That Jury Would Have to Find Defendant Guilty. — The trial judge's comment that the jury would have to find the defendant guilty of one of the three offenses which he had previously discussed was prejudicial error and was not cured by construing the charge contextually as a whole. State v. Whitley, 22 N.C. App. 666, 207 S.E.2d 328 (1974).

The instruction "If you find the defendant guilty of murder in the second degree, you need not consider whether he is guilty of manslaughter. But if you find him not guilty of murder in the second degree, then it would be your duty to find him guilty of manslaughter, as charged in the bill of indictment," constitutes an expression of opinion by the judge which is prohibited by this section. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

B. Contentions of Parties.

Contentions Not a Necessary Part of Instructions. — The contentions of the parties to an action are not a necessary part of the instruction of the trial judge to the jury upon the law of the case. State v. Whaley, 191 N.C. 387, 132 S.E. 6 (1926).

A statement of contentions by the judge is not required. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

But Judge Is Permitted to State Contentions. — Although the judge is not required to state or recapitulate the contentions of the parties, it is permissible for him to do so. State v. Holway, 8 N.C. App. 340, 174 S.E.2d 54 (1970).

Manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section. State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946).

Duty Where Contentions Are Stated. — A trial judge is not required by law to state the contentions of litigants to the jury. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party. State v. Billinger, 9 N.C. App. 573, 176 S.E.2d 901 (1970).

Though this section does not require the trial judge to state the contentions of either party, the statute does require that the trial judge give equal stress to the State and defendant in a criminal action; therefore, where the court gives the State's contentions but gives no contentions of the defendant, the mandate of this section is not satisfied. State v. Lane, 18 N.C. App. 316, 196 S.E.2d 597 (1973).

A judge is not required by law to state the contentions of the parties, but when he does give the contention of the State on a particular phase of the case, it is error to fail to give defendant's opposing contention arising out of the evidence on the same aspect of the case. State v. Thomas, 284 N.C. 212, 200 S.E.2d 3 (1973).

The trial judge is not required by this section or other law to give the contention of the parties; but when he does state the contentions of the State on a particular aspect of the case, it is error to fail to state defendant's opposing contentions arising out of the evidence, or lack of the evidence, on the same aspect of the case. State v. Vail, 26 N.C. App. 73, 214 S.E.2d 796, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975).

Failure to state the contentions of the parties is not error, but failure to give equal stress to the State and defendant in a criminal action is error. So, when the judge states the contentions of one party he must also give the pertinent contentions of the opposing party. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

This section does not require the trial court to state the contentions of the litigants; but if the court does so, it must give equal stress to the State and the defendant, and must state the pertinent contentions of both parties. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

It is not error for the trial judge to state the contentions of the parties provided that the contentions of each litigant are stated fairly and accurately. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Although a statement of contentions is permissible, the trial judge must exercise extreme care to retain, and convey the appearance of retaining, a cold neutrality. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

The prohibition against the court expressing an opinion on the evidence applies to the manner of stating the contentions of the parties as well as in any other portion of the charge. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Statement of a valid contention based on competent evidence is not error as being an expression of opinion. State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303, cert. denied, 292 N.C. 468, 233 S.E.2d 397 (1977).

Inferences in Contentions Fairly Drawn from Evidence. — It is not error for the trial judge to instruct the jury in terms of the State's contentions where the record discloses evidence from which inferences drawn by the court could legitimately, fairly and logically be drawn by the jury. State v. Lyles, 19 N.C. App. 632, 199 S.E.2d 699, appeal dismissed, 284 N.C. 426, 200 S.E.2d 662 (1973).

Expressions Used in Stating Contentions May Violate Section. — Where expressions by the trial judge, in their warmth and vigor, though stated in the form of contentions, are capable of impressing the jury with the strength of the State's case and the weakness of the alibi of the defendant, such expressions, though unintended by the trial judge to prejudice anyone, are in violation of this section and constitute prejudicial error. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Argument Repeated by Court as Contention. — An argument that would be permissible when made by the solicitor (now prosecutor) may, when repeated by the court as a contention, give emphasis that would weigh too heavily upon defendant, and would constitute a prejudicial charge under this section. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Contentions which may be argued properly by counsel may be highly improper when stated by the judge. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

What State Contended Happened. — It was not error for the court to charge the jury as to what the State contended happened the night deceased was shot in the back while he was alone with defendant. State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987).

Defendant who desires a more detailed statement of his contentions must request it from the court. State v. Murray, 21 N.C. App. 573, 205 S.E.2d 587 (1974).

Taking More Time in Stating State's Contentions. — That the court necessarily takes more time in stating the State's contentions than in stating the defendant's contentions is not ground for objection. State v. Sparrow, 244 N.C. 81, 92 S.E.2d 448 (1956).

Defendant may not object if the court takes more time in stating the State's contentions than in stating the defendant's, and the equal stress required does not mean that the statement of contentions of the State and of the defendant must be equal in length. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

The equal stress which this section requires to be given to contentions of the State and the defendant in a criminal action does not mean that the statement of the contentions of the State and of the defendant must be equal in length. In a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

The trial court did not improperly fail to give equal stress to the contentions of the State and of the defendant by taking more time in stating the State's contentions than in stating those of defendant where the sole evidence offered by defendant was character evidence, the State introduced a considerably greater volume of testimony than did the defendant, and the contentions of the defendant were therefore very few in contrast with those of the State. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Prejudicial error is committed when a trial judge gives an exhaustive and detailed array of the State's contentions and evidence but deals with the contentions and evidence of the defendant in only a brief and summary fashion; but a trial judge is not required to consume an equal amount of time in stating the contentions and evidence of each party to a case. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488

S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Equal Stress Does Not Require Equal Time. — The requirement that equal stress must be given to the contentions of both sides does not mean that the respective statements thereof must also be of corresponding lengths, consuming similar amounts of time. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Statements Need Not Be of Equal Length Where Amounts of Evidence Offered Differ. — When a trial judge elects to state the contention of one party, he must equally stress the contention of the opposing party. This does not mean that the statement of contentions of the respective parties must be of equal length for where one party's evidence is meager, his contentions must be few in contrast with those of an opposing party who offers a great volume of testimony which raises many pertinent contentions. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978); State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

Failure to State Defendant's Contentions. — Where the court stated fully the contentions of the State but stated no contentions of defendant, the charge does not meet the requirement of this section. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Prejudicial error requiring a new trial is committed when the trial judge in his charge to the jury in a criminal case gives the contentions of the State but fails to give any contentions of defendant. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Where the trial judge in his charge states fully the contentions of the State but fails to give any contentions of the defendant, the party whose contentions have been omitted is not required to object or otherwise bring the omission to the attention of the trial court. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978); State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

Failure to Give Equal Stress to Defendant's Contentions. — The trial judge failed to comply with the provisions of this section in that, after stating fully the contentions of the State, he failed to give equal stress to the contentions of defendant. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Statement of Defendant's Contentions in Brief, General Terms. — Where court gave the State's contentions on every phase of the testimony at great length and in detail, but gave the defendant's contentions in very brief, general terms, as though he had offered no evidence at all, the pertinent contentions arising from the defendant's evidence were not given as required by the provisions of this section. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

Failure to Give Contention That Felonious Intent Not Shown. — Failure of the court to state the contention of defendant that the State's evidence completely failed to show that he had a felonious intent to commit larceny was highly prejudicial to defendant. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Contentions of Defendant Who Offers No Evidence. — While the trial judge is not required to state the contentions of the parties, when he undertakes to do so he must give equal stress to the contentions of both parties. This is true even when the defendant does not testify. He still has contentions regarding the case that arise from his plea of not guilty, from the State's evidence and from his cross-examination of the State's witnesses. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

Objection by Defendant Who Offers No Evidence. — An exception by the defendant charging that the judge gave unequal stress to the contentions of the State and the defendant, where the defendant offered no evidence, was held to be unfounded. State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953).

Remark That Court Does Not Know What Defendant Contends. — Where the court gives the contentions of the State and then states that it does not know what defendant contends, the instructions must be held prejudicial as contravening this section. State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955).

Charge Construed as a Whole in Determining Whether Undue Stress Given. — Objection to the charge on the ground that the court unduly emphasized the contentions of the State, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. State v. Wilcox, 213 N.C. 665, 197 S.E. 156 (1938).

Misstatement of Contention. — Where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

Statement by Judge That He Is Only Giving Contentions. — Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of this section, in expressing his opinion upon the weight and credibility of the evidence, is untenable. State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931).

Where the court expresses an opinion upon the weight of the evidence while stating contentions, it is not required that it must be brought to the trial judge's attention before verdict; this question can be considered for the first time on appeal upon exceptions duly noted. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Opinion in Summarizing Defendant's Contentions. — Where in prosecution under former G.S. 14-26, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under 16 years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under 16 years of age," the instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by the section, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under 16 years of age, if they believed the uncontradicted testimony. State v. Wyont, 218 N.C. 505, 11 S.E.2d 473 (1940).

C. Explanation of Law.

1. Defining Terms Used in Instructions.

Words of Common Usage and Meaning Need Not Be Defined. — It is not error for the court to fail to define and explain words of common usage and meaning to the general public, in the absence of a request for special instructions, and this applies equally to essential elements of the crime charged as well as to other legal terms contained in a charge. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Explanation of Technical Words Used in Instructions. — The duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them. State v. Clark, 134 N.C. 698, 47 S.E. 36 (1904).

Failure to Define "Reasonable" and "Doubt". — Where no request was made to define the term "reasonable doubt," the failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

The failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Bailiff, 2 N.C. App. 608, 163 S.E.2d 398 (1968).

Explanation of "Felonious Intent". — The comprehensiveness and specificity of the definition and explanation of "felonious intent" required in a charge depends on the facts in the particular case. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

"Felonious Intent" Must Be Defined Where Taking Admitted But Intent Denied. — Where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

2. Failure of Defendant to Testify.

Failure to Instruct Not Error Absent Request. — The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, the matter being in the sound discretion of the trial court. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

Absent a special request, the judge is not required to instruct the jury that a defendant's failure to testify does not create any presumption against him. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973).

3. Lesser and Included Offenses.

When Instruction on Included Offense Required. — The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with this section. Wilson v. Wilson, 190 N.C. 819, 130 S.E. 834 (1925); Watson v. Sylva Tanning Co., 190 N.C. 840, 130 S.E. 833 (1925); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926); State v.

Hardee, 192 N.C. 533, 135 S.E. 345 (1926).

The trial court judge must submit and instruct the jury on a lesser included offense when, and only when there is evidence from which the jury can find that a defendant committed the lesser included offense; conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser included offense, the court should refuse to charge on the lesser included offense. State v. Summitt, 301 N.C. 561, 273 S.E.2d 247 (1981).

If there is evidence from which the jury could find that the defendant committed a lesser included offense, the judge must charge on that lesser offense. State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980).

The judge has a duty to declare and explain the law arising on all of the evidence, and this duty necessarily requires the judge to charge upon a lesser included offense, even absent a special request, when there is some evidence to support it. State v. Little, 51 N.C. App. 64, 275 S.E.2d 249 (1981), aff'd, 56 N.C. App. 765, 290 S.E.2d 393 (1982); State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985); State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instruction Not Proper Absent Supporting Evidence. — It is not proper for the trial judge to charge the jury on a lesser included offense unless there is some evidence from which a commission of such lesser included offense can be found. State v. Scales, 18 N.C. App. 562, 197 S.E.2d 278 (1973).

Instruction Not Required Absent Evidence. — Where there was no evidence to support a conviction of assault, the trial court did not err in refusing to give instructions on the lesser included offense of assault in a prosecution for aiding and abetting in an attempted robbery with the use of firearms. State v. Parker, 16 N.C. App. 165, 191 S.E.2d 244, cert. denied, 282 N.C. 307, 192 S.E.2d 196 (1972).

Failure to Submit Lesser Degrees. — Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by this section. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

When there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge must instruct on the lesser included offense even where there is no specific request for such instruction. An error in this respect will not be cured by a verdict finding a defendant guilty of the greater crime. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Duty of Judge to Determine If Evidence Proves Lesser Offense. — It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it is the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Instruction on Included Offense Held Not Required. — In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Where all of the evidence indicated that the value of the stolen property exceeded $200.00, the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense. State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

When the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instruction on Included Offense Held Required. — Since a rational trier of fact could have found that the drugged and intoxicated defendant did not form an intent to commit larceny before breaking and entering, the trial court prejudicially erred in failing to instruct on misdemeanor breaking and entering. State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

Erroneous Instruction on Lesser Included Offense Not Prejudicial to Defendant. — Although it was error for court to instruct on unsupported lesser degrees of an offense, such error could not have been prejudicial to defendant. State v. Hamad, 92 N.C. App. 282, 374 S.E.2d 410 (1988), aff'd, 325 N.C. 544, 385 S.E.2d 144 (1991).

Where the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt. State v. Grier, 209 N.C. 298, 183 S.E. 272 (1936).

4. Defenses.

Defenses. — Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto. What weight, if any, is to be given such evidence, is for determination by the jury. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

Defenses raised by the evidence constitute substantial features requiring an instruction. State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980).

Defenses raised by the evidence are substantial features requiring an instruction. Failure to instruct on a substantial feature of a case, such as evidence of a complete defense, is error for which the defendant is entitled to a new trial. State v. Smith, 59 N.C. App. 227, 296 S.E.2d 315 (1982).

Alibi. — Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi if believed by the jury. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Alibi Instruction Not Required Absent Request. — The trial judge is not required to instruct on legal effect of an alibi unless defendant specifically requests such instruction. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Requested Alibi Instruction Must Be Given. — Notwithstanding the court's instruction that the burden of proof is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant was present and that he committed the crime, if a particular defendant is apprehensive that the jury will be misled unless the court gives an instruction substantially like that approved in prior alibi cases, he will be entitled to such instruction upon special request therefor. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

In the absence of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi. Conversely, when there has been sufficient evidence in the case to raise an issue as to alibi and the defendant has specifically requested the trial court to charge the jury in accordance with proper instructions submitted by him on this subject, it is the duty of the court so to instruct, and the failure, or refusal, to instruct as to alibi under such circumstances constitutes prejudicial and reversible error. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Mere denial that defendant was at the scene of the crime does not require a charge on the legal effect of an alibi, but rather, the general charge that the jury should acquit the defendant unless it is satisfied beyond a reasonable doubt that the defendant committed the crime is sufficient. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Failure to Use Pattern Form of Alibi Instruction. — Although the desired form of pattern instruction on the defense of alibi was not offered, in substance, where defendant twice received the benefit of the instruction that witnesses testified that he was not at the scene of the robbery on the date and time in question but was elsewhere, and could not, therefore, have committed the act, alone or in concert, no error in instructions was committed. State v. Shore, 20 N.C. App. 510, 201 S.E.2d 701, aff'd, 285 N.C. 328, 204 S.E.2d 682 (1974).

Not Entitled to Alibi Instruction Absent Any Evidence. — A defendant who merely denies that he was at the scene of the crime, without producing any evidence to show that he was at any other place, is not entitled to an alibi instruction. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

Failure to Instruct on Burden of Proving Alibi. — Where in the charge, the court failed to instruct the jury that the defendant, who relied on an alibi, did not have the burden of proving it, defendant suffered prejudicial error. State v. Moore, 19 N.C. App. 368, 198 S.E.2d 760 (1973).

Instruction Held to Be as Effective as Formal Alibi Instruction. — Where the trial judge made it quite clear that the burden was on the State to prove all essential elements of the crime charged and that defendant did not have to prove anything in order to be found not guilty, although the word "alibi" was not mentioned in the charge or in the recapitulation of the evidence, the charge given afforded defendant the same benefits a formal charge on alibi would have afforded. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Entrapment. — In order for the defense of entrapment to be available to defendant, there must be an intent to commit a crime and such intent must originate from the inducements of a law officer or his agent and not in the mind of the defendant. Where police action did not involve persuasion, fraud, or trickery but rather merely provided defendant with an exposure to temptation, there was no prejudicial error in the failure of the trial judge to instruct on the defense of entrapment. State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759, cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973); 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974).

Defendant's Burden in Proving Insanity Defense. — The trial court's instruction that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" rather than to the "satisfaction" of the jury was favorable to defendant, since "reasonable satisfaction" imposes a lesser burden than "satisfaction." State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Failure to Reinstruct on Insanity Defense Not Error. — The trial court did not err in failing to instruct that the jury could find defendant not guilty by reason of insanity, when the court instructed that if the jury had a reasonable doubt as to one of the elements of the offense charged it should return a verdict of not guilty, or when the court instructed that all 12 minds must agree on a verdict of guilty or not guilty where the court included the possible verdict of not guilty by reason of insanity at the beginning of the instructions, after the instructions on the elements of the offense charged, and in the final mandate. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Where defendant's evidence, even though contradicted by the State, raised an issue of self-defense, whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge, and the failure of the trial court to charge on self-defense was error. State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Self-Defense as Substantial and Essential Feature. — When supported by competent evidence self-defense unquestionably becomes a substantial and essential feature of a criminal case. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Failure to Include Self-Defense as Possible Verdict Merits New Trial. — In cases where the defendant has met his burden of production for self-defense, the failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury is prejudicial error and entitles the defendant to a new trial. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

And Is Not Cured by Discussion of Self-Defense. — Failure to include not guilty by reason of self-defense in the court's final mandate to the jury, where required, is not cured by the discussion of the law of self-defense in the body of the charge to the jury. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Duty to Instruct on Self-Defense Absent Request. — If defendant's evidence raises the issue of self-defense, the court has a duty to instruct the jury on this issue even though defendant neglects to request the instructions. State v. Taylor, 33 N.C. App. 70, 234 S.E.2d 202 (1977).

Failure to Instruct on Self-Defense Not Error Absent Any Evidence. — Where State's evidence tended to show a deliberate, premeditated killing with a deadly weapon, and there was no evidence that the killing was in self-defense, and defendant offered no evidence, the failure of court to instruct the jury upon the right of self-defense was not error. State v. Deaton, 226 N.C. 348, 38 S.E.2d 81 (1946).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

As to proper charge on verdict of not guilty by reason of self-defense, see State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous, the correct rule being that defendant could use such force as was reasonably or apparently necessary. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Mere Instruction That Evidence Competent on Plea of Self-Defense. — Where defendant introduced evidence that deceased was a man of violent character, an instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying the evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show that deceased had made on them, is insufficient to meet the requirements of this section, notwithstanding the absence of a request for special instructions. State v. Riddle, 228 N.C. 251, 45 S.E.2d 366 (1947).

Right of Defendant to Defend Himself in His Home. — In a prosecution for murder it was held that it was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law of self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the case arising upon the evidence. State v. Poplin, 238 N.C. 728, 78 S.E.2d 777 (1953).

Force Used in Defense of Home or Eviction of Trespassers. — When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, and failure to so instruct the jury on such substantive feature is prejudicial error. The same rule applies to the right to evict trespassers from one's home. State v. Spruill, 225 N.C. 356, 34 S.E.2d 142 (1945); State v. Goodson, 235 N.C. 177, 69 S.E.2d 242 (1952).

Failure to Instruct on Self-Defense in Murder Prosecution. — In a murder prosecution, where self-defense is relied upon, the failure of the trial court to instruct the jury in accordance with a settled principle of law, under which are fixed the rights of a person upon whom a murderous assault is made, undoubtedly weighed heavily against the defendant and constituted error. State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

Evidence Sufficient to Require Self-Defense Instruction. — Where State's evidence presents testimony which would permit, but not require, the jury to find that: (1) Defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm, the evidence was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case and the court's failure to so do constituted prejudicial error. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Self-Defense Instruction Held Not Required. — In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Failure to Instruct as to Self-Defense. — See State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937); State v. Greer, 218 N.C. 660, 12 S.E.2d 238 (1940).

Failure to Instruct on Right of Defendant to Go to Defense of Third Person. — It is prejudicial error to fail to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault, since the court must instruct the jury on all substantial features of the case that arise from the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Failure to Instruct Defendant Had No Duty to Retreat. — Because the evidence showed that the victim of a fatal shooting was using deadly force, defendant was permitted to stand his ground and kill the victim if defendant believed it necessary and had a reasonable ground for such belief; thus the trial court erred in failing to instruct that defendant had no duty to retreat and defendant was entitled to a new trial. State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (1994).

Instruction that "the defense of drunkenness is one which is dangerous in its application" is clearly an expression of opinion by a judge in giving a charge to a petit jury, which is prohibited by this section. State v. Oakes, 249 N.C. 282, 106 S.E.2d 206 (1958).

5. Duty to Reach Verdict.

Instruction on Duty to Reach Verdict. — Generally, where the jury has retired but is unable to reach a verdict, the court may call the jury back and instruct it as to its duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert.

denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

Where the jury has failed up to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but that it was their duty to agree if they could do so without violence to their consciences, and that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., was held not to be an expression of opinion by the judge upon the evidence. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

An instruction to the effect that the jury had a duty to reach a verdict "if you can do so without violence to your conscience" contains nothing that tends to coerce, nor any expression of opinion as to what the verdict should be. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

The court may properly instruct the jury that the trial of the cause involves heavy expense to the county and that it is the duty of the jury to continue its deliberations and attempt to reach an agreement, but that the court is not attempting to force an agreement. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

A statement made by the trial court that insofar as he knew all available evidence had been introduced was simply a statement that the court knew of no other evidence which would come up in a new trial, and that based upon the evidence it was the duty of the jury, if possible, to reach a verdict. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

Where the jury, after some deliberation, returned to the courtroom without reaching a verdict and the trial judge at that time, inter alia, stated to the jury that the case was one of importance to the State and to the defendant, and some jury must pass upon it and that it was their duty to consider the evidence and not to decline to agree on account of stubbornness, such statements were allowed. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691; 410 U.S. 987, 93 S. Ct. 1516, 36 L. Ed. 2d 184 (1973).

When jurors, after deliberating only a short time, reported to the court that they were unable to agree, and the court twice simply asked them to continue their deliberations, the court being careful to point out that it did not want any juror to do anything against his conscience, the instruction that the jury try to reach a unanimous verdict neither intimated an opinion in violation of this section nor tended to coerce the jury to reach a verdict notwithstanding the conscientious convictions of any member. State v. Strickland, 21 N.C. App. 545, 204 S.E.2d 888 (1974).

It is the duty of the judge to counsel a perplexed jury towards an agreement, keeping always within the statutory restriction that he shall give no intimation on the merits or whether any fact has been fully and sufficiently proved. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Urging Jury to Reach Verdict. — Absent other factors, giving an instruction urging a jury to reach a verdict before the jury commences its deliberations is not reversible error. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Instruction That Juror Should Not Surrender Beliefs to Reach Verdict. — A strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone" was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Requiring Juror to Surrender Convictions. — A trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Failure to Instruct Jurors Not to Surrender Convictions. — Where the trial court's instruction on unanimity of the verdict complied with G.S. 15A-1235, the court's failure to instruct that the individual jurors were not to surrender their own convictions solely in order to reach a verdict was not error since the defendant requested no instructions to that effect. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Comment on Expense of Retrying Case. — The isolated mention in an instruction to the jury of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Instruction on Possibility of Mistrial If Verdict Not Reached. — In charging the jury upon the law and evidence pursuant to this section, and in instructing that a verdict must be unanimous, G.S. 15A-1237(b), the trial judge is not required to anticipate that the jury may be unable to reach a verdict, much less to express such anticipated result by instructing that a mistrial would result if the jury could not reach a verdict. Such an instruction, if given before the jury began its deliberations, would, in itself, tend to coerce a verdict, increasing the risk of error. State v. McBryde, 55 N.C. App. 473, 285 S.E.2d 866 (1982).

6. Punishment.

Punishment Irrelevant. — The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt, and is therefore no concern of the jurors. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

And Judge Should So Inform Jury If Instruction Is Requested. — In noncapital cases where the jury requests information as to punishment, the trial judge should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurors Not to Be Informed Absent Compelling Reason. — In the absence of some compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Absent compelling reasons for disclosure, the trial judge should not inform a jury as to punishment. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Punishment in Capital Cases. — In a capital case, there may be a compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

If the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Comment as to Recommendation of Mercy in Capital Case. — Any expression of opinion by the judge on the issue of the defendant's guilt or innocence results in prejudice to his case which is virtually impossible to cure. Thus, for example, the judge may not, in a capital case, apprise the jury as to whether it can make a recommendation of mercy since such a recommendation assumes a guilty verdict. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

Recommendation of Life Imprisonment. — In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949).

D. Summary of Evidence.

Effect of 1985 Amendment. — This section was amended in 1985 so as to no longer require trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law to the evidence. This amendment left undisturbed the prohibition contained in this section against a trial judge expressing an opinion as to whether a fact has been proved. Under the old law, the trial court was required to summarize the evidence in the jury charge to the extent necessary to apply the law applicable to the evidence. The court, however, was not required to give a verbatim recital of the evidence. A recapitulation sufficiently comprehensive to present every substantial and essential feature of the case was sufficient. Minor discrepancies between the evidence and the court's summation were required to be called to the attention of the court in time to afford an adequate opportunity for correction. Otherwise, they were to be considered waived and would not be considered on appeal. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Recapitulation of Evidence Within Judge's Discretion. — Trial judges are not required to state, summarize or recapitulate the evidence, although they may elect in their discretion to do so, and the exercise of such discretion will not be reviewed except upon a showing of abuse, and upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990).

Taking More Time to Summarize State's Evidence. — No error was found in the trial court's narration of the evidence where the transcript revealed that although the court's summary of defendant's evidence was shorter than that of the state, it nevertheless clarified the issues and eliminated extraneous matters. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence Must Be Stated Impartially. — It has been accepted as the proper construction and meaning of the act of this section, though it goes beyond the words: that a judge in charging a jury shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of evidence. State v. Jones, 67 N.C. 280 (1872).

Due process requires that the evidence be reviewed in a fair and impartial manner. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979).

Trial judge must confine his summary of the evidence to the facts and avoid drawing conclusions based thereon. State v. Washington, 57 N.C. App. 309, 291 S.E.2d 270, aff'd, 59 N.C. App. 490, 297 S.E.2d 170, cert. denied, 306 N.C. 563, 294 S.E.2d 228 (1982).

Judge Not to Rely on Contentions of Parties. — The judge, in his instructions to the jury, must recite the evidence and may not rely solely on the contentions of the parties. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

Where the court made no reference in the charge to the evidence except in a short statement as to the contentions of the parties, that was held insufficient to satisfy the requirements of this section. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

Where the court referred to the evidence by its substance in the form of contentions rather than by recital of the words of the witnesses, there was a lack of indication that the jurors were in anywise misled or confused. State v. Jennings, 279 N.C. 604, 184 S.E.2d 254 (1971).

Recapitulation Must Be Reasonably Accurate. — The evidence offered by defendant as well as by the State, together with the contentions, is to be recapitulated with reasonable accuracy. The law requires no more. State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973).

Judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. State v. Gould, 90 N.C. 658 (1884); State v. Thompson, 226 N.C. 651, 39 S.E.2d 823 (1946); State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

In the instructions to the jury, recapitulation of all the evidence is not required, but the trial judge is required to state the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969); State v. Harrelson, 54 N.C. App. 349, 283 S.E.2d 168 (1981), cert. denied and appeal dismissed, 305 N.C. 154, 289 S.E.2d 381 (1982).

Recapitulation of all the evidence is not required, and the statute is complied with in this respect by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969); State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

The trial judge is not required to recapitulate the testimony. He is only required to summarize the evidence sufficiently to permit him to explain and apply the appropriate principles of law. State v. West, 21 N.C. App. 58, 203 S.E.2d 86, cert. denied, 285 N.C. 376, 205 S.E.2d 101 (1974); State v. Adcox, 303 N.C. 133, 277 S.E.2d 398 (1981).

The recapitulation of all the evidence is not required under this section, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Thompson, 257 N.C. 452, 126 S.E.2d 58, cert. denied, 371 U.S. 921, 83 S. Ct. 288, 9 L. Ed. 2d 230 (1962); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Greene, 278 N.C. 649, 180 S.E.2d 789 (1971); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977); State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

In instructing the jury, the court is not required to recapitulate all of the evidence. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971); State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Where defense counsel responded negatively to a request for further instructions, and the evidence was simple and direct and without equivocation and complication, a charge which briefly applied the law to the evidence but failed to state the evidence sufficed to comply with the requirements of this section. State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983).

This section requires the trial court to summarize the evidence of both parties only to the extent necessary to explain the application of the law to the evidence. State v. Carter, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

But Trial Court Not Relieved of Burden of Declaring and Explaining Law Arising on Evidence. — In giving jury instructions, the trial court is not required to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence, but this statute does not relieve the trial court of its burden of declaring and explaining the law arising on the evidence relating to each substantial feature of the case. State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

Verbatim Recital Not Required. — In reviewing the evidence, the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Judge is not required to recite the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue. State v. Jones, 97 N.C. 469, 1 S.E. 680 (1887).

The court is not required to recapitulate the evidence, witness by witness. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965); State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

The trial judge is not required to recapitulate the testimony of a witness in the exact words used by the witness. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

The law does not require the judge to review the facts and take up each witness that has testified one by one and repeat the testimony of the witness. State v. Vickers, 22 N.C. App. 282, 206 S.E.2d 399, further review denied, 285 N.C. 668, 207 S.E.2d 760 (1974).

The law does not require the trial judge to review all of the evidence nor to recapitulate the testimony of the witnesses one by one. The duty imposed upon the trial judge is to summarize only so much of the evidence as is necessary for him to apply the law. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

This section does not require the trial judge in his charge to recite verbatim, repeat, recount, or recapitulate the testimony of each witness. Such repetition would be redundant to a juror's ears and lengthen jury instructions unnecessarily. The judge's duty is performed when he summarizes only so much of the evidence as is necessary for him to apply the law. State v. Webster, 71 N.C. App. 321, 322 S.E.2d 421 (1984).

It is sufficient for the trial judge to fairly summarize the evidence for the purpose of explaining the law applicable thereto. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

A trial judge need only summarize the evidence to the extent necessary to apply the law relevant to the case. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Recapitulation of the principal features of the evidence relied on satisfies this section. State v. Hatch, 21 N.C. App. 148, 203 S.E.2d 334, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

The requirement of this section that the judge state the evidence is met by presentation of the principal features of the evidence relied on by the prosecution and the defense. A verbatim recital of the evidence is not required. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

Under this section it is the duty of the court to instruct the jury on all substantial features of a case, but this duty extends only to those features which are raised by the evidence. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Simple Repetition of Testimony Insufficient. — This duty is not performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889).

This section is not complied with where the court reads to the jury full notes of all the testimony in the cause, and tells them that he does this to refresh, and not to control, their recollection of the testimony, that it is their duty to remember the testimony, and that they ought to rely in the last resort on their own recollection. State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889).

Discretion as to Jury's Request for Restatement of Evidence. — It is discretionary with the court to grant or refuse the jury's request for restatement of the evidence. State v. Crane, 11 N.C. App. 721, 182 S.E.2d 225 (1971).

Exclusion of Objectionable Evidence. — The trial judge has the right to exclude objectionable evidence without an objection by the opposing party. However, he is prohibited from doing so in such a manner as to exhibit any hostility toward the party offering the evidence thereby expressing an opinion. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

Inclusion of Matters Not in Evidence. — The trial court's instructions to the jury were prejudicial where the trial court did not summarize the evidence as required by this section, but instead consistently and without exception stated the contentions of the parties, and in stating the State's contentions, included matters that were not in evidence. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Although the court ordinarily should be informed of an inaccuracy in the summary of the evidence in the charge during or at the conclusion of the instructions so that any error may be corrected, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Possibilities of Fact. — Where there are several possibilities of fact, different from the inference tended to be drawn from the evidence offered, a judge is not required to note one such possibility, and specifically bring it to the attention of the jury. State v. Clara, 53 N.C. 25 (1860).

Restricting Evidence to Purpose for Which Admissible. — It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. State v. Ballard, 79 N.C. 627 (1878).

Evidence Reflecting upon Witness' Credibility. — Absent a special request, the court is not required to summarize that evidence which merely reflects upon the credibility of a given witness. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Miller, 302 N.C. 572, 276 S.E.2d 417 (1981).

Evidence Tending to Impeach. — While a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence goes not to the establishment of a substantive defense but rather is of an impeaching quality and effect. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 220, rehearing denied, 451 U.S. 1012, 101 S. Ct. 2350, 68 L. Ed. 2d 865 (1981).

Testimony which merely tends to impeach or show bias is not substantive in nature and need not be summarized. State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); State v. Carter, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Reviewing State's Evidence Not Error Where Jury Aware of Court's Evidence. — The portion of the charge devoted to reviewing the evidence for the State cannot be held for error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the State's evidence. State v. Jessup, 219 N.C. 620, 14 S.E.2d 668 (1941). See State v. Johnson, 219 N.C. 757, 14 S.E.2d 792 (1941).

A charge which reviews the State's evidence cannot be held erroneous as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury it was reviewing the State's evidence. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

Response to Request of Counsel That Certain Testimony Be Summarized. — Where the prisoner's counsel called attention to the judge's failure to state in his summary certain testimony of the prosecutrix, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of the judge in violation of this section. State v. Freeman, 100 N.C. 429, 5 S.E. 921 (1888).

Statement of judge that he had only stated that part of the evidence as seemed to be necessary to enable him to explain and apply the law did not constitute an expression of opinion but was in strict compliance with this section. State v. Tyson, 242 N.C. 574, 89 S.E.2d 138 (1955).

Suggestion as to What Evidence Indicates. — On a trial of an indictment for an assault with intent to commit rape under former G.S. 14-22, where there was evidence that the defendant had been found on the six-year-old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" State v. Dancy, 78 N.C. 437 (1876).

Recapitulation of Testimony Given in Jury's Absence. — Where, in his charge to the jury the trial judge undertook an unnecessary and laborious recapitulation of the testimony of each witness and recapitulated testimony of the officer which was given only on voir dire in the absence of the jury, inadvertently reviewing for the jury testimony which was material to the charge against defendant, this constituted a misstatement of a material fact not shown in evidence. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973), cert. denied and appeal dismissed, 285 N.C. 666, 207 S.E.2d 752 (1974), overruled on another point, State v. Harris, 25 N.C. App. 404, 213 S.E.2d 414 (1975).

Taking More Time to Summarize One Party's Evidence. — It is not error for the court merely to consume more time in summarizing the State's evidence than it does in restating the evidence for defendant. State v.

Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981); State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

A mere disparity in the length of time devoted by a judge in stating contentions of parties does not constitute prejudicial error. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

The rule that a mere disparity in the length of time devoted by a judge in stating the contentions of the parties does not constitute prejudicial error particularly applies in cases where the number of witnesses presented by one side greatly exceeds the number presented by the other side. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

Where the State has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the State than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. State v. Cureton, 218 N.C. 491, 11 S.E.2d 469 (1940); Bryant v. Watford, 240 N.C. 333, 81 S.E.2d 926 (1954).

The fact that the court necessarily consumes more time in stating the evidence for the State than in stating that of the defendant does not constitute an expression of opinion on the evidence. State v. Norman, 29 N.C. App. 606, 225 S.E.2d 141, cert. denied, 290 N.C. 665, 228 S.E.2d 456 (1976).

The fact that the trial court necessarily consumed more time in outlining the evidence for the State than that of the defendant did not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

The court summarized the evidence fairly and accurately showing no bias in favor of either the State or the defendants; the fact that more time was devoted to the State's evidence than to that of the defendants was to be expected where the State presented far more evidence. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

The charge of the court in summarizing the evidence for the jury was not weighed in favor of the State to such a degree that it constituted an expression of opinion. The State presented a great deal more evidence than the defendant and it is to be expected that more time would be required for summary. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

The fact that the court spent more time in summarizing the State's evidence than that of the defendant is attributable to the fact that the witnesses for the State testified more extensively than those of the defendant. State v. Payne, 19 N.C. App. 511, 199 S.E.2d 132 (1973).

The trial court may have emphasized discrepancies in defendant's evidence more than those in State's evidence, but the court is not required to give equal time to each side; nothing more is required than a clear instruction applying the law to the evidence and giving the positions taken by the parties as to the essential features of the case. State v. Reisch, 20 N.C. App. 481, 201 S.E.2d 577, cert. denied, 285 N.C. 88, 203 S.E.2d 61 (1974).

When a defendant offers no evidence or very little evidence at trial, recapitulation of the evidence for the State must necessarily take longer than recapitulation of the evidence for the defendant, and such difference does not alone violate the trial judge's obligation under this section to not express an opinion whether a fact has been proved. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Instructing Jury to Ignore Longer Time Taken to Give State's Evidence. — Where the judge in his charge stated that it had taken longer to give a summary of the State's evidence than the defendants' but the jury were to attach no significance to that, and he gave equal stress to the contentions of the State and of the defendants, this was held not error. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Failure to Summarize Evidence of Defendant. — When the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant, he violates the clear mandate of the statute which requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given to the State and to the defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980), overruled on other grounds, 318 N.C. 457, 349 S.E.2d 566 (1986).

Where the trial judge failed to summarize evidence which raised inferences favorable to defendant including evidence of defendant's prior statement to police officers and evidence elicited on cross-examination, this omission constituted error prejudicial to defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

This section does not require the trial judge to summarize evidence favorable to defendant where the evidence is not necessary to an explanation of the applicable law. State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

Summary of Evidence Favorable to Defendant Who Offers None. — The trial judge is not required to fully recapitulate all the evidence, but when he does so he must summarize the evidence in the case that is favorable to the defendant even though defendant presented no evidence. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980); State v. Carter, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Evidence favorable to defendant elicited on cross-examination that tends to exculpate defendant is substantive evidence. A trial court cannot adequately explain the application of the law to the evidence in such a case without mentioning the exculpatory evidence elicited by defendant on cross-examination. State v. Carter, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Failure to Summarize Such Evidence. — The trial court did not err in its summary of the evidence to the jury by failing to relate any of the evidence favorable to defendant, since defendant presented no evidence in her behalf, and none of the State's evidence favorable to defendant or evidence elicited by defendant on cross-examination was necessary to an explanation of the applicable law. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980), overruled on other grounds, 318 N.C. 457, 349 S.E.2d 566 (1986).

Objection to Slight Inaccuracies in Statement of Evidence. — Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. State v. Sterling, 200 N.C. 18, 156 S.E. 96 (1930).

Slight inaccuracy in stating evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

A slight inaccuracy in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction, else an exception thereto will not be considered on appeal. State v. Sanders, 29 N.C. App. 662, 225 S.E.2d 620 (1976).

Objections to minor discrepancies in the trial judge's statement of the evidence to the jury are deemed to be waived and will not be considered on appeal unless called to the attention of the court in time to afford opportunity for correction. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Any minor misstatement in the trial judge's statement of facts or contentions must be brought to his attention at trial. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

An inadvertence in recapitulating the evidence must be called to the attention of the court in time for correction and an objection after verdict comes too late. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

As a general rule, a misstatement of the evidence or contentions by the trial judge will not entitle a defendant to a new trial unless the defendant makes a timely objection and calls it to the attention of the judge to permit him to correct it. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

A defendant may not avoid the operation of this rule by contending that the trial judge's misstatements were impermissible expressions of opinion. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

No Error Where Jury Could Infer What Judge Said Evidence Tended to Show. — The trial court stated in the jury instructions that there was evidence which tended to show that defendant cut victim with a knife over some beer. This did not amount to an improper expression of opinion by the court that a fact had been proved or states facts not in evidence. Besides, there was clearly ample evidence introduced at trial from which the jury could reasonably infer that defendant cut the victim's throat with a knife over some beer. State v. Brewer, 89 N.C. App. 431, 366 S.E.2d 580, cert. denied, 322 N.C. 482, 370 S.E.2d 229 (1988).

Recital of What Evidence Tended to Show Without Instruction on Applicable Law. — Where the trial court gives a recital of what some of the evidence tended to show, but no instruction is given as to how the law applies to it, the jury is left unaided to apply the abstract principles of law to the facts, and this constitutes error requiring a new trial. State v. McKinnon, 9 N.C. App. 724, 177 S.E.2d 299 (1970).

Where Parties Waive Recapitulation of Evidence. — Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

All Jurors to Be in Courtroom for Request to Review Testimony. — Both N.C. Const., Art. I, § 24 and G.S. 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

Instructions Upheld. — In a felony murder case, where defendant was charged with robbery with a dangerous weapon and felony larceny, and the victim's wallet and car were taken, the trial court was not obliged to instruct the jury as to which property was the subject of the robbery charge, and which was the subject of the larceny charge, where the court provided instructions as to the elements of each offense and referenced the vehicle during its instructions in the lesser included offenses of felony larceny. State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600, 2002 N.C. App. LEXIS 387 (2002), cert. denied, 356 N.C. 169, 568 S.E.2d 618 (2002).

E. Subordinate Features of Case.

What Constitutes Subordinate Feature. — Instructions to scrutinize the testimony of an alleged accomplice, or that the jury should not consider evidence withdrawn by the court, or explaining the difference between corroborative and substantive evidence, or charging how evidence relating to the credibility of a witness should be considered, or that certain evidence had been admitted solely for the purpose of corroboration, or that the jury should take its own recollection of the evidence, or instructions on defendant's evidence of good character, relate to subordinate features upon which the court is not required to charge in the absence of request for special instruction aptly made. State v. Witherspoon, 5 N.C. App. 268, 168 S.E.2d 243 (1969).

Instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor are subordinate features of the case. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973); State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

An instruction as to the credibility of an interested witness relates to a subordinate feature of the case and the court is not required to charge thereon absent a request. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

A substantive feature of a case is any component thereof which is essential to the resolution of the facts in issue. Evidence which does not relate to the elements of the crime itself or the defendant's criminal responsibility therefore are subordinate features of the case. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

The weight to be accorded the defendant's confessions concerns a subordinate feature of the case and is not a substantive feature thereof which requires a specific instruction in the absence of a special request. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

Trial judge may in his discretion instruct on the subordinate and nonessential features of a case without requests by counsel. The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

When the trial judge instructs on a subordinate feature he must do so accurately and completely. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

Instruction on Subordinate Feature Must Be Requested. — A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965); State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

A party desiring further elaboration on a particular point, or of his contention, or a charge on a subordinate feature of the case must aptly tender his request for special instructions. Instructions to scrutinize the testimony of an alleged accomplice are not required when, as here, no request therefor has been made. State v. Dunbar, 8 N.C. App. 17, 173 S.E.2d 543 (1970).

The charge of the court did not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for special instructions. State v. Ellis, 203 N.C. 836, 167 S.E. 67 (1933).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with this section and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969); State v. Floyd, 15 N.C. App. 438, 190 S.E.2d 353, cert. denied, 281 N.C. 760, 191 S.E.2d 363 (1972); State v. Nettles, 20 N.C. App. 74, 200 S.E.2d 664 (1973), appeal dismissed, 284 N.C. 621, 202 S.E.2d 277 (1974); State v. Murray, 21 N.C. App. 573, 205 S.E.2d

587 (1974); State v. Walker, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure. And where this is not done, objection may not be raised for the first time after trial. State v. Davis, 246 N.C. 73, 97 S.E.2d 444 (1957).

Since It Is Not Required. — The judge is not required to instruct the jury as to evidentiary matters essentially "subordinate," i.e., those which do not relate to the elements of the crime charged or to defendant's criminal responsibility. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Saunders, 64 N.C. App. 350, 307 S.E.2d 197 (1983).

Failure to Give Such Instruction Absent Request. — In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Failure to Instruct on Character Evidence Held Not Error. — In a prosecution for embezzlement where character evidence was a subordinate feature of the case, failure of the court to give an instruction as to how the jury should view character evidence was not error absent a request for such an instruction. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

F. Instructions as to Particular Offenses.

First-Degree Murder. — Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895).

Difference Between First- and Second-Degree Murder. — Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

The use of the word "killing" in referring to the degrees of homicide cognizable under the bill of indictment in a prosecution for manslaughter is not harmful error where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. State v. Scoggins, 225 N.C. 71, 33 S.E.2d 473 (1945).

Failure to State That Intentional Killing Must Be Shown to Raise Implication of Malice. — See State v. Bright, 237 N.C. 475, 75 S.E.2d 407 (1953).

Use of "Intentional Killing" in Manslaughter Instruction. — The frequent and interchangeable use of the terms "intentional killing" and "intentional shooting" constituted error in a manslaughter instruction inasmuch as it pointed to a finding of malice, but the same charge in an instruction on second-degree murder would in no manner be deemed prejudicial. State v. Briggs, 20 N.C. App. 368, 201 S.E.2d 580 (1974).

Presumptions of Malice and Unlawfulness of Killing. — In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instruction on "heat of passion" in a murder case is inappropriate when not supported by the evidence. State v. Briggs, 20 N.C. App. 368, 201 S.E.2d 580 (1974).

Instruction That Jury May Consider "Absence of Provocation" for Murder. — Judge's instruction to the jury in a first-degree murder case that the jury, in determining premeditation and deliberation, may consider the "absence of provocation" did not express a court opinion that there was no evidence of provocation in the case. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Incorrect Definition of Voluntary Manslaughter in Murder Case. — In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976), aff'd, 292 N.C. 461, 233 S.E.2d 554 (1977).

Charge on Involuntary Manslaughter. — Where the record in a first-degree murder prosecution contained no evidence which tended to show that the victim died as the result of an unlawful act not amounting to a felony or as the result of an unlawful act that was not naturally dangerous to human life, it was error to permit the jury to consider an involuntary manslaughter charge, and since it appeared that there was a reasonable possibility that the defendant would have been acquitted if the involuntary manslaughter issue had not been submitted, the error had to be held prejudicial. State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Summary of Evidence in Involuntary Manslaughter Case. — Where, when explaining the law of involuntary manslaughter and applying the evidence to that law the judge stated, "that it was dark...; and that the defendant fired a .22 rifle into the darkness...," this was a fair summary of the evidence, since defendant himself contended it was too dark for him to see when he fired his gun. State v. Parks, 92 N.C. App. 181, 374 S.E.2d 138 (1988), rev'd on other grounds, 324 N.C. 420, 378 S.E.2d 785 (1989).

Reference to Deceased as Common-Law Husband. — In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussle over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Instruction That Injury Was Serious. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, an instruction that the victim's skull fracture was a serious injury did not violate this section. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

Charge on "Serious Injury". — In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury is any physical injury that causes great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

Unqualified Use of "Assault" and "Rape". — The charge, when read as a whole, did not show that the judge in any manner expressed any opinion in violation of this section by the unqualified use of the words "assault" and "rape" or "raping" in referring to the charges against the defendants and the use of these words, did not lead the jury to assume that the facts in controversy had been established. State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971).

In a prosecution for kidnapping, use of the word "rape" by the judge in a charge to the jury did not indicate an expression on the judge's part that such fact had been established where, in addition to the full and adequate curative instruction regarding the use of the word "rape," the jury was instructed elsewhere in the charge that "what the evidence does actually show is a question of fact for the jury's determination." Therefore, the charge when considered as a whole is free from prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Specific Intent in Robbery. — In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948).

In prosecution for homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, was without error and did not contain an expression of opinion on the evidence in violation of this section. State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

Charge of Murder in Perpetration of Robbery, Where Robbery Merged into Murder Charge. — Court erred in charging that a verdict of murder in the first degree could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or in the attempt to perpetrate a robbery, where the robbery was merged in and became a part of the first-degree murder charge. State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974).

With respect to stolen property charges, the legal principle of possession of recently stolen property constituted a substantive feature which the court had a duty to discuss in its jury instructions. State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992), cert. denied, 332

N.C. 670, 424 S.E.2d 415 (1992).

Reckless Driving. — An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient to meet the requirements of this section, since it fails to explain the law or apply the law to the facts as the jury should find them to be. State v. Flinchem, 228 N.C. 149, 44 S.E.2d 724 (1947).

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, this section requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Instructions in Prosecutions for Driving under Influence of Intoxicating Liquors Held Prejudicial Where Defendant Stated to Be Driver. — See State v. Swaringen, 249 N.C. 38, 105 S.E.2d 99 (1958).

Failure to Define "Conspiracy". — Where the court charged the jury that defendant would be guilty of first-degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement and the defendant excepted on the ground that the court did not define "conspiracy," it was held that the exception could not be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Forcible Trespass. — In a prosecution for forcible trespass, a charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, is not a compliance with this section. State v. Lawson, 98 N.C. 759, 4 S.E. 134 (1887).

Instruction as to Uncorroborated Testimony in Perjury Trial. — While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with this section. State v. Hill, 223 N.C. 711, 28 S.E.2d 100 (1943).

"Delivery" Under § 90-87. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under G.S. 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Instruction as to Former Marriage. — In an indictment for bigamy an instruction that the weight of the evidence was that there had been no first marriage, is a violation of this section. State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

Instruction as to Lottery Held Sufficient. — In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complies with the requirements of this section. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

In a dissemination of obscenity case, the properly denied request for an instruction to the jury that if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case, and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under U.S. Const., Amends. I and XIV, and that it would be the duty of the jury to return a verdict of not guilty. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Instruction on Illegality of Collecting a Debt by Force. — The trial judge in a common-law robbery case did not express an opinion as to the validity of defendant's defense when he charged on the illegality of collecting a debt by the use of force, since defendant's own testimony tended to show that he was attempting to collect a debt owed to him by the victim's brother at the time of the incident in question, and the legal issue thus arose on the evidence. State v. Thompson, 49 N.C. App. 690, 272 S.E.2d 160 (1980).

Driving While Intoxicated. — When a driving-while-impaired defendant requested that the trial court instruct the jury on the expiration date of the vials used to collect blood samples, the trial court properly refused to give the instruction. The requested instruction was defendant's version of the evidence in the guise of a jury instruction; had the trial court given it, it would have violated its duty not to express an opinion on the evidence. State v. Turner, 177 N.C. App. 423, 628 S.E.2d 464, 2006 N.C. App. LEXIS 979 (2006), cert. denied, 361 N.C. 226, 643 S.E.2d 398 (2007).

Error Not to Instruct Jury on Willfulness Where it was Element of Crime of Damaging Computer or Computer Network. — Defendant was entitled to a new trial on the charge of damaging a computer or a computer network under G.S. 14-455(a), because the jury was not instructed that it had to find that defendant acted "willfully" and the error was not harmless where the jury could have found that defendant intended only to delete files that defendant believed defendant's supervisor had consented to and thus, that defendant acted without authorization, but not willfully. State v. Ramos, — N.C. App. —, 668 S.E.2d 357, 2008 N.C. App. LEXIS 2025 (2008).

G. Miscellaneous Instructions.

Use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of this section. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

It is not error, as commenting on the weight of evidence, to use in instructions the phrases "the evidence tends to show" and "evidence tending to show." State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Harris, 213 N.C. 648, 197 S.E. 142 (1938).

The use of the phrase "the State has presented evidence in this case which tends to show" in arraying the State's evidence, the same phrase being used when arraying defendant's evidence, did not constitute error as an expression of opinion by the court on the evidence. State v. Huggins, 269 N.C. 752, 153 S.E.2d 475 (1967); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

Use of the words "the State has offered evidence which tends to show" in a charge to the jury does not constitute an expression of opinion in violation of this section. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Statement of Judge's Recollection as to What Evidence Tended to Show. — The phrase, "I believe the evidence tends to show . . .," does not constitute an expression of opinion that any particular facts had been fully proven but rather is a statement of the trial judge's recollection as to what the evidence tended to show. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

Judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence." State v. Green, 134 N.C. 658, 46 S.E. 761 (1904); State v. Seaboard A.L.R.R., 145 N.C. 570, 59 S.E. 1048 (1907).

Use of the words "you want to find" in charging the jury as to the elements of the offense charged, construing the charge as a whole, merely placed the burden on the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

Use of Phrase "We Are Trying the Defendant". — In a prosecution for armed robbery, where the judge's instruction to the jury included "Now, members of the jury, in the case in which we are trying the defendant . . .," the use of the word "we" was proper and did not convey to the jury that the trial judge was part of the solicitor's (now prosecutor's) machinery for prosecution. State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974).

Instruction That There Is No Evidence. — If any testimony, however slight or insufficient, is given, which tends to establish the issue, it is error to instruct the jury that there is none. State v. Allen, 48 N.C. 257 (1855).

Failure to Repeat Limiting Instruction in Charge. — The fact that a limiting instruction was not repeated in the charge is not error in the absence of a request for a special instruction. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

Matters Subject to Mathematical Calculation. — Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error under this section. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931).

Motive. — A charge, "While it is permissible to show a motive as a circumstance to be considered by the jury, it is not necessary. All the state has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the indictment," was held to be error under this section. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

Instruction which mistakenly asserted that defendant took the stand and testified as to material matters of the case was reversible error, even though the defendant did not call this misstatement of the evidence to the court's attention before the jury retired to consider the case. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

It was prejudicial for the trial judge, when the defendant did not testify, to inform the jury that the defendant testified that he did shoot "into" the car when in fact a deputy sheriff testified that the defendant told him that he had shot "at" the car. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Correction of Inadvertent Statement. — Where the court instructed the jury to disregard an inadvertent statement previously made and then proceeded to charge the jury correctly, the inadvertence was discovered immediately and the correction was prompt and complete, this is sufficient and is all the law requires. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

Instructions which tend to bolster the witnesses for the State, and to impair the effect of defendant's plea of not guilty, are violative of this section. State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951), aff'd, 238 N.C. 535, 78 S.E.2d 388 (1953).

Failure to Instruct on Law Applicable to Evidence Offered in Support of Defense. — See State v. Sherian, 234 N.C. 30, 65 S.E.2d 331 (1951).

Circumstantial Evidence Instruction Not Required Where State Relies Primarily on Direct Evidence. — The duty imposed upon the trial court by this section to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony, where the State relies principally upon the direct evidence, and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. State v. Hicks, 229 N.C. 345, 49 S.E.2d 639 (1948).

Jury instructions on circumstantial evidence were adequate where defendant requested no additional instructions; and where the State relied primarily on direct evidence, instructions on circumstantial evidence were not required. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

The trial court is not required to instruct the jury on the law of circumstantial evidence in a criminal action involving direct and circumstantial evidence if the State primarily relies on direct evidence, and if the direct evidence is sufficient to warrant the conviction of the accused. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Failure to Instruct as to Acquittal. — By failing to give the converse or alternative view that acquittal should result if the jury were not satisfied beyond a reasonable doubt as to each and every stated element, the trial judge failed to provide even a general application of the law to the evidence raised by defendant's testimony. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

Use of Word "His" to Refer to All Witnesses. — In a prosecution for kidnapping, where the trial judge charged the jury to scrutinize the testimony of interested witnesses, and the trial judge used the personal pronoun "his" to refer to the testimony of such witnesses, the charge does not constitute an expression of opinion upon the credibility of defendant in violation of this section since the admonition to scrutinize included not only the defendant but also the testimony "of any witness" whether male or female. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Definition of Reasonable Doubt. — In a first-degree murder prosecution, the trial judge's definition of reasonable doubt as a "possibility of innocence" was more favorable to defendant than was required and therefore did not constitute prejudicial error. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Necessity of Proving Prerequisite Evidential Fact beyond Reasonable Doubt. — Where proof of a particular evidential fact beyond a reasonable doubt is obviously a prerequisite to the establishment of the defendant's guilt, if the circumstantial evidence in its entirety is deemed sufficient to withstand a defendant's motion for judgment as in case of nonsuit, an application of the law to the facts arising on the evidence as provided in this section requires that the presiding judge instruct the jury that proof of such fact beyond a reasonable doubt is a prerequisite to a verdict of guilty. State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967).

Statement That Evidence Satisfies "Beyond Reasonable Doubt". — Where the trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence, "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc., it was held that the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of this section. State v. Johnson, 207 N.C. 273, 176 S.E. 581 (1934).

Testimony of Witnesses Having Interest in Case. — There is no hard and fast form of expression or consecrated formula required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested. State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971).

A charge did not constitute an expression of opinion upon the credibility of defendant or his mother where the admonition to scrutinize their testimony in light of their interest in the case included not only the defendant and his mother but also the testimony of any witness who had an immediate personal interest in the outcome of the verdict. State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971).

It is proper for the trial court to instruct the jury to scrutinize the defendant's testimony in the light of his interest in the outcome of the case, and that if they believe he is telling the truth they will give to his testimony the same weight they would give to the testimony of any other believable witness. State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514 (1972).

When all the evidence shows a witness to be an accomplice, then the trial judge may, upon timely request, instruct that the witness's testimony should be carefully scrutinized. The trial judge must further advise the jury that if the testimony is believed, it should be given the same weight as any other credible evidence. State v. Diaz, 88 N.C. App. 699, 365 S.E.2d 7, cert. denied, 322 N.C. 327, 368 S.E.2d 870 (1988).

Reading Warrant. — In a drunken driving prosecution, the trial court did not express an opinion by the statement in the instructions that "the offense charged here was committed against the peace and dignity of the State" where the court was reading the warrant upon which the defendant was being tried. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

Charge as to Attitude and Conduct of Jurors. — The trial judge's charge was allowed which said that the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance, and that it is rarely productive of good for a juror upon entering the jury room to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691; 410 U.S. 987, 93 S. Ct. 1516, 36 L. Ed. 2d 184 (1973).

Informing Jury That Manslaughter Does Not Arise from Evidence. — It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Remark on Evidence of Character of Defendant. — An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the State, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of this section. State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938).

Charge Based on Uncontradicted Testimony. — A charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of an uncontradicted witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence. State v. Moore, 192 N.C. 209, 134 S.E. 456 (1926).

Statement Concerning Admission. — Where in the course of his charge to the jury a trial judge said: "I believe the State's evidence further tends to show that the defendant after being warned of his rights made an admission or confession to the police and told them that he had a gun; that is to wit: a .22 caliber pistol with a blue steel barrel and white handles," that was not an expression of opinion that defendant had confessed his guilt. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Instruction That Jury Could Consider Inconsistencies in Details. — An instruction to the jury that they can consider inconsistencies in details which did not pertain to the essential elements of the charges in determining the degree of credibility to be given any witness is proper. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A charge that "... and the State contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the State "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, is not an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the State. State v. McKnight, 226 N.C. 766, 40 S.E.2d 419 (1946).

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating this section. State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948).

Complete Instructions Not Necessary in Answering Specific Jury Question. — When the trial court has once instructed the jury in such manner as to declare and explain adequately the law arising on the evidence, there is no requirement that complete instructions be given again each time the jury returns to ask a specific question. In such instances, the trial court properly may answer the question asked without resorting to repetition of all of the instructions previously given. State v. Howard, 305 N.C. 651, 290 S.E.2d 591 (1982).

Instruction That Arresting Officer Had No Personal Interest or Bias. — In a prosecution for driving while under the influence of intoxicating liquor, an instruction to the jury, based on a contention by the State, that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, was a prohibited expression of opinion by the court, and its repetition by the judge, even though stated as a contention, gave it an emphasis that would weigh too heavily upon the defendant. State v. Maready, 269 N.C. 750, 153 S.E.2d 483 (1967).

Testimony of Codefendant. — Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. State v. Jenkins, 85 N.C. 544 (1881).

Instruction Held to Express Opinion Where Defendants Pleaded Not Guilty and Made No Judicial Admission. — Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," is an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

Identification of Defendant. — Where the only evidence connecting the defendant with operating a still was a coat found there with a receipt with defendant's name on it in one of the pockets, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, is an expression of an opinion. State v. Allen, 190 N.C. 498, 130 S.E. 163 (1925).

Reference to Victim Other Than Named in Indictment. — In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

Flight from Scene of Crime. — Trial judge did not err in failing to instruct, without request, on the weight to be given evidence of flight from the scene of a crime since flight is not an element of the State's case nor is its absence a defense, but is rather a circumstance to be considered by the jury in determining a general mens rea in a criminal case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instruction as to Voluntary Flight of Defendant. — The trial court's instruction that the voluntary flight of a defendant immediately after he is accused of a crime is not a circumstance sufficient in itself to establish his guilt, is not an expression of opinion, on the theory that the court implied to the jury that defendant had been formally charged with crime at the time of his flight from a deputy sheriff's car, when in fact the deputy had told defendant that he wanted to talk to him concerning a robbery. State v. Kirby, 7 N.C. App. 366, 172 S.E.2d 93 (1970).

Consideration of Prior Inconsistent Testimony. — In a prosecution for assault with a deadly weapon inflicting serious injury, trial judge did not abuse his discretion in failing to give a limiting instruction immediately before a witness's prior inconsistent statement was read to the jury where he cautioned the jury in his charge that the statement was to be considered not as substantive evidence, but only in weighing the credibility of the witness's testimony. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Failure to Distinguish Counts of Indictment. — Where the charge of the court fails to point out the distinction between the counts in the indictment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error, under this section. State v. Ray, 207 N.C. 642, 178 S.E. 224 (1935).

Failure to Instruct Concerning Admissions as to Unrelated Prior Convictions. — The trial court's failure to instruct that admissions as to convictions of unrelated prior criminal offenses were not competent as substantive evidence but were competent as bearing upon defendant's credibility as a witness does not constitute error, absent a request for such instruction. State v. Alexander, 16 N.C. App. 95, 191 S.E.2d 395, cert. denied, 292 N.C. 305, 192 S.E.2d 195 (1972).

Instruction as to Result of Failure to Convict. — In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" was held prejudicial as an expression of opinion by the court on the evidence. State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964).

Giving Correct Instructions on Interested Witnesses and Failing to Repeat All Original Instructions Not Error. — There was no merit to defendant's contention in a homicide prosecution that the trial judge impermissibly expressed an opinion (1) on the credibility of defendant and those of his relatives who testified on his behalf, since the court's instruction on interested witnesses was proper; (2) by failing to reinstruct the jury on the elements of self-defense when the jury on two occasions returned to the courtroom and requested additional instructions on the crimes charged, since a trial judge who has complied with a request by the jury for additional instructions is not required also to repeat his instructions as to other features of the case which have already been correctly given; and (3) in instructing the jury on the procedure which was to be followed upon their return of a verdict which found defendant guilty of first-degree murder, since the judge's comments did not precipitate a rush to judgment by the jury. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Where part of the court's instructions omitted the single word "if," it resulted in an expression of opinion by the court that the State had already shown that defendant's act was criminally negligent. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

Credibility of Defendant's Testimony. — The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924).

Instruction for Jury to Deliberate Further. — In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, where one juror, after the verdict was first returned and the jury was being polled, stated that at that time he had some doubt about defendant's mental capacity, the trial judge's instruction to the jury to deliberate further was not error, since the juror's statement was not a vote of guilty, but indicated only that the verdict was not unanimous. State v. Sellers, 29 N.C. App. 22, 222 S.E.2d 750 (1976).

Failure to include instructions as to purposes for which evidence was received is not ground for exception unless counsel has requested such an instruction. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Instruction on Weight of Evidence. — That testimony is admissible does not require the judge, without a request therefor, to instruct the jury as to the weight to be given the evidence. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instruction that Knife Was Deadly Weapon. — Instructing the jury that the knife allegedly used to commit the assault was a deadly weapon was not error where the evidence presented led to only one conclusion, that the knife was a deadly weapon. State v. Caudle, 172 N.C. App. 261, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005), vacated, in part, on other grounds, 361 N.C. 151 (2006), no error found on remand, 641 S.E.2d 351, 2007 N.C. App. LEXIS 478 (2007).

Instruction That Whether Statement Was Oral or Written Made No Difference. — In replying to the jury's question as to whether defendant's statement to the sheriff was oral or written, the trial court's instruction that, if the jury believed that such a statement was made, it would make no difference whether or not the statement was in writing, did not constitute an expression of opinion. State v. Crane, 11 N.C. App. 721, 182 S.E.2d 225 (1971).

Effect of a "Slip of the Tongue". — A mere inadvertent "slip of the tongue" in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. State v. Sinodis, 189 N.C. 565, 127 S.E. 601 (1925).

A mere slip of the tongue by the judge while reading his instructions to the jury which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

When Charge Contains a "Powerful Summing Up". — Where the trial judge in his general charge gives "every reasonable contention of the State," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the State. State v. McDowell, 129 N.C. 523, 39 S.E. 840 (1901).

Failure to charge as to the degree of circumstantial proof required to convict is not error, the charge that jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. State v. Shoup, 226 N.C. 69, 36 S.E.2d 697 (1946).

Presumption of Good Character. — Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Payment of Detectives to Secure Evidence Against Defendant. — In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924).

Failure to Accede to Juror's Request for Review of Instructions Given Day Before. — See State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Inadvertent Misstatement Held Not Error. — The court did not commit reversible error when it inadvertently used the words "appreciable extent" rather than "appreciable impairment" when referring to the effect which the intoxicating liquors must have upon an individual to sustain a conviction for driving under the influence. State v. Payne, 19 N.C. App. 511, 199 S.E.2d 132 (1973).

When two or more defendants are jointly charged with a crime, a charge which can be construed to mean that the jury must convict all if it finds one guilty constitutes reversible error. State v. Mitchell, 20 N.C. App. 437, 201 S.E.2d 720 (1974).

Statement That Offense Charged Violated Certain Statute. — In prosecution charging resisting lawful arrest in violation of G.S. 14-223, statement of the trial court during the instructions that "the offense charged here was committed in violation of G.S. 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Charge as to How Jury Should Find If They Believe Certain Witness. — It is error for the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. State v. Rogers, 93 N.C. 523 (1885).

Attributing Testimony of Another Witness to Defendant. — Where the trial judge attributed much of what a deputy sheriff testified that the defendant told him, as having been testified to by the defendant himself, the case of the State was strengthened to the prejudice of the defendant. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Burden of Rebutting Presumption So as to Reduce Charge. — Trial judge's charge to the jury in a prosecution for first-degree murder placing the burden on defendant to rebut the presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to instructions relating to second-degree murder and manslaughter. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instruction to Disregard Previous Inconsistent Instructions. — The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case it was held not prejudicial. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948).

Judicial Notice. — In a prosecution for taking a deer between the hours of sunset and sunrise on a public highway by the use of artificial light, the trial court did not express an opinion that the State had proved the time of commission of the offense by its instruction that as a matter of law "a few minutes after seven o'clock on December 9 is after sunset," the instruction amounting to no more than judicial notice of a physical fact of general knowledge. State v. Link, 13 N.C. App. 568, 186 S.E.2d 634 (1972).

Defendant's Admission of Fact. — In a prosecution for first-degree rape, where the trial court instructed that defendant's admission that he was in the car with the rape victim could be considered by the jury as an admission of a fact relating to the crime charged, there was no merit to defendant's contention that such instruction could have led the jury to believe that his mere presence was sufficient for conviction and that he had therefore committed the crime, since the trial court's instructions made clear what the jury must find in order to convict defendant. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

Charge on Contention in Defendant's Confession. — In a prosecution for breaking and entering and larceny, the trial court did not express an opinion on the evidence in charging on defendant's contention as contained in his confession that he acted only as a watchman during perpetration of the crimes where the court immediately thereafter instructed the jury that defendant denied being at the scene of the crime and claimed that his confession was made under duress. State v. McIlwain, 18 N.C. App. 230, 196 S.E.2d 614, cert. denied, 283 N.C. 668, 197 S.E.2d 877 (1973).

Instruction on Evidence to Be Considered Where One Victim Unavailable. — In a prosecution of defendants for two armed robberies wherein one of the victims was unavailable to testify at the trial and the jury, after deliberating for some time, asked the court whether "we have to base the verdict on strictly the evidence we have heard due to the fact that one of the State's witnesses is not here," the trial court did not err in instructing the jury that it could consider only the evidence it heard from the witness stand and the exhibits. State v. Jones, 50 N.C. App. 560, 274 S.E.2d 401 (1981).

Defendants Charged with Identical Of-

fenses. — Where the defendants were charged with identical offenses and where the evidence adduced at the consolidated trial was identical as to each defendant, it was not necessary for the trial judge to give wholly separate instructions as to each defendant in order to comply with this section. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

It was reasonable for the court to declare and explain the law arising from the evidence in the cases as to both defendants simultaneously. However, the trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

Court May Not Assume That Any Necessary Fact Is Proved. — It is reversible error for the court to assume that any fact necessary to establish the guilt of the defendant has been proved, and thus, by its instructions, to relieve the jury of its obligation to consider that issue. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Assumption of Existence or Nonexistence of Material Fact. — The trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

An instruction that there was evidence that defendant admitted some of the facts related to the crime was an assumption by the judge of a material fact which was not in evidence. It constituted an expression of opinion that a fact had been proven. State v. Clanton, 20 N.C. App. 275, 201 S.E.2d 365 (1973).

Assumption of Unproven Fact. — In homicide prosecution, instruction which assumed that defendant fired the fatal shot is erroneous as an expression of opinion by the trial court, since defendant's admission that he shot at the deceased and his stipulation that the cause of death resulted from gunshot wounds of the chest do not constitute an admission by defendant that he fired the fatal shot. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Eligibility for Parole Is Not Proper Consideration. — The long-standing rule in this jurisdiction is that a defendant's eligibility for parole is not a proper matter for consideration by a jury. A defendant's requested instruction concerning the eligibility for parole, although a correct statement of the law, was not appropriate information for the jury to consider in its deliberations. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Reasonableness of Detention of Homicide Victim. — Defendant was entitled to requested instruction concerning the reasonableness of his armed detention of homicide victim only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated in G.S. 15A-404(b) had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances. State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Instruction That Defendant Was "Scared and Confused" Held Not Required. — Taking the victim's car "while scared and confused" in order to escape the scene of a murder does not mean that defendant would not be guilty of armed robbery. The trial court would not err in failing to so instruct the jury. This evidence is not necessarily exculpatory, even if it is believed. State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

H. Objections to Instructions.

Exception Must Be Specific. — An exception to the charge on the ground that it failed to explain and apply the law to the evidence as required by this section may be disregarded as a broadside exception. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

An alleged error in the charge of the court to the jury must be specified, both as to alleged error in the charge actually given and as to an alleged failure to give an instruction required by the law. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

An assignment of error to the charge on the ground that it failed to explain and apply the law to the evidence as required by statute is a broadside exception and ineffectual, it being required that the assignment of error set forth the part of the charge challenged and point out specifically the error complained of. State v. Black, 14 N.C. App. 373, 188 S.E.2d 634, appeal dismissed, 281 N.C. 624, 190 S.E.2d 467 (1972).

An exception, for failure to charge the jury as required by this section, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence — otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. State v. Britt, 225 N.C. 364, 34 S.E.2d 408 (1945).

And Based on Proper Assignment of Error. — An exception for the failure of the court to comply with the provisions of this section must be based upon a proper assignment of error on this ground. State v. Muse, 230 N.C. 495, 53 S.E.2d 529 (1949).

Supreme Court will not go "on a voyage

of discovery" to ascertain wherein the judge failed to explain adequately the law in the case. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

Broadside Exception Untenable. — An exception that the court "did not charge the jury as to the law on every substantial feature of the case embraced within the issues and arising on the evidence" is untenable as a broadside exception. State v. Triplett, 237 N.C. 604, 75 S.E.2d 517 (1953).

Assignment of error that the judge failed to explain and apply or correlate the law and statutes to the different phases of the evidence as provided in this section is too general and indefinite to present any question for decision. Unpointed, broadside exceptions will not be considered. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

An argument in an appellate brief that the court failed to charge as to the contentions of the defendant in accordance with the statute is a broadside exception which is not sufficient. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

An exception to the entire charge of the court is a broadside exception and presents no question for review upon appeal. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered. Panhorst v. Panhorst, 9 N.C. App. 258, 175 S.E.2d 609 (1970), rev'd on other grounds, 277 N.C. 664, 178 S.E.2d 387 (1971); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

Broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of this section. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Where the error assigned is that "the court erred in failing to declare and explain the law arising on the evidence given in the case," and that in so failing the court violated this section, such an assignment of error is a broadside exception and will not be considered on appeal. State v. Rigsbee, 15 N.C. App. 218, 189 S.E.2d 583 (1972).

Objections Must Be Timely. — The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto will be considered on appeal. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

A slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975); State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

An inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction and will not be held reversible error when this is not done. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

An inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

But instruction containing statement of material fact not shown in evidence must be held prejudicial, even though not called to the court's attention at the time. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

While ordinarily error in stating contentions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

Errors Should Be Pointed Out at Trial. — Any error or omission in the statement of the evidence by court must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. State v. Thompson, 226 N.C. 651, 39 S.E.2d 823 (1946); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976), reconsideration denied, 293 N.C. 259, 243 S.E.2d 143 (1978).

Objections to the statement of contentions should be brought to the trial judge's attention in order that a misstatement can be corrected by the trial judge before verdict; otherwise they are deemed to have been waived. State v. Wilson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Any error or omission by the court in its review of the evidence in the charge to the jury must be then called to the attention of the court so that the court may have an opportunity to make the appropriate correction. State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Objections to Be Made Before Jury Retires. — The general rule in this State is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973); State v. Greer, 18 N.C. App. 655, 197 S.E.2d 601 (1973); State v. West, 21 N.C. App. 58, 203 S.E.2d 86, cert. denied, 285 N.C. 376, 205 S.E.2d 101 (1974); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423

U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976); State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Tolley, 30 N.C. App. 213, 226 S.E.2d 672, cert. denied, 291 N.C. 178, 229 S.E.2d 691 (1976); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976); State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977); State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978); State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

Objections to the trial court's review of the evidence must be made before the jury retires in order that the trial court may have an opportunity for correction. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979).

When counsel is unsatisfied with the summary of the evidence or contentions of the parties, in order to preserve the error, he must bring this to the court's attention before the jury is sent to deliberate on the issues. This affords the trial court the opportunity to correct any misstatements or to expand on its summary when this is deemed necessary. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

Exception After Verdict Comes Too Late. — The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so, as an exception after verdict comes too late to be considered on appeal. State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924); State v. Harvey, 214 N.C. 9, 197 S.E. 620 (1938); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938).

Objections Will Not Be Considered for First Time on Appeal. — Where defendant did not object to the court's statement of the State's contentions at the time they were given, objections thereto will not be considered for the first time on appeal. State v. King, 6 N.C. App. 702, 171 S.E.2d 33 (1969).

But Impermissible Comment May Be So Challenged. — Where the court impermissibly expresses an opinion in stating the contentions of the parties, the question may be considered for the first time on appeal. State v. Covington, 48 N.C. App. 209, 268 S.E.2d 231 (1980).

Waiver of Objections. — Generally objections to statements of the contentions of the parties not made at the time of trial so as to permit the court to correct them are deemed waived. State v. Covington, 48 N.C. App. 209, 268 S.E.2d 231 (1980).

If objections to the review of the evidence are not timely made, they are deemed to have been waived and will not be considered on appeal. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979).

Defendant waived any objection to the manner or length of the judge's statements of the contentions of either side by failing to make an appropriate challenge at trial before the jury retired. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Exception Held Insufficient to Present Question for Review. — An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under this section, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with this section does not properly present the question for review. State v. Brooks, 228 N.C. 68, 44 S.E.2d 482 (1947).

I. Error in Instructions.

Considerations Before Appellate Court. — In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Must Be Assigned as Error for Consideration on Appeal. — Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exceptions on this ground will not be considered on appeal. State v. Spivey, 230 N.C. 375, 53 S.E.2d 259 (1949); State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

An assignment of error to a charge should state wherein the charge fails to comply with this section. State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947).

Failure to instruct upon a substantive or "material" feature of the evidence and the law applicable thereto will result in reversible error, even in the absence of a request for such an instruction. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

Failure of the court to correctly instruct the jury on substantial features of case arising on the evidence was error for which defendant is entitled to a new trial. State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986).

Trial judge must charge the essential elements of the offense and that when he undertakes to define the law, he must state it correctly. If he does not, it is prejudicial error sufficient to warrant a new trial. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

Presumption That Court Correctly Instructed Jury. — When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Faison, 246 N.C. 121, 97 S.E.2d 447 (1957).

Upon review by certiorari of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. State v. Hedgebeth, 228 N.C. 259, 45 S.E.2d 563 (1947), cert. dismissed, 334 U.S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739 (1948).

Where the charge of the court to the jury does not appear in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by this section. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

When the charge is not included in a case on appeal, it is presumed to be free from error and also it is presumed that the jury was properly instructed as to the law arising upon the evidence. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

Cure of Error in Instruction. — Any error in the instruction excepted to as an expression of the court's opinion on the facts was completely cured by the instruction which followed, that the court had no opinion. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Erroneous Instruction Not Cured by Correct Instruction. — An error in giving an erroneous instruction is not cured by subsequently correctly stating the law. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

And New Trial Is Necessary. — Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, particularly when the incorrect portion of the charge is the application of the law to the facts. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

When the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Trial court's failure to give an agreed upon modified jury instruction was prejudicial because the trial court's error resolved a disputed issue of fact for the jury when it identified the shooter as an accomplice, not an "alleged accomplice," and thus, necessitated a new trial. State v. Castaneda, — N.C. App. —, 674 S.E.2d 707, 2009 N.C. App. LEXIS 367 (2009).

Harmless Error. — Although the language used in an instruction was a poor choice for the purpose intended and was expressly disapproved and would ordinarily require a new trial, it did not constitute reversible error because it had no prejudicial effect on the result of the trial and was therefore harmless. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Insubstantial technical errors in the charge which could not have affected the result will not be held prejudicial. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

Error Not Reversible Where Issues Simple. — Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not appear to have misled the jury, the error in this respect will not be held as reversible. Craig v. Stewart, 163 N.C. 531, 79 S.E. 1100 (1913).

Defendant Cannot Complain of Favorable Error in Instruction. — Where, in a murder case, an instruction on self-defense did not require defendant to show that he was not the aggressor and did not use excessive force in order to be acquitted upon his plea of self-defense, this was error favorable to the defendant of which he cannot complain. State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973), reconsideration denied, 293 N.C. 260, 247 S.E.2d 234 (1977).

The failure of the court to comply with this section will not be sufficient ground for a new trial, where the case on appeal shows that the charge of the court presented the case in the most favorable light for the defendant. State v. Pritchett, 106 N.C. 667, 11 S.E. 357 (1890).

Error as to One Count Cured by Verdict as to Another. — Where there were several counts of an indictment, and the charge was correct upon those on which a conviction was had, the verdict cured the error committed in not giving the principles of law arising from the evidence upon the count under which the appealing defendant was acquitted. State v. Church, 192 N.C. 658, 135 S.E. 769 (1926).

An erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

New Trial for Opinion Expressed in Stating Testimony and Contention. — Where in recapitulating the testimony and, more grievously, in stating what was said to be the State's contentions, the judge violated the prohibition against expressing an opinion on the evidence and merits of the case, such expressions of opinion entitle the defendant to a new trial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

§ 15A-1233. Review of testimony; use of evidence by the jury.

(a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) is based upon A.B.A. Standards, Trial by Jury § 5.2. Subsection (b) is a substantial modification of material covered by A.B.A. Standards, Trial by Jury § 5.1.

CASE NOTES

This statute imposes two duties upon the trial court when it receives a request from the jury to review the evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

This section mandates that the judge fulfill two duties: First, that all the jurors be returned to the courtroom and, second, that the judge exercise discretion in ruling upon the request. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the trial court must have all jurors present in the courtroom. Second, the trial court must exercise its discretion in determining whether to permit the requested evidence to be read to the jury. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Exercise of Discretion by Trial Court. — The decision to grant or deny a jury request for a review of evidence is committed to the discretion of the trial court; the trial court errs where it does not exercise its discretion in determining whether the jury should be allowed to review the evidence introduced at trial. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

Defendant's claim that the trial court's refusal to permit the jury to review deputy's testimony in attempted murder trial was arbitrary and not the result of a reasoned decision-making process was without merit; the record clearly showed that the trial court reasonably exercised its discretion under G.S. 15A-1233(a) in denying the jury's request based on its concern that the jury might overemphasize the deputy's testimony and not properly consider the totality of the evidence before them. State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

Denial of the jury's request for the testimony of three witnesses was not plain error under N.C. R. App. P. 10 as the trial court properly noted that it had the authority under G.S. 15A-1233(a) to order the jury to reexamine testimony read back or transcribed, but that it could deny the request in its discretion. State v. Ballard, — N.C. App. —, 668 S.E.2d 78, 2008 N.C. App. LEXIS 1979 (2008).

In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the trial court did not abuse its discretion nor commit prejudicial error when it denied a jury request to review certain exhibits as they were admitted solely for the purpose of illustrating an expert's testimony, the jury already had seen the exhibits in their entirety, and there was some inadmissible material in the exhibits. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

Failure to Conduct Jurors to Courtroom. — Defendant in capital murder case failed to meet his burden of showing prejudice as a result of the trial court's failure to conduct jurors to the courtroom as required by this section. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Where the trial court plainly exercised its discretion in denying jury's request to review testimony, and did not rely solely on the fact that the transcript was not readily available, defendant's assignment of error to such refusal was without merit. State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997).

It is a well established rule in North Carolina that the decision whether to grant or refuse a request by the jury for a restatement of the evidence after jury deliberations have begun lies within the discretion of the trial court. State v. Van Johnson, 346 N.C. 119, 484 S.E.2d 372 (1997).

This section authorizes a judge to allow the jury to take into the jury room exhibits and writings which have been admitted into evidence only when the jury so requests and all parties give their consent. State v. Wagner, 343 N.C. 250, 470 S.E.2d 33 (1996).

All Jurors to Be in Courtroom for Request to Review Testimony. — Both N.C. Const., Art. I, § 24 and subsection (a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, the legislature intended to place this responsibility on the judge presiding at the trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

The statute means that all jurors must be present not only when the request is made, but also when the trial court responds to the request, whatever that response might be. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

For the trial court to hear the jury foreman's inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of this section. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

Where the court heard the jury foreman's inquiry and responded to it without first requiring the presence of all jurors, it was prejudicial error as the question and the response may have been inaccurately relayed by the foreman to other jurors. State v. Robinson, 160 N.C. App. 564, 586 S.E.2d 534, 2003 N.C. App. LEXIS 1819 (2003).

No Consent Required for Courtroom Examination. — If the judge simply lets the jury examine requested evidence in open court, but does not allow the jury to take it into the jury room, there is no necessity for obtaining the consent of the parties. State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998), cert. denied, 348 N.C. 76, 505 S.E.2d 883 (1998), appeal dismissed, 348 N.C. 76, 505 S.E.2d 883 (1998).

Trial judge has sole discretion to decide matter of whether to grant jury's request for restatement of evidence. State v. Burgin, 313 N.C. 404, 329 S.E.2d 653 (1985).

Instructions, as read in their entirety, that the jury, all 12 members, was to use their own memories, was not an abuse of the trial judge's discretion. State v. Burgin, 313 N.C. 404, 329 S.E.2d 653 (1985).

It is a well established rule in North Carolina that the decision whether to grant or refuse a request by the jury for a restatement of the evidence after jury deliberations have begun lies within the discretion of the trial court. State v. Van Johnson, 346 N.C. 119, 484 S.E.2d 372 (1997).

The statutory requirement of subsection (a) that the trial court exercise its discretion is a codification of the common-law rule. State v. Van Johnson, 346 N.C. 119, 484 S.E.2d 372 (1997).

When no reason is assigned by the court for a ruling which may be made as a matter of discretion, the presumption on appeal is that the court made the ruling in the exercise of its discretion; however, where the statements of the trial court show that the trial court did not exercise discretion, the presumption was overcome, and the denial was deemed erroneous. State v. Van Johnson, 346 N.C. 119, 484 S.E.2d 372 (1997).

When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that it does so in accordance with this section. In addition, the trial court must instruct the jury that it must remember and consider the rest of the evidence. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Defendant waived his right to assert, on appeal, the judge's failure to bring the jury to the courtroom, where defendant's lawyer went beyond simply failing to enter an objection and consented to communication procedure. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

Subsection (b) Inapplicable to Jury Instructions. — Subsection (b) of this section applies to exhibits and writings received as evidence, not jury instructions. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Response to Jury by Message Sent Through Bailiff. — Trial judge's response to jury's request to review certain testimony by sending a message to the jury through the bailiff rather than by addressing the jury as a whole in open court, though erroneous, was not prejudicial to defendant. State v. McLaughlin, 320 N.C. 564, 359 S.E.2d 768 (1987).

Reading and Reexamining Requested Material. — Under this section the trial judge, in his discretion, may, after notice to the prosecutor and defendant, direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. State v. Lewis, 321 N.C. 42, 361 S.E.2d 728 (1987).

Where jury inquired about reviewing both prior testimony and exhibits, and the trial judge, after conferring with the prosecutor and defense attorney, denied the former and allowed the latter, and further reminded the jurors of his earlier charge to them to depend upon their individual and collective recollection of the evidence rather than any recapitulation of the evidence by the judge or the attorneys, the trial court properly exercised its discretion in accordance with this section. State v. Lewis, 321 N.C. 42, 361 S.E.2d 728 (1987).

Whether to allow a jury's request that previously admitted testimony be read to it lies solely within the discretion of the trial court. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Where jury foreman asked to review the transcript in general, the trial court exercised its discretion and complied with the requirements of this section, when the court explained it would not be fair to give the jury only portions of the testimony taken out of context of the whole trial, and instructed the jury to rely upon their individual recollections to arrive at a verdict. State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994).

Instruction That Jury Must Remember and Consider Rest of Evidence. — Where, after the jury in this case began deliberations, it submitted a question to the judge regarding rape victim's testimony about a conversation between defendant and her friends, the trial judge located the relevant portion of her testimony and had the court reporter read it to the jury, and immediately after the court reporter read rape victim's testimony, the trial judge instructed the jury that they "must consider and deliberate on all of the evidence and remember what the rest of the evidence was concerning that conversation," based on these instructions, the trial judge properly exercised his discretion in having the requested testimony read to the jury. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 129, 373 S.E.2d 123 (1988).

Materials Not Received in Evidence. — This section does not grant the trial judge authority to permit the jury to take exhibits or other materials which have not been received in evidence to the jury room under any circumstances. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

The trial judge has no authority to permit the jury to take exhibits or other materials to the jury room that have not been received into evidence. State v. Parker, 61 N.C. App. 94, 300 S.E.2d 451 (1983).

Where the jury's question related to a point for which no direct evidence had been introduced, the trial court could not exercise its discretion as to whether to allow the jury to review evidence on that point. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

It is error to allow the jury to take evidence into the jury room over a party's objection. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

By denying the jury's request to hear the testimony of both defendants and prosecution witnesses, and by allowing the jury to take witnesses' written statements, which directly implicated defendant, into the jury room over defendant's objection, there existed a reasonable possibility and a reasonable assumption that the jury may have inadvertently given more weight to witnesses' statements; the trial court's submission of the statements to the jury to take to the jury room over defendant's objection rose to a level of error sufficiently prejudicial to entitle defendant to a new trial. State v. Poe, 119 N.C. App. 266, 458 S.E.2d 242 (1995).

The consent of all parties is required before the jury may take evidence to the jury room. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

The trial court erred in delivering exhibits requested by the jury to the jury without bringing the jury into the courtroom and informing the defendant of the jury's request. State v. Bartlett, 130 N.C. App. 79, 502 S.E.2d 53 (1998).

Defendant must consent to request of jury to reexamine statements admitted into evidence only when the jury is allowed to take writings or exhibits to the jury room. State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983).

Upon the jury's request for defendant's statement, the trial court permitted the document to be taken into the jury room over defendant's objection. To do so was error. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Failure to Obtain Party's Consent Was Not Prejudicial. — Although the trial court did not obtain the consent of all of the parties in allowing prosecution witnesses' statement to go to the jury to take to the jury room, defendant was not prejudiced by this error; not only did defendant not object to the jury's request at trial, but witnesses' statement made no reference whatsoever to defendant. State v. Poe, 119 N.C. App. 266, 458 S.E.2d 242 (1995).

Trial court erred by allowing the jury to view photographs in the jury room without first obtaining the consent of all parties; however, reversal was not required since defendant was not prejudiced. State v. Thomas, 132 N.C. App. 515, 512 S.E.2d 436 (1999).

In a murder prosecution, the trial court's error, under G.S. 15A-1233(b), in allowing the jury to take an admitted written, prior consistent statement of a witness's testimony to the jury room without defendant's consent was harmless, in light of extensive other evidence of defendant's malice. State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17, 2002 N.C. App. LEXIS 17 (2002), cert. denied, 355 N.C. 495, 564 S.E.2d 47 (2002).

Refusal to Allow Jury to See Exhibit Held Not Prejudicial. — The trial court erred in refusing to accede to the jury's request to see an exhibit, and the court misstated the law when it informed the jury that it could only view exhibits during the trial while sitting together in the jury box. However, no prejudice was found by the error where the transcript showed that the jury did not unequivocally demand to see the particular exhibit. See State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The trial court did not abuse its discretion by refusing to allow the jury to review trial testimony as requested by the defendant, when the testimony taken as a whole supported the State's version of the events at issue, and the evidence and exhibits reviewed by the jury were not inconsistent with the testimony not reviewed by the jury. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

All elements of a trial should be viewed and heard simultaneously by all 12 jurors; to allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

Judge's Communication to Jury by Way of Written Notes. — Judge's communication with jury in the jury room via written notes violated the requirements of subsection (a) of this section; however, where the judge communicated with all jurors, since his notes were delivered to the jury as a whole, there was no violation of the North Carolina Constitution, and defendant failed to show other prejudice. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

Refusal to Submit Statement from Which Portion Excised. — Defendant was not prejudiced by the court's refusal to submit his statement to the jury, where a portion of the statement had been deleted and the court felt that submitting the statement without the excised portion would positively prejudice one side or the other. State v. Bell, 48 N.C. App. 356, 269 S.E.2d 201, cert. denied and appeal dismissed, 301 N.C. 528, 273 S.E.2d 455 (1980).

Effect of Failure to Object. — The defendant waived objection to the action of the trial court in permitting the jury to take into the jury room an item which had been introduced into evidence by failing to enter an objection or otherwise indicate his lack of consent at the trial. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

Under this section, a failure by the defendant to object to the jury's request, and the judge's permission, to take photographic exhibits into the jury room constitutes consent by implication. State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981).

Standard of Review on Appeal. — Violations of subsection (b) of this section, in allowing exhibits to go into the jury room over defendant's objection, are corrected by the appellate division only when they prejudice the defendants and such prejudice obtains only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises; the burden of showing such prejudice is upon the defendant. State v. Taylor, 56 N.C. App. 113, 287 S.E.2d 129 (1982); State v. Green, 77 N.C. App. 429, 335 S.E.2d 176 (1985).

Burden on Defendant to Show Abuse of Discretion. — Fact that the trial court granted the jury's request that the testimony of a State's witness be read does not in and of itself constitute prejudicial error. The defendant must show that the trial court abused its discretion. To make the showing, the defendant must demonstrate that the trial court's action was so arbitrary that it could not have been the result of a reasoned decision. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Exercise of Discretion in Denying Jury's Request. — Defendant's argument that the trial judge failed to exercise his discretion in denying the jury's request for portions of the transcript was without merit, where the transcript revealed that three times the trial judge stated that he was denying the request in the exercise of his discretion, and he even referred to the appropriate statute. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

The trial judge did not impermissibly deny the jury's request based solely on the unavailability of the transcript but plainly exercised his discretion. Moreover, the defendant acquiesced in the instruction and, therefore, could not complain that he was prejudiced by the court's action. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Trial court's statements that it "could not" provide the jury with a written transcript and that it was exercising its discretion by denying the jury's requests were not a disavowal of the trial court's authority to exercise its discretion under G.S. 15A-1233(a). State v. White, 163 N.C. App. 765, 594 S.E.2d 450, 2004 N.C. App. LEXIS 572 (2004), cert. denied, 358 N.C. 738, 602 S.E.2d 681 (2004).

Denial of the jury's request to "look at the transcripts" was within the trial court's discretion; the record revealed that the trial court consulted with the court reporter after receiving the request and determined that it was not going to grant the request because of the time associated with typing and printing an actual transcript. State v. Kitchengs, 183 N.C. App. 369, 645 S.E.2d 166, 2007 N.C. App. LEXIS 1165 (2007).

Court Not Exercising Discretion Entitled Defendant to New Trial. — The trial court's errors in not exercising its discretion in determining whether to permit the jury to review some of the evidence and in hearing the foreman's request and responding to it in the absence of the remaining jurors, entitled defendant to a new trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

The trial court erred in not exercising its discretion in denying the request to review testimony, where he said, "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence. . . ." State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

Where the trial judge did not exercise his discretion in denying the jury's request to rehear testimony of the only witness to identify defendant as the perpetrator, but denied the request because he felt that he could not grant it, the trial court's failure to exercise its discretion constituted reversible error. State v. Thompkins, 83 N.C. App. 42, 348 S.E.2d 605 (1986).

No Abuse of Discretion Found. — Where the trial court explained that to allow the jurors' request to review certain evidence might give undue importance to the portions of the evidence reviewed without giving equal importance to the other evidence in the case and cautioned the jurors that it was their duty to recall and consider all of the evidence, the trial court did not abuse its discretion in allowing the jurors' request in part; the transcript made it apparent that the trial court considered the court reporter's absence a factor in its decision. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102, 1999 N.C. App. LEXIS 1181 (1999).

Under G.S. 15A-1233(a), the decision whether to allow a jury to review trial testimony lies within the discretion of a trial court; trial court did not abuse its discretion when it did not allow the jury to review a sex offense defendant's testimony. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

In a drug case, a trial court did not err by responding to the jury's question regarding the amount of cocaine in a cooler under G.S. 15A-1233(a) because the record showed that no drugs were found inside; moreover, defendant was not prejudiced because the evidence showed that defendant was acquitted of the charges relating to cocaine. State v. Cardenas, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

In a case in which defendant was convicted of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not violate G.S. 15A-1233(a) when responding to the jury's request to review evidence during their deliberations. State v. Pointer, 181 N.C. App. 93, 638 S.E.2d 909, 2007 N.C. App. LEXIS 93 (2007).

Failure to Exercise Discretion Held Not Prejudicial Error. — Although judge may have failed to exercise his discretion in denying jury's request to have portions of transcript read to it, the error was not prejudicial. The testimony requested by the jury was not significant to defendant's defense; this testimony related to events occurring after defendant fired murder weapon, and thus this requested testimony, unlike alibi testimony, would not have exonerated defendant and was not critical to the jury's determination of defendant's guilt. State v. Hanible, 94 N.C. App. 204, 379 S.E.2d 696, cert. denied, 325 N.C. 548, 385 S.E.2d 505 (1989).

Defendant presented no showing of prejudice in a trial court's failure to exercise its discretion under the statute, so reversal of defendant's conviction for robbery with a dangerous weapon was not reversed. State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004).

Failure to Exercise Discretion Held Prejudicial Error. — The trial court's statement that it did not have the ability to present the transcript to the jury indicated a failure to exercise discretion and resulted in prejudicial error. State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999).

Failure to Exercise Discretion Entitled Defendant to New Trial. — With regard to a defendant's convictions on two counts of first degree sexual offense and rape of his young daughter, the trial court did not exercise its discretion under G.S. 15A-1233(a) as a result of failing to consider having the testimony of the victim and the defendant read to the jury after the jury had requested the same and indicating in its colloquy that it did not have the discretion to do so. The denial to the jury of an opportunity to review the requested testimony was prejudicial error since the evidence involved was material, which entitled the defendant to a new trial. State v. Long, — N.C. App. —, 674 S.E.2d 696, 2009 N.C. App. LEXIS 372 (2009).

Trial court did not act under a misapprehension of law in refusing to allow the jurors to reexamine the testimony of a social worker and an officer under G.S. 15A-1233, as it noted that it would be time-consuming for the testimony to be transcribed, but never indicated that it lacked authority to order the court reporter to transcribe the requested testimony; further, the trial court indicated that it was denying the request in its discretion, which implied that it understood that it could have granted the request. State v. James, — N.C. App. —, 643 S.E.2d 34, 2007 N.C. App. LEXIS 797 (2007).

Error in Permitting Jury to Take Exhibit to Jury Room Not Prejudicial. — Statement which had been admitted but not read into evidence, which did not contradict the trial testimony on critical points, did not prejudice defendant, although it was error to permit jury to take it to the jury room. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Defendant did not show a reasonable possibility that had the jury not been allowed to review photographs of the deceased in the jury room, a different result would have been reached, where the photographs had been previously admitted and shown to the jury to illustrate the testimony of witnesses, and the trial court had the discretion to permit the jury to reexamine the pictures closely and at length in the courtroom. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Even if it was error to allow the jury to take an exhibit into the jury room without the defendant giving his consent, the error was harmless where the exhibit consisted of the capital murder defendant's statement to the police, which already had been admitted into evidence, read to the jury in its entirety, and published individually to jurors as the State's rebuttal evidence. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

Trial court did not commit prejudicial error when it allowed the jury to review a redacted officer's report that admitted portions of defendant's statement to the officer that were testified to at trial. State v. Combs, 182 N.C. App. 365, 642 S.E.2d 491, 2007 N.C. App. LEXIS 696 (2007).

New Trial Not Warranted Where Error Could Not Change Outcome. — The trial court erred in permitting the jury to take written statements of defendant and two witnesses into the jury room during its deliberations without defendant's consent, but such error was not sufficiently prejudicial to warrant a new trial where it does not appear that the error could have changed the outcome of the trial. State v. Bell, 48 N.C. App. 356, 269 S.E.2d 201, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

Admission of Implicating Statement Held to Be Error. — The court erred in allowing witness' statement, which was inadmissible and which directly implicated defendant, to go into the jury room over defendant's objection and this error was sufficiently prejudicial to warrant a new trial for defendant on all charges. State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332, cert. denied, 320 N.C. 516, 358 S.E.2d 529 (1987).

Denial of Jury's Request Held Error. — Where a note the jury sent to the trial judge during deliberations asked, "May the jurors please be permitted to hear victim's testimony again?," and underneath this question were the words, "NO, That is not possible. Judge Saunders," the judge committed reversible error by failing to exercise discretion when he denied the jury's request and by failing to return the jury to the courtroom to receive and respond to their inquiry. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

Denial of Jury's Request Held Not Error. — The trial court did not err in refusing to grant the jury's request to "review" the testimony of the State's firearm and tool mark identification expert; the court indicated that it was denying the request because it did not want to give undue emphasis to the testimony of any particular witness. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Refusal to Allow Testimony to Be Read Back Held Error. — Where the trial judge refused the jury's request to have the transcript of one of the defendant's witnesses read to it, on the grounds that the judge did not have the authority to grant the jury's request in his discretion, the trial judge's action was actually a refusal to exercise his discretion and the denial of the jury's request was prejudicial error entitling the defendant to a new trial. State v. Lang, 301 N.C. 508, 272 S.E.2d 123 (1980).

The trial judge did not abuse his discretion in refusing to allow the jurors to have certain testimony read back to them after deliberations had begun, since the judge explained that the witness whose testimony was requested by the jury was one of a number of witnesses, and the court did not want to give special emphasis to any particular witness. State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Explanation for Not Allowing Jurors to See Materials Held Error. — Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under this section which was nevertheless harmless in itself, since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of G.S. 15A-1222 and 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Medical Records Properly Taken to Jury Room. — Where defendant's objection was made to preserve his objection to the admissibility of the exhibit, and he did not object to the court's decision to permit the jury to take the exhibit into the jury room, the court did not err by permitting the jury to take medical records to the jury room. State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997).

Defendant Not Prejudiced By Allowing Evidence Into Jury Room. — Though the trial court violated G.S. 15A-1233 by allowing the jurors to take previously admitted written statements into the jury room, defendant was not prejudiced as he, the trial court, and the prosecutor all agreed to this procedure. State v. Carter, — N.C. App. —, 679 S.E.2d 457, 2009 N.C. App. LEXIS 1174 (July 21, 2009).

Applied in State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980); State v. Dover, 308 N.C. 372, 302 S.E.2d 232 (1983); State v. McDermott, 68 N.C. App. 786, 316 S.E.2d 93 (1984); State v. Gilliam, 71 N.C. App. 83, 321 S.E.2d 553 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); Nelson v. Patrick, 73 N.C. App. 1, 326 S.E.2d 45 (1985); State v. Wilson, 73 N.C. App. 398, 326 S.E.2d 360 (1985); State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (1995); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998); State v. Wampler, 145 N.C. App. 127, 549 S.E.2d 563, 2001 N.C. App. LEXIS 546 (2001); State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008).

Cited in Doby v. Fowler, 49 N.C. App. 162, 270 S.E.2d 532 (1980); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981); State v. Jones, 54 N.C. App. 482, 283 S.E.2d 546 (1981); State v. Poplin, 56 N.C. App. 304, 289 S.E.2d 124 (1982); State v. Burbank, 59 N.C. App. 543, 297 S.E.2d 602 (1982); Barnes v. Ford Motor Co., 95 N.C. App. 367, 382 S.E.2d 842 (1989); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604 (1993); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (1998).

§ 15A-1234. Additional instructions.

(a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:

(1) Respond to an inquiry of the jury made in open court; or
(2) Correct or withdraw an erroneous instruction; or
(3) Clarify an ambiguous instruction; or
(4) Instruct the jury on a point of law which should have been covered in the original instructions.

(b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.

(c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

(d) All additional instructions must be given in open court and must be made a part of the record. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Trial by Jury § 5.3.

Legal Periodicals. — For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

Discretion of Court. — The trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions. State v. Prevette, 317 N.C. 148, 345 S.E.2d 159 (1986).

Court's Discretion in Using Exact Language Requested by Counsel. — Whether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Where the trial court instructed the jury in substantial conformity with the defense counsel's request, the court's refusal to give the defendant's special instructions verbatim was not an abuse of discretion. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

A trial court is not required to give a requested instruction in the exact language prayed for. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Judge is not required to repeat instructions which have been previously given to the jury in the absence of some error in the charge. Needless repetition is undesirable and has been held erroneous on occasion. State v. Hockett, 309 N.C. 794, 309 S.E.2d 249 (1983).

Court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge but may do so in its discretion. State v. Bartow, 77 N.C. App. 103, 334 S.E.2d 480 (1985).

Giving of Additional Instructions in Response to Inquiry. — Once the jury retires for deliberation, the trial court may give appropriate additional instructions in response to an inquiry made by the jury in open court. When the trial court gives such additional instructions, it may also give or repeat other instructions to avoid giving undue prominence to the additional instructions. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Additional Instructions Upheld. — Where questions asked by jurors indicated a general confusion about the elements of the crime charged, the trial court properly determined that repeating the pertinent portions of its instructions in their entirety would answer all the jury's questions; and as the trial court's additional instructions avoided giving undue prominence to any one of the questions or any part of the instructions, the trial court did not err. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Where the jury was instructed that they had three options: (1) guilty of robbery with a firearm, (2) guilty of common-law robbery, or (3) not guilty, and they had been instructed on the elements necessary for conviction of robbery with a firearm, the trial court did not err in instructing the jury only on the elements of common-law robbery in response to the jury's question about an element of robbery with a dangerous weapon. State v. Davis, 167 N.C. App. 770, 607 S.E.2d 5, 2005 N.C. App. LEXIS 14 (2005).

It was entirely appropriate for the trial court to instruct the jury on acting in concert following a jury deadlock because acting in concert should have been addressed in the trial court's original instructions. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

This statute does not preclude the trial court from receiving a written communication from the jury and responding to such in open court. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Additional Instructions Not Warranted. — The defendant was not entitled to additional instructions on his ability to evict trespassers where the focus of the case was on whether he used excessive force when he threw an ashtray at his girlfriend in order to, as he claimed, "defend himself." State v. Clegg, 142 N.C. App. 35, 542 S.E.2d 269, 2001 N.C. App. LEXIS 42 (2001), cert. denied, 353 N.C. 453, 548 S.E.2d 529 (2001).

Defendant's requested instruction regarding mens rea in his trial for first-degree sexual assault against his three children was untimely in that it came after the jury initially retired for deliberation; the instruction did not correctly state the law, since mens rea is not an element of first-degree sexual assault. State v. Bartlett, 153 N.C. App. 680, 571 S.E.2d 28, 2002 N.C. App. LEXIS 1247 (2002), appeal dismissed, cert. denied, 356 N.C. 679, 577 S.E.2d 892 (2003).

Repeated or Clarified Instructions Are Not Additional Instructions. — If the trial judge planned to give "additional instructions" in order to add to his previous charge because of omissions therein, then the judge might be required under this statute to inform the parties of the instructions he intended to give. However, when he is repeating or clarifying instructions previously given in response to the jury's question, these are not "additional instructions" as contemplated under subsection (c) of this section. State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979).

An instruction which is repeated at the jury's request does not constitute an additional instruction within the meaning of subsection (c) of this section. State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992).

The requirements set forth in subsection (c) do not apply when the court merely repeats a previous instruction; therefore, as long as the trial court is merely repeating a previous instruction, it is not necessary for the judge to give the parties an opportunity to be heard prior to reinstruction. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Defendant not permitted to make further argument to the jury after the trial court gave additional instructions pursuant to subsection (c), where the court changed its earlier instruction on securities fraud, but the new instruction was for clarification only and did not change the permissible verdicts. State v. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (1998).

Where the trial judge simply repeats or clarifies instructions previously given and does not add substantively to those instructions, the latter instructions are not "additional instructions" under this section, and the trial judge need not consult with the parties or give them an opportunity to be heard in advance of giving such instructions. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

Defendant's rights under G.S. 15A-1234 were not violated when the trial court clarified its original instructions based on questions the jury sent to the trial court during deliberations; that statute applied when the trial court gave additional instructions and the trial court did not give any additional instructions in the case. State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (2008).

Where jury requested clarification on the term "deliberation," the supplemental oral instructions given by the judge, coupled with the principal instructions he first gave, correctly informed the jury as to the applicable law and in no way prejudiced defendant's right to a fair trial. State v. Lewis, 346 N.C. 141, 484 S.E.2d 379 (1997).

Where the trial court merely repeated and clarified instructions it had previously given in its original charge to the jury and did not add substantively to those instructions, it was unnecessary for the trial court to consult with the parties and give them an opportunity to be heard prior to reinstructing the jury. State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996).

Clarification of "Deliberation" and "Cool State of Blood". — Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined State v. Ruof jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

In a situation involving an exchange of questions and answers between the court and the jury, it would obviously be cumbersome, impractical and unnecessary for the court to confer with counsel before answering each question put to him by the jury. It is inconceivable that the legislature intended to require such a procedure. State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979).

Failure to Answer Question as to Whether Particular Element Proved. — Where the jury had some question as to whether the State had proved beyond a reasonable doubt that the perpetrator of a sexual offense was armed with a dangerous or deadly weapon, and thus, they were inquiring as to the effect of such a finding upon their determination of guilt on the various offenses charged, it was prejudicial error for the trial judge not to answer jury questions on this point. State v. Hockett, 309 N.C. 794, 309 S.E.2d 249 (1983).

Correction of Instruction. — Although the trial judge did not instruct the jury in his original instruction that they could consider the purpose of facilitating flight, that omission was error favorable to the defendant where the indictment and the evidence both supported the instruction, and it was therefore not error for the trial judge to correct his instruction before the jury rendered its verdict on the kidnapping charge, as the State was entitled to the instruction and the instruction did not in any way change any instructions discussed at the charge conference. State v. Mason, 317 N.C. 283, 345 S.E.2d 195 (1986).

Where it did not appear from the jurors' question that they were confused about the burden of proof, nor were additional instructions of a nature to give undue emphasis to the State's case, the judge did not abuse his discretion in denying defendant's request to repeat the instructions. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Where the jury specifically requested clarification of elements of first degree murder only, the trial court did not abuse its discretion in refusing to reinstruct on second degree murder pursuant to defendant's request. State v. Prevette, 317 N.C. 148, 345 S.E.2d 159 (1986).

Accepted Parahrases Not Additional Instructions. — Trial court was not required to inform the parties or afford them opportunity to be heard concerning a clarifying instruction which consisted of legally-accepted paraphrases of "deliberately bent on mischief" as this did not constitute additional instructions in the legal sense. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

On Appeal, No Need to Have Objected at Trial. — Defendant did not have to object at trial in order to pursue his argument concerning this section on appeal. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

Failure to Bring Entire Jury to Courtroom to Respond to Jury's Question. — Failure of the trial court to bring the entire jury into the courtroom to respond to the jury's question was reversible error where the court answered only to the jury foreman and the jury foreman struggled in his effort to present the question to the court, thus creating a great opportunity for miscommunication to the remaining jurors to the prejudice of defendant. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

The requirement that all jurors be brought to the courtroom helps ensure that the judge understands what the jury has asked. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

All elements of a trial should be viewed and heard simultaneously by all 12 jurors; to allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

Where the court heard the jury foreman's inquiry and responded to it without first requiring the presence of all jurors, it was prejudicial error as the question and the response may have been inaccurately relayed by the foreman to other jurors. State v. Robinson, 160 N.C. App. 564, 586 S.E.2d 534, 2003 N.C. App. LEXIS 1819 (2003).

Defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Error in Instructing Jury Held Harmless. — Where the trial court determined that instruction as given adequately explained the law defining felony murder and twice offered to charge the jury again on this subject, the error was harmless. State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

Applied in State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995); State v. Price, 344 N.C. 583, 476 S.E.2d 317 (1996).

Cited in State v. Parker, 61 N.C. App. 585, 301 S.E.2d 450 (1983); State v. Southern, 71 N.C. App. 563, 322 S.E.2d 617 (1984); State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992); State v. Lewis, 346 N.C. 141, 484 S.E.2d 379 (1997); State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002); State v. Dexter, 151 N.C. App. 430, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002); State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002).

§ 15A-1235. Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The Commission considered three possible approaches to the deadlocked jury:

(1) the "weak" charge set out in the A.B.A. Standards;

(2) the "strong" Allen charge traditionally used in the federal courts; and

(3) the even stronger charges authorized under North Carolina case law.

After much discussion, the Commission approved this section, which in its essentials follows A.B.A. Standards, Trial by Jury § 5.4. The Commission deleted from its draft a provision previously sanctioned under North Carolina case law which would have authorized the judge to inform the jurors that if they do not agree upon a verdict another jury may be called upon to try the case.

The four subdivisions of subsection (b) are linked together with the conjunction "and." This reflects the Commission's view that whenever the judge gives any of the instructions authorized by subsection (b), he must give all of them.

Subsection (c) requires that the instructions to a deadlocked jury must contain all the provisions of subsections (a) and (b).

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

I. General Consideration.
II. Instructing Jurors Not to Surrender Convictions.
III. Comment on Expense of Retrial.

I. GENERAL CONSIDERATION.

Section is based upon the standards approved by the American Bar Association. This enactment provides trial judges and practicing bar with clear standards for instructions urging verdicts. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

This section represents a choice of the "weak" charge approved in the American Bar Association standards, as opposed to the "strong" charge traditionally used in federal courts and the even stronger charges authorized under North Carolina case law. County of Lenoir ex rel. Dudley v. Dawson, 60 N.C. App. 122, 298 S.E.2d 418 (1982).

Purpose. — The legislature intended by enactment of this section to provide that a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

The purpose behind the enactment of this section was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision. State v. Evans, 346 N.C. 221, 485 S.E.2d 271 (1997), cert. denied, 522 U.S. 1057, 118 S. Ct. 712, 139 L. Ed. 2d 653 (1998).

Purpose behind the enactment of G.S. 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

Section Provides Standards for Instructing Deadlocked Jury. — This statute, which borrows from standards approved by the American Bar Association, is the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Brown, 56 N.C. App. 390, 289 S.E.2d 142 (1982); State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

Mere failure to follow the form instructions of this section is not in itself reversible error. State v. Sanders, 81 N.C. App. 438, 344 S.E.2d 592, cert. denied, 318 N.C. 419, 349 S.E.2d 604 (1986).

Verbatim Adherence to Section Not Required. — The instructions prescribed in this section need not be given verbatim whenever a jury is deadlocked; rather, such instructions are guidelines, and the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982); State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

The plain language of the statute provides that the trial court may give or repeat the instruction provided in subsections (a) and (b). State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

The trial court is not required to give instructions listed in subsection (b) upon request, but may give them in its discretion. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Giving of Some Instructions Under Subsections (a) or (b) Necessitates Giving All. — When a trial judge attempts to give any of the instructions of subsections (a) and (b) of this section to a deadlocked jury, he must give all those instructions. However, where defendant did not object at trial, the evidence of defendant's guilt was very strong, and the instructions given were in substantial conformity with the statute, the error committed did not amount to "plain error". State v. Logan, 79 N.C. App. 420, 339 S.E.2d 449, cert. denied, 316 N.C. 383, 342 S.E.2d 903, writ denied, 316 N.C. 199, 341 S.E.2d 584 (1986).

Whenever the trial judge gives the jury any of the instructions authorized by subsection (b) of this section, whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them. State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

Trial judge committed error when, after forming the opinion that the jury was deadlocked, he gave the instructions set out in subdivisions (b)(1) and (b)(2) of this section, but failed to give the instructions set out in (b)(3) and (b)(4). State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986), holding, however, that this error was not "plain error" entitling defendant to a new trial.

Subsection (c) is permissive rather than mandatory. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Instruction Under Subsection (c) Within Discretion of Trial Judge. — It is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to subsection (c) of this section. State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

Instruction Pursuant to Subsection (c) Held Not Prejudicial. — Any error in the court's decision to instruct the jury pursuant to subsection (c), where the charge was given during a break in the deliberations, and no inquiry was made nor indication given as to the numerical division of the jury, was not prejudicial to defendant, even though the jury had been deliberating less than two hours and there was no indication that the jury was deadlocked. State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987).

Full Instruction Not Required. — It was not error not to give the full instruction set out in this section where the jury never indicated it was deadlocked or that it was having difficulty reaching a unanimous verdict. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, 516 U.S. 833, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995), overruled in part, State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997).

Where the jury never indicated that it was deadlocked or that it was having difficulty reaching a unanimous decision, the court did not err in delivering less than the full instructions set out in this section. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

Discretion of Trial Judge as to Mistrial. — The action of the judge in declaring or failing to declare a mistrial under this section is reviewable only in case of gross abuse of discretion. State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980).

The granting or denial of a motion for a mistrial is a matter within the sound discretion of the trial judge. State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982); State v. Hall, 73 N.C. App. 101, 325 S.E.2d 639 (1985).

G.S. 15A-1235 does not mandate a mistrial where it appears that there is no reasonable possibility of agreement by the jury on a verdict; the decision to declare a mistrial is in the trial judge's discretion in those circumstances. State v. Replogle, 181 N.C. App. 579, 640 S.E.2d 757, 2007 N.C. App. LEXIS 257 (2007).

The trial judge did not violate this section by refusing to declare a mistrial where the court never expressed irritation at the jury for failing to reach a unanimous verdict, or intimated that the jury would be held for an unreasonable period of time to reach such a verdict although the jury was required to deliberate late on a Friday night and although it took the jury approximately eight hours to reach a verdict. State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815, 2000 N.C. App. LEXIS 1401 (2000).

Trial court did not err by allowing defendant to be convicted with fewer than 12 jurors finding him guilty because the trial court's use of the term "consensus" in an instruction did not violate the verdict unanimity requirement, as the trial judge twice repeated that the jury had to unanimously agree on a verdict. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Urging Jury to Reach Verdict. — Absent other factors, giving an instruction urging a jury to reach a verdict before the jury commences its deliberations is not reversible error. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Inquiry as to Jury's Division. — The trial court did not coerce a verdict by his inquiry as to the jury's division. The making of such an inquiry lies within the sound discretion of the trial judge. State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986).

A trial judge's questions about the numerical division of a jury do not constitute a per se violation of N.C. Const., Art. I, § 24. Rather, the proper analysis is whether, in considering the totality of the circumstances, the inquiry was coercive. State v. Bussey, 321 N.C. 92, 361 S.E.2d 564 (1987).

In the totality of the circumstances, judge's inquiry as to the numerical division of the jury was not coercive of the jury's verdict. State v. Bussey, 321 N.C. 92, 361 S.E.2d 564 (1987).

Challenge of defendant in a murder case to the trial court's inquiry into the numerical division of the deliberating jury and its instruction concerning deliberating further toward a verdict would be decided by employing a totality of the circumstances test. State v. Forrest, 321 N.C. 186, 362 S.E.2d 252 (1987), holding that the instruction given was not coercive and did not constitute error. State v. Forrest, 321 N.C. 186, 362 S.E.2d 252 (1987).

An inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive. Without more, it is not a violation of the defendant's right to a jury trial. State v. Beaver, 322 N.C. 462, 368 S.E.2d 607 (1988).

Trial judge did not violate defendant's right to trial by jury under N.C. Const. art. I, § 24 by asking the jury about its numerical division on the issue of guilt when the jury could not reach a verdict on charges of conspiracy to traffic in cocaine by transportation, trafficking in cocaine by transportation, and maintaining a vehicle which was used for unlawfully keeping or selling controlled substances, or abuse its discretion by giving the jury an instruction on further deliberations, pursuant to G.S. 15A-1235. State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003).

Deadlock Justifies Mistrial. — A jury's failure to reach a verdict due to deadlock is "manifest necessity" justifying declaration of a mistrial. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

Jury Indicated They Were Nearing a Decision. — Where the defendant made his motion for a mistrial after the jury indicated to the trial judge that it was approaching a unanimous verdict, and the trial court, in denying the mistrial motion, considered the nature of the charges, the evidence presented in the trial, and the time spent deliberating up to that point in proportion to the total length of the trial proceedings, the trial court did not abuse its discretion by denying the defendant's mistrial motion based on deadlock. State v. Jones, 110 N.C. App. 169, 429 S.E.2d 597 (1993), cert. denied, 336 N.C. 612, 447 S.E.2d 407 (1994).

Trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

The defendant's contention that supplemental instruction which said "[a]ll of us have a considerable amount of time in this case" was coercive was without merit. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Trial court did not abuse the court's discretion when, only two hours after the jury began deliberating, the court inquired into the numerical division of the jury and gave an Allen instruction because the trial court did not attempt to coerce the jury into reaching a verdict. State v. Streeter, 191 N.C. App. 496, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (2008).

In deciding whether instructions have had the effect of coercing a verdict, the court will consider the circumstances under which the instructions were given and the probable impact of the instructions on the jury. State v. Sanders, 81 N.C. App. 438, 344 S.E.2d 592, cert. denied, 318 N.C. 419, 349 S.E.2d 604 (1986).

The totality of circumstances will be considered in determining whether the jury's verdict was coerced. State v. Beaver, 322 N.C. 462, 368 S.E.2d 607 (1988).

Jury's Verdict Held Not Coerced. — The fact that the jury deliberated for a considerable length of time and into the weekend and that the court made several inquiries of the jury because the jury took as much time as it did in the deliberations did not show there was coercion. State v. Beaver, 322 N.C. 462, 368 S.E.2d 607 (1988).

The trial court's statements that "we've got all the time in the world" and "we've got all week" did not convey the meaning that the trial court would force the jury to continue to deliberate until a verdict was reached, no matter how long it took; the trial court facilitated the necessary deliberation, but it did not force a verdict. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

When a jury indicated it was having difficulty reaching a verdict, the trial court did not coerce a verdict by allowing the jury to continue to deliberate past 5:00 p.m., as the jury made the decision to continue deliberating, nor was the trial court's giving of an Allen charge coercive, as the jury deliberated only one and one-half hours after 5:00 p.m. and was properly allowed to decide whether to continue deliberating. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

Jury Verdict Not Coerced by Repeated Allen Instructions. — Although it was possible that a trial court gave Allen charges more frequently than was necessary to assist the jury in reaching a verdict, the trial court did not deprive defendant of a fair trial by concluding that after each one-to-two hour period of deliberation, the jury was having difficulty reaching a verdict and an Allen charge would be appropriate under G.S. 15A-1235(c). State v. Boston, 191 N.C. App. 637, 663 S.E.2d 886, 2008 N.C. App. LEXIS 1487 (2008), appeal dismissed, review denied, 362 N.C. 683, 670 S.E.2d 566 (2008).

Charge Will Be Considered as a Whole. — One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

And in the Context of the Circumstances. — In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Peek, 313 N.C. 266, 328 S.E.2d 249 (1985).

Jury could have reasonably concluded that it was required to deliberate until it reached a unanimous verdict, which was a violation of G.S. 15A-1235(c) and N.C. Const. art. I, § 24, where the trial court encouraged deliberations despite being told three times that jury was deadlocked, and it did not address juror's request to be absent the next day so he could attend his wife's surgery. State v. Dexter, 151 N.C. App. 430, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002).

No Rule as to How Long Jury Should Deliberate. — Although the jury deliberated for four days, while only two days were used for the presentation of evidence, Supreme Court declined to adopt any rule as to how long the jury should be allowed to deliberate which is based on the time required for the State to present evidence; it is left to the discretion of the trial court to decide if jury agreement as to a verdict is reasonably possible. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

No Rule as to How Long Before Allen Instruction. — G.S. 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give an Allen instruction. Rather, G.S.

15A-1235(c) provides that the trial court may give the Allen instruction if it appears to the judge that the jury is unable to reach a verdict. State v. Boston, 191 N.C. App. 637, 663 S.E.2d 886, 2008 N.C. App. LEXIS 1487 (2008), appeal dismissed, review denied, 362 N.C. 683, 670 S.E.2d 566 (2008).

Setting of Time Limit for Reaching Verdict. — When the jury informed the court that it was divided 10 to two, the court's response that the jury could continue to deliberate that night, could return to deliberate the next day, and had two more days in which deliberations could take place did not coerce the jury into reaching a decision, particularly in light of the court's instruction the following morning that the jury should reach a unanimous verdict if possible without surrendering their conscientious convictions. State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Inquiry into Whether to Continue Deliberations That Day. — The provisions of this section were not invoked where the trial judge called in the jury to ask whether they had been able to reach a verdict for the purpose of deciding whether to allow the jury to continue that day or resume deliberations the next day, and the foreman stated that they were still divided, but the jury at no time indicated that they were deadlocked or unable to reach a verdict. State v. Paul, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

Failure to Reinstruct on Insanity Defense Held Not Error. — The trial court did not err in failing to instruct that the jury could find defendant not guilty by reason of insanity when the court instructed that if the jury had a reasonable doubt as to one of the elements of the offense charged, it should return a verdict of not guilty, or when the court instructed that all 12 minds must agree on a verdict of guilty or not guilty where the court included the possible verdict of not guilty by reason of insanity at the beginning of the instructions, after the instructions on the elements of the offense charged, and in the final mandate. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Discretion of Trial Judge. — Trial court did not abuse its discretion when it encouraged the jury to overcome its difficulty in reaching a verdict, properly reinstructed the jury as to its duty under this section, and denied defendant's motion for a mistrial due to deadlock. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Standard of Review on Appeal. — The fundamental principle is that unless there is a reasonable probability that the alleged error in the instruction changed the result at trial, the verdict should not be disturbed on appeal. State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980).

It should be the rule rather than the exception that a disregard of the guidelines established in this statute will require a finding on appeal of prejudicial error. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Giving of Supplemental Instruction Not Abuse of Discretion. — Trial court did not abuse its discretion by providing a supplemental instruction to the jury which did not threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

Trial court did not abuse its discretion in instructing the deadlocked jury to continue deliberating after the jury had deliberated for two and one half hours before indicating they could not come to a consensus but then reached a verdict one hour after being so instructed and receiving a fifteen minute recess. State v. Allen, — N.C. App. —, 667 S.E.2d 295, 2008 N.C. App. LEXIS 1820 (2008).

No Prejudicial Error in Giving of Allen Instruction. — Even assuming that the trial court erred in deciding to instruct the jury pursuant to G.S. 15A-1235, given the absence of any indication of deadlock or coercion, any error was not prejudicial to defendant. State v. Herrera, — N.C. App. —, 672 S.E.2d 71, 2009 N.C. App. LEXIS 126 (2009).

Applied in State v. Bunn, 66 N.C. App. 187, 310 S.E.2d 792 (1984); State v. Fowler, 312 N.C. 304, 322 S.E.2d 389 (1984).

Cited in State v. Berkley, 56 N.C. App. 163, 287 S.E.2d 445 (1982); State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982); State v. Sandlin, 61 N.C. App. 421, 300 S.E.2d 893 (1983); State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493 (1984); State v. McEntire, 71 N.C. App. 720, 323 S.E.2d 439 (1984); State v. Mann, 77 N.C. App. 654, 335 S.E.2d 772 (1985); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Felton, 330 N.C. 619, 412 S.E.2d 344 (1992); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. Aikens, 342 N.C. 567, 467 S.E.2d 99 (1996); State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996); State v. Woody, 124 N.C. App. 296, 477 S.E.2d 462 (1996); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997); State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000); State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001); State v. Dexter, 151 N.C. App. 430, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008).

II. INSTRUCTING JURORS NOT TO SURRENDER CONVICTIONS.

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Failure to Instruct Jurors Not to Surrender Convictions Not Error Absent Request. — Where the trial court's instruction on unanimity of the verdict complied with this section, the court's failure to instruct that the individual jurors were not to surrender their own convictions solely in order to reach a verdict was not error since the defendant requested no instructions to that effect. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Instruction Held Sufficient. — A strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone" was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Instructions were proper where the trial court urged the jury to attempt to reach a unanimous decision but to do so without doing violence to the jurors' individual judgment and cautioned the jurors not to surrender their honest convictions solely because of the opinions of their fellow jurors or merely for the purpose of returning a unanimous decision. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Where the court's abbreviated version of jury instructions under this section conveyed to jurors that they were not to sacrifice their individual beliefs in order to reach a verdict, the abbreviated instruction did not have a prejudicial impact. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

Given the length of deliberations, the substantial quantity of conflicting evidence, the failure of the defendant to request the court to instruct the jury on its failure to reach a verdict pursuant to this section, and the fact that the record was devoid of any evidence suggesting that the jury indicated it was deadlocked, the trial court did not err in failing to declare a hung jury or in failing to instruct ex mero motu as to each juror's individual responsibility under this section. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Jury instructions that the trial court gave to the jury were not coercive and, thus, the trial court did not err in giving them in defendant's murder trial; the record did not support defendant's contention that the jury was deadlocked and the trial court instructed the jurors not to surrender their honest convictions in trying to reach a verdict. State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (2008).

III. COMMENT ON EXPENSE OF RETRIAL.

Comment Prohibited. — Under this section, trial judges are prohibited from mentioning or suggesting that wasted jury and judicial resources might occur as a result of mistrials in criminal cases. County of Lenoir ex rel. Dudley v. Dawson, 60 N.C. App. 122, 298 S.E.2d 418 (1982).

To charge a jury, in civil or in criminal cases, that failure to reach a verdict will mean another week or more of the court's time for the retrial of this case, and that a mistrial will mean that another jury will have to be selected to hear the case and evidence again, is legally inaccurate. County of Lenoir ex rel. Dudley v. Dawson, 60 N.C. App. 122, 298 S.E.2d 418 (1982).

Trial court's comment to a jury which had indicated it was deadlocked that the case would probably have to be retried, at great expense to the taxpayers, was reversible error. State v. Burroughs, 147 N.C. App. 693, 556 S.E.2d 339, 2001 N.C. App. LEXIS 1240 (2001).

Isolated mention of the necessity to retry the case does not warrant a new trial unless the charge as a whole is coercive. State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980).

The isolated mention in an instruction to the jury of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Mention of Expense of Retrial Must Be Carefully Scrutinized. — Where the jury is deadlocked, and this fact is known to the trial judge, the mention of inconvenience and additional expense may well be prejudicial and harmful to the defendant, and must be scrutinized with extraordinary care. State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981).

Such Comment Should Be Accompanied by Instruction That Jurors Not Surrender Convictions. — The trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Error to Comment on Retrial Before Jury Has Announced Deadlock. — It is error to instruct a deadlocked jury that its inability to agree will result in the inconvenience of having to retry the case, where such instruction is given before the jury has returned announcing any deadlock. State v. Lipfird, 302 N.C. 391, 276 S.E.2d 161 (1981).

Instruction Held Not Error. — The trial judge's additional instruction to the jury after it had deliberated for an hour that the case would have to be retried if the jury failed to reach a verdict and that the jurors were as capable of deciding the case as any other group of jurors, if contrary to this section, did not constitute prejudicial error where the instruction was not directed to the minority but to all the jurors; the court's reference to another trial in the event the jurors failed to agree was followed by an almost verbatim recital of the instructions set forth in subsection (b) of this section, and the charge made it clear that the court was not asking any juror to surrender any conscientious opinion he might have but was only asking the jurors to make every reasonable effort to arrive at a unanimous verdict. State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980).

The court's instruction that a disagreement meant "that if this case is not brought to a verdict as I previously instructed you that another judge and another jury in another week will try this case again" was not erroneous since an isolated mention of the necessity to retry the case does not warrant a new trial unless the charge as a whole is coercive. State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Despite the trial court's erroneously informing a deadlocked jury under G.S. 15A-1235 that if they did not agree upon a verdict another jury might be called upon to try the case, and that the state and defendant had a tremendous amount of time and money invested, given the evidence, defendant was not entitled to a new trial; the error was not so fundamental under G.S. 15A-1443 that absent the error, the jury probably would have reached a different verdict or the error constituted a miscarriage of justice. State v. Pate, 187 N.C. App. 442, 653 S.E.2d 212, 2007 N.C. App. LEXIS 2423 (2007).

Instruction Held Error. — Where the jury foreman advised the court that in his opinion the jury could not reach a decision, it was error for the trial court to charge the jurors that if they did not agree upon a verdict another jury might be called upon to try the case; that the State and defendants had a tremendous amount of time and money invested; and that retrial involved a duplication of all the time and expense. State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979), cert. denied, 299 N.C. 739, 267 S.E.2d 667 (1980).

Where not only did the trial judge have a statement from the foreman that the jury was unable to reach a verdict, but in addition the court was advised of the 11 to one numerical division of the jury, his instruction which clearly mentioned the potential inconvenience and use of the court's time incident to the jury's failure to reach a verdict constituted prejudicial error. State v. Johnson, 80 N.C. App. 311, 341 S.E.2d 770 (1986).

The trial judge's instruction that the jury should try to reconcile its differences because of the expense of a retrial, given after the foreperson announced they were unable to agree, constituted prejudicial error. State v. Buckom, 111 N.C. App. 240, 431 S.E.2d 776, aff'd, 335 N.C. 765, 440 S.E.2d 274 (1994).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

(a) The judge at appropriate times must admonish the jurors that it is their duty:

(1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;

(2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;

(3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;

(4) To avoid reading, watching, or listening to accounts of the trial; and

(5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

(b) The judge in his discretion may direct that the jurors be sequestered.

(c) If the jurors are committed to the charge of an officer, he must be sworn by the clerk to keep the jurors together and not to permit any person to speak or otherwise communicate with them on any subject connected with the trial nor to do so himself, and to return the jurors to the courtroom as directed by the judge. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 3.)

OFFICIAL COMMENTARY

Compare A.B.A. Standards, Function of the Trial Judge § 5.2.

The Commission considered inserting in subsection (a) an admonition that the jurors should not go and view the place where the offense was alleged to have occurred, but omitted it because in some instances the place may be a public one difficult to avoid. In cases in which viewing the scene may present a problem, the last sentence of subsection (a) may be utilized by the judge.

The Commission directed that the Commentary reflect its interpretation of the word "sequestered" in subsection (b). It intended to authorize either complete sequestration, including separate lodging facilities at night, or partial sequestration during lunch or while in the vicinity of the courthouse.

A companion provision is the amendment to G.S. 9-17 providing that the State will pay all the expenses of sequestration of jurors.

CASE NOTES

Admonition to Maintain an Open Mind. — Where the court was simply admonishing the jurors, pursuant to subdivision (a)(3) of this section, to maintain an open mind until they conducted their deliberations, the court was instructed them to resist their natural impulses to reach preliminary conclusions based on the quantity of evidence presented by the opening side. The court further informed the jurors that it was their duty to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion. The instruction, in context, contained no expression of opinion about any question to be decided by the jury or about the weight of the evidence. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

Trial court did not deprive defendant of his constitutional right to a presumption of innocence by virtue of the jury instructions it gave, including one instruction admonishing the jury not to form an opinion as to defendant's guilt or innocence until the jury began its deliberations; since the trial court had clearly instructed the jury as to the burden of proof upon the State to show defendant's guilt beyond a reasonable doubt. State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311, 2005 N.C. App. LEXIS 144 (2005), cert. denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

Failure to Admonish Not Violation of Constitutional Right. — The failure of the trial judge to admonish the jury at an appropriate time in violation of this section does not involve the violation of a constitutional right. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

Discretion of Court. — A motion for individual jury selection and jury segregation or sequestration are matters addressed to the trial court's sound discretion, and its exercise of discretion will not be disturbed absent a showing of an abuse of discretion. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Error Not Reversible Per Se. — Where defense counsel is concerned about the failure of the trial judge to admonish the jury, it is a simple matter for defense counsel to call to the attention of the judge such failure to admonish. Extending the reversible error per se rule to all violations of this Chapter would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of G.S. 15A-1443. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

Failure to fully admonish the jury on every occasion does not of itself constitute prejudicial error. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

Trial court's failure to admonish the jury regarding their conduct and duties during court recesses was not error, where defendant conceded he did not object, defendant failed to show that he was prejudiced, the trial court did remind the jurors of their duties on several occasions during the trial, as well as referring them to the written instructions, and defendant did not contend that jurors engaged in any improper conduct or conversation or that their deliberations were tainted in any way. State v. Thibodeaux, 341 N.C. 53, 459 S.E.2d 501 (1995).

Counsel for defendant must object to any failure to instruct the jury properly. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

While subdivision (a)(4) of this section requires the trial judge to admonish jurors to avoid contact with any accounts of the trial outside the courtroom, and the trial judge's failure to do so was error, defendant must show prejudice, and furthermore, he must object to any failure to properly instruct the jury. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

No Prejudicial Error Where Defendant Failed to Object. — Where defendant failed to object at the times he contended the court was remiss in its duty to instruct the jury on its behavior, and did not request further instructions, there was no prejudicial error in court's failure to give such instructions. State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

Defendant failed to demonstrate prejudice where he failed to object, the trial court conducted an adequate inquiry and correctly concluded that none of the seated jurors who participated in deliberations were present in the jury room when a newspaper article was read and discussed by the prospective alternate jurors, the admonition specifically advised the prospective jurors that, if they were selected for the jury, they were not to read media reports about the case, and the record indicated that none of the deliberating jurors saw or read the article. State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

Defendant must show prejudice from the court's failure to admonish the jury. State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982), rev'd in part and aff'd in part, 308 N.C. 470, 302 S.E.2d 799 (1983).

Oral Arguments Not Required Before Final Ruling. — Although fundamental fairness would seem to require it, at least when a proper and timely request therefor is made, this section does not specifically mandate the receipt and consideration of oral arguments prior to the entry of final rulings by the trial court. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Oral Admonition Held Sufficient. — Oral giving of cautionary instructions to individual jurors and to the venire was sufficient to satisfy G.S. 15A-1236. State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

Failure to Admonish Prior to Overnight Recess. — Failure of the trial court to admonish the jury pursuant to this section prior to an overnight recess was not reversible error per se where defendant failed to show that he was prejudiced by the court's failure to admonish and where defendant and his counsel, who were present in the courtroom when the overnight recess was ordered, should have called the court's attention to its failure to admonish if they were concerned about such omission. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

The trial court is not required to recite each provision of subsection (a) of this section at each recess. State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983).

Allowing jurors to be transported by an unsworn deputy was harmless error; upon discovery of the error, the trial court asked the deputy several questions for the record and the deputy stated that when he transported the jurors he knew nothing about the case but the defendant's name and he had not discussed the facts or circumstances or proceedings of the case with any jury member. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Delivery of Keys by Juror to Husband. — The admonitions prescribed by this section were not required where the trial judge merely permitted the juror to step out into the courtroom, or to the door of the courtroom, and deliver a set of keys to her husband, and there was nothing to suggest that the court permitted the juror to converse with her husband concerning the case — only that the court permitted the juror to speak to her husband briefly in connection with delivering him the keys. State v. Williams, 296 N.C. 693, 252 S.E.2d 739 (1979).

Where there was no evidence or showing by defendant to suggest the possibility of jury contamination because of publicity and notoriety of other executions, particularly the one of the first woman executed in 25 years, the trial court did not abuse its discretion in denying defendant's motion for sequestration. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Exposure of the jury to a newspaper article that contained an account of most of the testimony offered during the voir dire hearing on the previous day as to whether to allow the testimony of a police officer as to defendant's statement to him was not so prejudicial to the defendant as to require a new trial, since the defendant himself placed information substantially similar to that contained in the article before the jury during the course of the trial. State v. Langford, 319 N.C. 332, 354 S.E.2d 518 (1987).

Failure to Sequester Jurors Held Not Prejudicial. — Where the jury was selected from citizens of another county, the trial court quite frequently admonished the jury against discussing the case or gaining information about it from outside sources, and defendant presented no evidence that the jury did anything other than follow the trial court's orders, therefore he failed to show prejudice in the trial court's decision not to sequester jurors. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North

Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Failure to Question Jurors Held Not Prejudicial. — The trial court did not err in denying defendant's motion to have jurors questioned concerning whether they had read about a statement she made in the local newspaper because the court repeatedly warned the jurors to avoid reading, watching, or listening to accounts of the trial and because the statement was eventually admitted into evidence. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321, 1999 N.C. App. LEXIS 1239 (1999).

Excused Juror Allowed in Jury Room. — Subsection (c) of this statute was not violated when the trial court sent a juror who had been excused and replaced, to the jury room after admonishing her not to speak to the others about the case. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Admonition Held Sufficient. — When examined in the context in which they were given, instructions made repeatedly not to discuss the case or form an opinion about it which were delivered to a group of adult men and women were perfectly adequate under this section. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Applied in State v. Daniels, 59 N.C. App. 442, 297 S.E.2d 150 (1982); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996).

Cited in State v. Griffin, 308 N.C. 303, 302 S.E.2d 447 (1983); State v. Brogden, 137 N.C. App. 579, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000); State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006); State v. Jackson, 189 N.C. App. 747, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008).

§ 15A-1237. Verdict.

(a) The verdict must be in writing, signed by the foreman, and made a part of the record of the case.

(b) The verdict must be unanimous, and must be returned by the jury in open court.

(c) If the jurors find the defendant not guilty on the ground that he was insane at the time of the commission of the offense charged, their verdict must so state.

(d) If there are two or more defendants, the jury must return a separate verdict with respect to each defendant. If the jury agrees upon a verdict for one defendant but not another, it must return that verdict upon which it agrees.

(e) If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The provision in subsection (a) requiring written verdicts is new. It is contemplated that the jury will be given a verdict form setting out the permissible verdicts recited by the judge in his instructions. This procedure should cure a great many defects that occur when the foreman of the jury inadvertently omits some essential element of a verdict in stating it orally.

The provision in subsection (c) is also new, but was thought to be quite desirable by the Commission.

The Commission briefly considered and then abandoned any attempt to define a lesser included offense. It determined that this task may be more appropriately tackled during the consideration of revision of the substantive law. Until that time, the Commission recommends the retention of G.S. 15-169 and G.S. 15-170.

CASE NOTES

Purpose. — This section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979); State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983).

This section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself when given orally. A verdict form is sufficient for this purpose if it provides the court a proper basis upon which to pass judgment and sentence the defendant appropriately. State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983).

When Verdict Should Be Received and Recorded. — If the verdict substantially answers the issue(s) so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, then the verdict should be received and recorded. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

Where defendant claimed that the jury was fundamentally flawed because the foreperson lied to the trial court when the foreperson stated that the jury had not come to a verdict and sought to deliberate on the following day even though it appeared that the jury may have, indeed, come to a verdict, the argument failed, as the foreperson followed the instructions of the trial court and waited until all members of the jury were satisfied with the verdict before making the verdict final by marking the form in accordance with G.S. 15A-1237(a). State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

Omission of Foreman's Signature Does Not Invalidate Verdict Where Jury's Intention Manifest. — Where no omission of the essential element of the verdict by the jury foreman was possible since the written verdict form properly set forth the essential elements of the verdicts that could be returned, and where the verdict substantially answered the issue so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, there was no merit to defendant's contention that the verdict against him was invalid because the jury foreman did not sign it as required by this section. State v. Collins, 50 N.C. App. 155, 272 S.E.2d 603 (1980).

Reading of Verdict by Judge. — Where the trial judge takes the verdict sheet from the jury at the door of the jury room after being informed that they have reached a verdict and the judge then reads the verdict in open court, no violation of this section occurs. State v. Caudle, 58 N.C. App. 89, 293 S.E.2d 205 (1982), cert. denied, 308 N.C. 545, 304 S.E.2d 239 (1983).

Unanimous Verdict. — When defendant was charged with 10 counts of statutory rape; the trial court submitted all 10 counts to the jury without differentiating among them; the indictment alleged 10 counts occurring between two dates, without specifying a date for any one charge; and the verdict sheets indicated guilty verdicts without specifying a particular offense, defendant's constitutional right to a unanimous jury verdict, in G.S. 15A-1237(b), was violated because it could not be said that the jury unanimously agreed that defendant committed any particular offense. State v. Holden, 160 N.C. App. 503, 586 S.E.2d 513, 2003 N.C. App. LEXIS 1818 (2003), aff'd, 359 N.C. 60, 602 S.E.2d 360 (2004).

Because of the trial court's failure to ensure that each juror had in mind the same instances of abuse when voting to convict defendant of multiple counts of first-degree sexual offense and indecent liberties with a minor, defendant's right to a unanimous jury verdict was jeopardized. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

There was no risk of a lack of unanimity where defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses, and using the same underlying act to support convictions for both first-degree sexual offense and indecent liberties did not violate defendant's constitutional protection against double jeopardy; where the instructions told jury that it must "agree unanimously" on particular sex offenses and limited consideration of first-degree sexual offenses to the approximate dates on which they were alleged to have occurred and to a specific act, and dates and acts corresponded with the evidence, the instructions were proper and there was no lack of unanimity. State v. Brewer, 171 N.C. App. 686, 615 S.E.2d 360, 2005 N.C. App. LEXIS 1363 (2005), cert. denied, — N.C. —, 632 S.E.2d 493 (2006).

Defendant's right to an unanimous verdict under N.C. Const., Art. I, § 24, G.S. 15A-1201, and G.S. 15A-1237(b) was not violated by generic testimony, or evidence of more incidents than there were criminal charges. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Where the state presented sufficient evidence to support the elements of each crime charged, defendant's constitutional right to a unanimous jury was not violated despite defendant's contention that neither the jury instructions nor the verdict sheets required the jury to unanimously agree on the specific acts defendant committed to support each verdict. State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006), cert. denied, appeal dismissed, 361 N.C. 436, 649 S.E.2d 896 (2007).

Defendant's conviction for habitual impaired driving did not have to be overturned despite the fact that the verdict sheet given to the jury did not differentiate between the two statutory definitions of impaired driving, and thus it was not known which definition applied; the fact remained that the jury unanimously found defendant guilty of the single offense of impaired driving, which meant that defendant was not deprived of his state constitutional and state statutory right to a unanimous verdict. State v. Bradley, 181 N.C. App. 557, 640 S.E.2d 432,

2007 N.C. App. LEXIS 251 (2007).

Because the trial court did not give any disjunctive instruction and, in any event, the unanimity cases relied upon by defendant did not apply to a charge of conspiracy to traffic in cocaine, the trial court's instruction did not create a risk of a non-unanimous verdict. State v. Davis, 188 N.C. App. 735, 656 S.E.2d 632, 2008 N.C. App. LEXIS 278 (2008).

Trial court's instructions allowed a jury to find defendant guilty of felony murder if it found he committed either robbery with a dangerous weapon of the store owners or robbery with a dangerous weapon of a customer. Because either of these alternative acts established an element of felony murder — namely, the commission of one of the several felonies enumerated in G.S. 14-17 — the N.C. Const., Art. 1, § 26 and G.S. 15A-1237(b) requirements of jury unanimity were satisfied. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Verdict Based on Erroneous Instruction. — In a statutory rape case, when the trial court realized it had incorrectly instructed the jury as to the element of the victim's age, before reading the verdict the jury had arrived at, it correctly sealed the jury's verdict for appellate review, correctly instructed the jury as to this element, and allowed the jury to deliberate further; this did not violate defendant's double jeopardy protection nor was the first verdict res judicata, as that verdict was never read in open court or shown to either counsel, so it was never returned in open court, as required by G.S. 15A-1237(b). State v. Bell, 159 N.C. App. 151, 584 S.E.2d 298, 2003 N.C. App. LEXIS 1432 (2003), cert. denied, 358 N.C. 733, 601 S.E.2d 863 (2004).

A Verdict Sheet Captioning a Different Defendant's Name Was Not Fatally Defective. — Although the verdict sheet which initially was captioned in the name of a different defendant was changed by the trial court to correct what it considered a typographical error, where the verdict sheet listed the proper file number for the case, and the proper charges listed were consistent with the evidence presented at trial and with the court's instructions, and where the transcript and exhibits were replete with references to the defendant by name, verdict would be upheld. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

Lost Verdict Sheet. — Although the verdict sheet was lost in the office of the clerk of superior court the record was sufficient for the Supreme Court to determine the appeal. State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), cert. denied, 523 U.S. 1031, 118 S. Ct. 1323, 140 L. Ed. 2d 486 (1998).

Inquiry or Polling of Jury Not Barred. — The statutory requirement of a written jury verdict does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

Show of Hands Not Polling of Jury. — Trial court did not undertake on its own motion to poll the jurors individually where, after the verdict was read, the court asked the jurors to raise their hands as a group and not individually. State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997).

Submission of Issue in the Disjunctive. — Submission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous and thereby prevents the jury from reaching a unanimous verdict. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

Instructions in a disjunctive form on the charge of maliciously assaulting in a secret manner were fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict. State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991).

A verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

Disjunctive phrasing of the jury instruction was not a fatal ambiguity which resulted in a nonunanimous jury verdict. State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996).

By instructing the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana, the trial judge submitted two possible crimes to the jury, as the jury could find defendant guilty if it found that he committed either or both of the crimes submitted to it. Thus, the jury's verdict of guilty was fatally defective because it was ambiguous, depriving defendant of his constitutional right to be convicted by a unanimous jury. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

The risk of a nonunanimous verdict arises if the trial court instructs the jury that it may find the defendant guilty of the crime charged on either of two alternative grounds and each alternative ground constitutes a separate and distinct offense. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

Where the jury was instructed on alternative theories of second-degree kidnapping, some of which lacked sufficient evidentiary support, and it was unclear which theory the jury based defendant's conviction on, defendant was entitled to a new trial on the second-degree kidnapping charge. State v. Johnson, — N.C. App. —, 646 S.E.2d 123, 2007 N.C. App. LEXIS 1169 (2007).

Single Wrong from Multiple Acts. — There is no risk of a nonunanimous verdict where the statute criminalizes a single wrong that may be proved by any one of a number of acts and the court instructs the jury disjunctively as to various alternative acts because the particular act performed is immaterial. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

Unanimity Regarding the Aggravating Factors Set Out in § 20-141.5. — The eight aggravating factors set out by G.S. 20-141.5(b) are not separately chargeable, discrete criminal activities requiring a jury to unanimously agree on the same two factors for purposes of aggravation; rather, the statutory factors are merely alternative ways of proving the crime of felonious speeding to elude arrest and a defendant may be convicted pursuant to that section if the jury merely agrees that he committed two of those violations although they do not agree on which two. State v. Funchess, 141 N.C. App. 302, 540 S.E.2d 435, 2000 N.C. App. LEXIS 1398 (2000).

Written Verdict Not Required on Each Element. — Although every element of the offenses charged was not included in the form verdicts submitted to the jury, the offenses which the jury was to consider were sufficiently identified, and there was no requirement in this section that written verdicts contain each element of the offense to which they referred. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

This section contains no requirement that a written verdict contain each element of the offense to which it refers. State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983).

There is no requirement that the written verdict contain each and every element of the subject offense. It is sufficient if the verdict can be properly understood by reference to the indictment, evidence and jury instructions. State v. Connard, 81 N.C. App. 327, 344 S.E.2d 568 (1986), aff'd, 319 N.C. 392, 354 S.E.2d 238 (1987).

The trial court committed reversible error in instructing the jury that it could convict defendant of first degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse, as defendant had a constitutional right to be convicted by the unanimous verdict of a jury in open court, and under this instruction there was no way to tell whether defendant was convicted of second degree sexual offense because the jury unanimously agreed that defendant engaged in fellatio, anal intercourse, or both fellatio and anal intercourse, or whether some members of the jury found that he engaged in fellatio but not anal intercourse, and some found that he engaged in anal intercourse but not fellatio. State v. Callahan, 86 N.C. App. 88, 356 S.E.2d 403 (1987).

Specification of Theory of Guilty Verdict. — Where, in an indictment for murder, the evidence would support two guilty verdicts to the charge of first-degree murder, guilty by reason of the felony-murder rule or guilty by reason of premeditation and deliberation, it was appropriate for the trial court to require the jury to specify in its verdict the theory upon which they found defendant guilty, since if the jury's verdict specified the theory, the court could sentence appropriately. The required use of a specific written verdict in this case is consistent with the intent of this section and it enabled the trial court to avoid the difficulty which that provision seeks to alleviate. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Unanimous Acquittal Not Required Prior to Consideration of Lesser Offense. — Under G.S. 15A-1237(e), a jury is permitted to return a verdict with respect to any offense to which it agreed, including a lesser included offense on which the judge charged, the jury is not required to agree unanimously on acquittal with regard to a primary offense before it may consider a lesser included offense. State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360, 2003 N.C. App. LEXIS 1254 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003), cert. denied, 358 N.C. 547, 599 S.E.2d 913 (2004).

Value of Property Stolen in Larceny Case. — This section does not require that a verdict in a felonious larceny case establish the value of the allegedly stolen property. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Insanity to Be Considered Only If Verdict Is Not Guilty. — In cases where a plea of not guilty by reason of insanity is recorded, the court should first submit general issues of guilt or innocence, and thereafter, where the evidence justifies instructions on the defense of insanity, a special issue as to whether the jury found defendant not guilty because he was insane may be submitted as the last issue, but the jury should be instructed that it is not to consider the special issue unless it has returned a general verdict of not guilty. State v. Linville, 300 N.C. 135, 265 S.E.2d 150 (1980).

Instruction Did Not Permit Conviction by Less Than Unanimous Verdict. — Trial judge correctly instructed jury that it could find immoral, improper, or indecent liberty upon a finding that defendant either improperly touched his son or induced his son to touch him; the instruction did not permit conviction by less than a unanimous verdict. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

Multiple Short-Form Indictments Did Not Create a Danger of Ununanimous Verdicts. — Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const., Art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

Applied in State v. Staley, 71 N.C. App. 286, 321 S.E.2d 551 (1984); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Cited in State v. McBryde, 55 N.C. App. 473, 285 S.E.2d 866 (1982); State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987); State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989); State v. Mayse, 97 N.C. App. 559, 389 S.E.2d 585 (1990); State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991); State v. Herndon, 177 N.C. App. 353, 629 S.E.2d 170, 2006 N.C. App. LEXIS 961 (2006).

§ 15A-1238. Polling the jury.

Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Trial by Jury § 5.5. As noted in the commentary to G.S. 15A-1063, this section does not state that the judge may in his discretion declare a mistrial if the poll indicates that the verdict is not unanimous, but leaves the matter to be determined under other principles of law governing mistrials.

CASE NOTES

Purpose of Polling. — The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Rationale Behind Polling. — The rationale behind requiring that any polling of the jury be before dispersal is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Right to Have Jury Polled. — This section gives any party the right to have the jury polled after a verdict is returned before the jury has dispersed. State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

The right to a poll of the jury in criminal actions is firmly established by N.C. Const., Art. I, § 24, and by statute. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Polling Not Barred by Written Verdict. — The statutory requirement of a written jury verdict does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

This section does not give defendant a right to an unlimited number of polls. State v. Martin, 315 N.C. 667, 340 S.E.2d 326 (1986).

Waiver of Right to Poll. — Defense counsel waives his right to request a polling of the jury where he does not make his request prior to the jury's discharge. State v. Froneberger, 55 N.C. App. 148, 285 S.E.2d 119 (1981), appeal dismissed, 305 N.C. 397, 290 S.E.2d 367 (1982); State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

When a trial court gave the jury a thirty-minute break, the jury was free to leave the courtroom and go into the streets. During that thirty-minute period, the members of the jury were exposed to influences extraneous to the deliberations of the entire jury as a body. Hence, the jury had been "dispersed" within the meaning of this section, and the motion to poll the jury, made during the jury's recess, came too late. Consequently, the defendant waived the right to poll the jury. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Where the jury dispersed before defendant requested that the jury be polled, defendant waived his right to poll the jury. State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565, petition denied as to additional issues, 336 N.C. 610, 447 S.E.2d 404 (1994), aff'd, 339 N.C. 733, 453 S.E.2d 865 (1995).

Request for Repolling Properly Denied. — Defendant's request for a repolling of the jury, occasioned by the attempt of the forelady to change her vote based on testimony presented at the sentencing phase of the trial, was correctly denied, as a juror may not impeach the verdict of the jury after it has been rendered and received in open court, and defendant's request to repoll the jury amounted to an attempt to impeach the jury's verdict. State v. Martin, 315 N.C. 667, 340 S.E.2d 326 (1986).

Defendant was not entitled to repoll a juror who had recanted her death sentence recommendations on two of three murder cases when she had twice been polled on her recommendation in the third case; once during normal course of polling after jury's death sentence recommendation in all three cases, and again after she had recanted in two of the cases but had stood by her original decision in the third case. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The defendant was not entitled to poll the jury the morning after it returned its verdict. State v. Clark, 138 N.C. App. 392, 531 S.E.2d 482, 2000 N.C. App. LEXIS 635 (2000).

Change of Mind After Verdict Returned of No Consequence. — If the jury is unanimous at the time the verdict is returned, the fact that some of them change their minds at any time thereafter is of no consequence; the verdict rendered remains valid and must be upheld. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

"Dispersed". — Where jurors chose to return to the jury assembly room, and were told that they could discuss the case with anyone if they so desired, the jury had "dispersed" within the meaning of this section. State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565, petition denied as to additional issues, 336 N.C. 610, 447 S.E.2d 404 (1994), aff'd, 339 N.C. 733, 453 S.E.2d 865 (1995).

Show of Hands Not Polling of Jury. — Trial court did not undertake on its own motion to poll the jurors individually where, after the verdict was read, the court asked the jurors to raise their hands as a group and not individually. State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997).

Polling of Jurors Proper. — Where each of the jurors individually was told the charges for which the jury had returned a guilty verdict and was asked whether this was their verdict and whether they still assented to the verdict, there was no error in the manner in which the jury was polled. State v. Ramseur, 338 N.C. 502, 450 S.E.2d 467 (1994).

Untimely Motion to Poll. — Where court allowed defendant until Monday morning to present authority for his request to individually repoll a juror, and he failed to present any arguments on this subject when the court reconvened, instead making a motion to repoll the entire jury, defendant's motion was untimely. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Trial Court had No Authority to Impose a Life Sentence. — In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the trial court was correct in its conclusion that it lacked authority to impose a life sentence in the case at the time the defendant made his motion for a mistrial following an inconsistency arising between the verdict and the responses of jurors during the polling process, as no evidence suggested that the jury could not agree and the jury had given no indication that it was having trouble reaching a sentencing recommendation following the direction to continue deliberations. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

Applied in State v. Clark, 73 N.C. App. 277, 326 S.E.2d 637 (1985); State v. Mutakbbic, 317 N.C. 264, 345 S.E.2d 154 (1986); Allen v. Lee, 366 F.3d 319, 2004 U.S. App. LEXIS 8349 (4th Cir. 2004).

Cited in State v. Nelson, 36 N.C. App. 235, 243 S.E.2d 392 (1978); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Hedgecoe, 106 N.C. App. 157, 415 S.E.2d 777 (1992).

§ 15A-1239. Judicial comment on verdict.

The trial judge may not comment upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel. If he does so, any defendant whose case is calendared for that session of court is entitled, upon motion, to a continuance of his case to a time when all members of the entire jury panel are no longer serving. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is in accord with G.S. 1A-1, Rule 51(c). Compare A.B.A. Standards, Trial by Jury § 5.6.

Cross References. — As to comment on verdict, see also G.S. 1-180.1.

CASE NOTES

The legislature has provided the exclusive remedy for judicial praise, criticism or comment on the verdict by declaring in G.S. 1-180.1 that the prohibited remarks shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of G.S. 1-180.1 shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. State v. Neal, 60 N.C. App. 350, 299 S.E.2d 654, appeal dismissed and cert. denied, 308 N.C. 390, 302 S.E.2d 256 (1983).

This section does not contain any reference to nonapplicability to motions for a new trial, or to set aside the verdict, or arrest of judgment. State v. Neal, 60 N.C. App. 350, 299 S.E.2d 654, appeal dismissed and cert. denied, 308 N.C. 390, 302 S.E.2d 256 (1983).

§ 15A-1240. Impeachment of the verdict.

(a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

(b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.

(c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsections (a), (b), and (c) are based on A.B.A. Standards, Trial by Jury § 5.7. Subsections (a) and (b) are almost identical to the wording of the A.B.A. Standard, but subsection (c) is somewhat more restrictive. As the A.B.A. commentary indicates, this is a most troublesome area. The traditional rule has been to disallow almost all attempts by a juror to impeach his verdict because to do otherwise would place the finality of verdicts in great jeopardy and subject jurors after the close of the case to intense pressures to come forward and impeach their verdicts.

It is noteworthy that this section is silent on impeaching verdicts by means other than the testimony of the juror himself.

The General Assembly deleted subsection (d) from the Commission's draft, which allowed counsel to ask jurors about their verdict so long as there was no harassment or embarrassment of jurors or any tendency to influence the jurors' actions in future cases. The members of the

General Assembly apparently thought a positive statement of the right of counsel to approach jurors about their verdict immediately after a case could encourage abuse by at least a few attorneys. Omission of this subsection apparently makes little difference in the light of North Carolina State Bar, Code of Professional Responsibility, DR7-108(D), (E), (F), and (G).

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Applicability. — This section applies only to criminal cases and has no applicability to a paternity proceeding. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

The trial court erred by amending the jury verdict after deliberation to enhance the defendant's conviction to the felony of assault with a deadly weapon upon a government official, pursuant to section 14-34.2, where the trial court instructed the jury on the charge of assault on a government official and the State's motion to amend the verdict did not comport with any of the challenges allowable under this section. State v. Brogden, 137 N.C. App. 579, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000).

General Rule. — Generally, after the jury renders a verdict and has been discharged, the court will not receive the testimony of jurors to impeach their verdict. This section codified this general rule and provided exceptions. State v. Carter, 55 N.C. App. 192, 284 S.E.2d 733 (1981).

This Section and § 8C-1, Rule 606(b) Do Not Conflict. — Although G.S. 8C-1, Rule 606(b) is broader in some respects than this section, the two do not conflict; the exceptions to the anti-impeachment rule listed in this section are designed to protect the same interests as, and are entirely consistent with, the exceptions in Rule 606(b). State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal. State v. Gilbert, 47 N.C. App. 316, 267 S.E.2d 378 (1980).

Subsection (c) Strictly Construed. — As subsection (c) of this section is in derogation of the common law, it must be strictly construed. State v. Froneberger, 55 N.C. App. 148, 285 S.E.2d 119 (1981), appeal dismissed, 305 N.C. 397, 290 S.E.2d 367 (1982); State v. Costner, 80 N.C. App. 666, 343 S.E.2d 241, appeal dismissed and cert. denied, 317 N.C. 709, 347 S.E.2d 444 (1986).

Jurors May Testify to Objective Events But Not Subjective Effect. — Jurors may testify regarding the objective events listed as exceptions in the statutes, but are prohibited from testifying to the subjective effect those matters had on their verdict. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Actual Prejudice from Influence of Jury Must Be Shown. — In instances where the contention is made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and the findings of the trial judge upon the evidence and facts are conclusive and not reviewable. State v. Gilbert, 47 N.C. App. 316, 267 S.E.2d 378 (1980).

Evidence of Juror's "Second Thoughts". — Vague hearsay evidence given by defense counsel's secretary, concerning "second thoughts" of a juror, is not sufficient to allow the alleged juror or any other juror to impeach his or her verdict. State v. Froneberger, 55 N.C. App. 148, 285 S.E.2d 119 (1981), appeal dismissed, 305 N.C. 397, 290 S.E.2d 367 (1982).

A juror's doubts were insufficient to impeach the defendant's verdict where these doubts arose after the defendant was convicted when the trial court corrected the verdict form, which had incorrectly captioned the name of another individual, had the foreperson sign it, and allowed the recalled jurors to view it. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

Juror's Knowledge of Possibility of Parole. — Testimony by a newspaper reporter that a juror told her that the jury had recommended the death penalty for defendant because the jurors knew that defendant would be eligible for parole in 20 years if he was sentenced to life imprisonment was not rendered admissible to impeach the verdict by subdivision (c)(1) of this section, since a juror's knowledge that there is a possibility of parole for a defendant would not "violate the defendant's constitutional right to confront the witnesses against him." State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

In a first-degree murder case, the trial court did not err in excluding from the record on appeal a newspaper clipping indicating that the possibility of parole was a major consideration in the jury's deliberation on whether to recommend the death penalty, since no purpose would have been served by inclusion of the newspaper clipping other than impeachment of the verdict. Any evidence relative to the jury's consideration of the possibility of parole would be excluded by subsection (a) of this section. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Juror's Questions to Professor Not Inappropriate. — Defendant was not entitled to relief under subsection (b) where a juror, who was enrolled in a psychology class, asked his professor if schizophrenics or paranoid schizophrenics commit violent acts. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997).

Use of Photographs in Jury Room. — In a first-degree murder case, the trial court did not err in excluding from the record on appeal a juror's affidavit stating in substance that photographic exhibits of the victim's body were taken into the jury room, since no purpose would have been served by inclusion of the juror's affidavit other than impeachment of the verdict. The affidavit concerning the pictures could not have been considered pursuant to subdivision (c)(1) of this section because the pictures had been admitted into evidence and in no event would consideration of them violate the defendant's constitutional right to confront the witnesses against him. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Observation of Codefendant in Handcuffs Prior to Defendant's Trial. — Affidavit of one of defendant's jurors, which stated that before defendant's trial some of defendant's jurors observed codefendant, who was tried separately, emerging from courtroom in handcuffs and assumed he had been convicted, did not contain any information permitted by subdivisions (c)(1) or (c)(2) of this section. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Juror Testimony on Effect of Extraneous Information Properly Excluded. — Hearing judge did not err by excluding juror testimony regarding how extraneous information affected jury's decision; although the official comment to G.S. 8C-1, Rule 606 suggests that a juror is competent to testify regarding the effect of extraneous prejudicial information upon the jurors' mental processes, the comment inadvertently misstates the rule, since both this section and G.S. 8C-1, Rule 606(b) unambiguously prohibit inquiry into the effect of anything occurring during deliberations upon jurors' minds. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Juror's Failure to Obey Instructions Not to Watch Television Program. — In prosecution for first-degree sexual offense, the defendant was not entitled to relief under this section, even though the foreman of the jury did not obey the instructions of the court and watched the television program on child abuse, where the matters he reported to the jury did not deal with the defendant or with the evidence introduced in the case. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Writing on Letter Was Extraneous Information and Matter Not in Evidence. — Where, while viewing an exhibit, one of the jurors peeled back the paper over the bottom of defendant's photograph, revealing the words, "Police Department, Wilson, North Carolina — 12291, 12-07-81" and where the jurors discussed the writing on the photograph as evidence that defendant had been in area in December 1981, a fact which, if true, contradicted the testimony of defendant's alibi witnesses, the writing on defendant's photograph was both "extraneous information" within the meaning of G.S. 8C-1, Rule 606(b) and was a "matter not in evidence" which implicated defendant's confrontation right within the meaning of subdivision (c)(1) of this section because it was information dealing with the defendant and the case being tried which reached a juror without being introduced in evidence. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Later Statement by Juror Held Insufficient to Impeach. — Testimony by one of defendant's friends that, after the trial was over, he heard a juror state, "If he [defendant] wasn't guilty, the judge would have dismissed it," was insufficient by itself to indicate that the juror was unqualified to serve; furthermore, the witness' testimony seeking to impeach the verdict was incompetent. State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980), appeal dismissed, 300 N.C. 561, 270 S.E.2d 115 (1980).

Affidavits of three jurors, asserting that the jury's verdict, as reported by the foreman, was not a true verdict, but represented their answer to the foreman's question of whether defendant might have been guilty of some other like offense, but that all 12 jurors, when polled, agreed with the verdict of guilty, were not admissible to impeach the verdict. State v. Costner, 80 N.C. App. 666, 343 S.E.2d 241, appeal dismissed and cert. denied, 317 N.C. 709, 347 S.E.2d 444 (1986).

Consultation of Dictionary Did Not Violate Right to Confront Witnesses. — Jury's consultation of dictionary definitions for "malice" did not violate defendant's right to confront the witnesses against him and the jurors' affidavits could not be used to impeach the verdict as the information considered by the jury did not discredit defendant's testimony or witnesses; it concerned legal terminology, not evidence developed at trial. State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Consultation of Dictionary. — Information contained in jurors' affidavits as to the reading of dictionary definitions of "malice" could not be used to impeach the verdict under G.S. 15A-1240 as under the caselaw, definitions in standard dictionaries were not extraneous information within the meaning of G.S. 8C-1-606(b). State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Testimony as to Juror Misconduct. — Defendant had no right to an evidentiary hearing on his post-murder conviction motion for appropriate relief under G.S. 15A-1414 and G.S. 15A-1420. The trial judge did not abuse his discretion in refusing a hearing because defendant failed to make an initial showing of juror misconduct, based on the fact that two jurors had prayed together outside the jury room, and a juror had no right to testify to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined, G.S. 15A-1240(a), and could only testify to impeach the verdict when the testimony concerned matters not in evidence which came to the attention of one or more jurors under circumstances that violated the defendant's constitutional right to confront the witnesses against him, bribery, intimidation, or attempted bribery or intimidation of a juror, pursuant to G.S. 15A-1240(c). State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Applied in State v. Hawkins, 59 N.C. App. 190, 296 S.E.2d 324 (1982); State v. Lewis, 188 N.C. App. 308, 654 S.E.2d 808, 2008 N.C. App. LEXIS 65 (2008); McNeill v. Branker, 601 F. Supp. 2d 694, 2009 U.S. Dist. LEXIS 11568 (E.D.N.C. 2009).

Cited in State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Bacon v. Lee, 225 F.3d 470, 2000 U.S. App. LEXIS 22231 (4th Cir. 2000); Robinson v. Polk, 438 F.3d 350, 2006 U.S. App. LEXIS 3454 (Feb. 14, 2006); State v. Jackson, 189 N.C. App. 747, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008).

§ 15A-1241. Record of proceedings.

(a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:

(1) Selection of the jury in noncapital cases;
(2) Opening statements and final arguments of counsel to the jury; and
(3) Arguments of counsel on questions of law.

(b) Upon motion of any party or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) must be recorded. The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be. Upon suggestion of improper argument, when no recordation has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

(c) When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made.

(d) The trial judge may review the accuracy of the reporter's record of the proceedings, but may not make substantive changes in the transcript concerning his charge, rulings, and comments without notice to the State, the defense, and the reporter. When any correction of a transcript is ordered made by a judge, each party is entitled to receive, upon request, a copy of the transcript indicating the text as submitted by the reporter and as changed by the judge. Upon motion of any party, the judge must afford the parties a hearing upon any change ordered by the judge. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Although the provisions of this section had not been spelled out in statutes before, the Commission had no special difficulty except with subsection (d). The Commission initially considered in the event of a dispute as to a transcript that a party should be allowed to submit the raw transcript of a challenged part of the record to the appellate court as an addendum to the record. It determined that interests of finality outweighed other considerations, and rejected the idea. In a case of serious abuse by a judge with respect to changes in a transcript, the Commission determined that the matter appropriately should be referred to the Judicial Standards Commission.

CASE NOTES

Trial court's failure to order transcript of sentencing hearing did not constitute prejudicial error. In the absence of an abuse of discretion, a judgment will not be disturbed because of either the sentencing procedure or procedural conduct. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

Judge's chance encounters in a corridor with jurors during a recess in defendant's murder trial were not a "proceeding." Therefore, the recordation requirement of this section was not triggered, and defendant's federal constitutional right to due process was not implicated. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Private Bench Conferences Not "Statements from Bench." — The phrase "statements from the bench" in subsection (a) of this section does not include private bench conferences between trial judges and attorneys. State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992).

Failure of Defendant to Request Reconstruction. — The trial court did not violate the defendant's statutory right to recordation under this section by failing to record its bench conferences with counsel where defendant never requested that the subject matter of a bench conference be reconstructed for the record. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Unrecorded Conference with Prospective Jurors Improper. — Trial court's excusal of prospective jurors as a result of its private unrecorded bench conferences with them, violated defendant's state constitutional right to be present at every stage of the trial and violated statutory requirements to make a true, complete and accurate record of the jury selection in a capital trial pursuant to subsection (a) of this section. State v. Smith, 326 N.C. 792, 392 S.E.2d 362 (1990).

Recordation Not Required. — Defendant's argument that a trial court erred as a matter of law by not ensuring there was a complete recordation of jury selection, the verbatim jury instructions from the court, bench conferences and arguments of counsel was rejected because such recordation was not required. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Defendant's right to due process and effective assistance of appellate counsel were not violated by trial counsel's failure to request that the trial court record jury selection, bench conferences, and the opening and closing arguments at trial, and such recordings are not required by statute. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Lack of Complete Record Harmless. — Based on the record facts and defendant's failure to specifically allege how he was prejudiced by the lack of complete recordation, the trial court's failure to require complete recordation of bench and chamber conferences was harmless beyond a reasonable doubt. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

Although the trial court erred in failing to have its ex parte conferences with prospective jurors recorded, this failure was harmless as it did not deprive defendant of a juror he would have been entitled to or result in the seating of a juror he would have rejected. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, 516 U.S. 833, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995), overruled in part, State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997).

The trial court did not violate a capital murder defendant's rights under this section by conducting a hearing without recording the proceedings, where the court entered an amended order changing the forensic psychiatrist assigned to evaluate the defendant's competency to stand trial and transferring the defendant from prison to a hospital, but there was nothing in the record to suggest that the trial court conducted a hearing concerning the hospital's request to amend the order, and there was a full record concerning the State's motion for a competency evaluation. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Trial judge's failure to record his ex parte communication with one prospective juror, as required by this section, was harmless error, because the record adequately revealed the substance of the unrecorded conversation and the juror was properly excused under G.S. 9-6(a) and 9-6.1 "[b]ecause he was over sixty-five." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Trial court's error, in having unrecorded private discussions with prospective jurors in a capital case, was harmless beyond a reasonable doubt, as the record did not indicate that any action was taken by the trial judge as a result of these discussions. State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002), appeal dismissed, cert. denied, 356 N.C. 443, 573 S.E.2d 508 (2002).

Ex Parte Communications. — The trial court's error in failing to record its ex parte communications with prospective jurors under this section was harmless where the questioning of prospective jurors in defendant's absence did not result in a jury composed differently from one which defendant might have obtained had he been present and participated in the process. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

Private Bench Conferences Need Not Be Recorded. — This section does not require recordation of private bench conferences between trial judges and attorneys. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, 516 U.S. 833, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995), overruled in part, State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997).

Statements from the bench do not include routine bench conferences between the trial court and the attorneys. State v. Speller, 345 N.C. 600, 481 S.E.2d 284 (1997).

Substitution of Affidavit Not Adequate. — Where court reporter did not record bench conferences, as required by this section, the court would not substitute this statutory requirement for an affidavit made approximately three years after the event, as the affidavit was not a part of the record made of the trial. State v. McCarver, 329 N.C. 259, 404 S.E.2d 821 (1991).

Ineffective Assistance of Counsel Not Found. — Defendant did not receive ineffective assistance of counsel, even though counsel did not request recordation under G.S. 15A-1241(b) of opening/closing arguments, jury selection, and rulings on matters of law, as defendant acknowledged that defendant could not show prejudice. State v. Thomas, 187 N.C. App. 140, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

Second Judge Not Bound By Ruling of Prior Judge in Mistried Case. — When a first judge declared a mistrial, his rulings no longer had legal effect, and, thus, neither collateral estoppel nor the one judge overruling another rule applied; as second judge was not bound by the rulings of the first judge, he did not err by failing to comply with the prior order for complete recordation. State v. Harris, — N.C. App. —, 679 S.E.2d 464, 2009 N.C. App. LEXIS 1163 (July 21, 2009).

Applied in State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979); State v. Colbert, 65 N.C. App. 762, 310 S.E.2d 145 (1984); State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Cited in State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981); State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420 (1983); State v. Wallace, 309 N.C. 141, 305 S.E.2d 548 (1983); State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992); State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994); State v. VanCamp, 150 N.C. App. 347, 562 S.E.2d 921, 2002 N.C. App. LEXIS 506 (2002); State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002); State v. Daniels, 189 N.C. App. 705, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

§ 15A-1242. Defendant's election to represent himself at trial.

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Function of the Trial Judge § 6.6.

After adoption of this section by the Commission the Supreme Court of the United States decided Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), holding that a person has a constitutional right to refuse counsel and represent himself. As written, the section does not conflict with Faretta, as the case stresses that the waiver of counsel must be knowing and intelligent. The case does require that the judge exercise his discretion to allow self-representation, however, once he finds that the criteria for waiver have been met.

CASE NOTES

The inquiry required by this section satisfies constitutional requirements. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Trial court satisfied the constitutional requirement to inform defendant of his right to counsel by complying with the provisions of G.S. 15A-1242 after defendant told the court he wanted to represent himself, and the record supported the trial court's judgment that defendant knowingly, intelligently, and voluntarily had waived his right to counsel. State v. King, 158 N.C. App. 60, 580 S.E.2d 89, 2003 N.C. App. LEXIS 939 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Trial court did not err in allowing defendant to represent himself because the court complied with the statutory requirements of G.S.15A-1242 prior to allowing such self-representation, which fully satisfied the constitutional requirement that any waiver of counsel be knowing and voluntary. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

The provisions of this section are mandatory in every case where an accused requests to proceed pro se. State v. Michael, 74 N.C. App. 118, 327 S.E.2d 263 (1985); State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985); State v. White, 78 N.C. App. 741, 338 S.E.2d 614 (1986).

The inquiry required by this section is mandatory and must be made in every case in which a defendant elects to proceed without counsel. State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986), cert. denied, 319 N.C. 225, 353 S.E.2d 409 (1987).

A defendant's right to represent himself is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; by Article I, Section 23 of the North Carolina Constitution; and by this section. State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997).

Section sets forth the prerequisites necessary before a defendant may waive his right to counsel and elect to represent himself at trial. State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981).

Compliance with this section fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary. State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980); State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981); State v. Wells, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Applicability of Section. — Nothing in this section makes it inapplicable to defendants who are magistrates, attorneys or judges. Inquiry under this section is necessary whenever a defendant either implicitly or explicitly indicates a desire to waive the right to counsel. State v. Bullock, 316 N.C. 180, 340 S.E.2d 106 (1986).

Question Presented. — The issue is not whether defendant has the skill and training to represent himself adequately, but whether defendant is able to understand the consequences of waiving court appointed counsel and representing himself. State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981).

Thorough Examination of Waiver Required. — Where defendant proceeds on a waiver of counsel, this section requires a thorough examination of the waiver. State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757, cert. denied, 330 N.C. 444, 412 S.E.2d 79 (1991).

A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of this section, even if it is conducted by a judge other than the judge who presides at the subsequent trial. State v. Lamb, 103 N.C. App. 646, 406 S.E.2d 654 (1991).

What Record Must Show. — Waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981).

Absent evidence that defendant was informed of the nature of the charges and the range of permissible punishments or that he understood and appreciated the consequences of proceeding without counsel, the court should not permit him to proceed pro se. State v. Graham, 76 N.C. App. 470, 333 S.E.2d 547 (1985); State v. Gordon, 79 N.C. App. 623, 339 S.E.2d 836 (1986).

The record must affirmatively show that the inquiry required by this section was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will. State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986), cert. denied, 319 N.C. 225, 353 S.E.2d 409 (1987).

A written waiver of counsel is no substitute for actual compliance by the trial court with this section. State v. Wells, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Defendant's written waiver of counsel was not adequate to comply with this section, although it stated that defendant understood the charges against him, the nature of the punishment, and the nature of the proceedings, where the court failed to conduct the inquiry required by this section. State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (1999).

Strict Compliance Required. — The trial court's failure to comply with this section was plain error entitling the defendant to a new trial where the record indicated that the trial court discussed with him the consequences of his decision to represent himself and advised him of his right to assigned counsel but did not make any inquiry to satisfy itself that he comprehended "the nature of the charges and proceedings and the range of permissible punishments." State v. Stanback, 529 S.E.2d 229, 2000 N.C. App. LEXIS 408 (N.C. Ct. App. 2000).

No Right to Appear Both in Propria Persona and by Counsel. —A party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

While defendant had the right to appear either in propria persona or by counsel, defendant had no right under U.S. Const., Amend. VI to serve as co-counsel with his court-appointed attorney. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

Procedure upon Indication of Problem with Counsel. — When defendant expresses to the trial court that there is a problem with his counsel, the trial court should conduct an inquiry out of the presence of the jury to determine the nature of the problem, the extent of which should be as necessitated by the circumstances. If defendant clearly indicates a desire to have counsel removed and proceed pro se, then the trial judge should make further inquiry; he should advise defendant of his right to represent himself, and determine whether defendant understands the consequences of his decision and voluntarily and intelligently wishes to waive his rights. State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981).

Although the better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense, it is not reversible error for the court not to do so when there has been no intimation that defendant desires to represent himself. Each case must be considered on its own merits. State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981).

Only if a defendant clearly expresses his desire to have counsel removed and to proceed pro se is the trial court obligated to make further inquiry pursuant to this section; in the absence of such an expression by defendant of a desire to proceed pro se, when faced with a claim of conflict between defendant and his attorney, the trial court must determine only that the defendant's present counsel is able to render competent assistance and that the nature of the conflict will not render such assistance ineffective. State v. Johnson, 341 N.C. 104, 459 S.E.2d 246 (1995).

Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Failure to Conduct Inquiry. — Where defendant employed counsel who were ready to proceed to trial and in fact demanded trial when the State requested a second continuance, but thereafter, when differences between defendant and his counsel necessitated counsel's withdrawal, defendant attempted to employ other counsel but understandably could not find anyone who would attempt to defend him, with only a few days' preparation time, on charges as serious as the ones he faced, it was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether defendant voluntarily, knowingly and intelligently waived his right to counsel. State v. Bullock, 316 N.C. 180, 340 S.E.2d 106 (1986).

In the absence of (1) a clear indication by defendant that he wished to proceed pro se, and (2) the inquiry required by this section, it was error to permit defendant to go to trial without the assistance of counsel. State v. White, 78 N.C. App. 741, 338 S.E.2d 614 (1986).

Absent a clear indication by defendant that he desired to proceed pro se, and absent the inquiries required by this section, the court erred in requiring defendant to proceed pro se at suppression hearing. State v. Gordon, 79 N.C. App. 623, 339 S.E.2d 836 (1986).

When there is no evidence in the record that the trial court, on defendant's waiver of counsel, made a thorough inquiry sufficient to comport with the dictates of this section, due process requirements have not been met. And where the court signs a certification indicating that this procedure has been followed, but the record belies that fact, the waiver will be invalidated. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Prejudicial error occurred where judge, without making the mandated inquiry, allowed defendant to speak for himself at a point where his lawyer would most probably have sought a mistrial. State v. Godwin, 95 N.C. App. 565, 383 S.E.2d 234 (1989).

Defendant's waiver of counsel in the probation revocation hearing was not knowing, intelligent, or voluntary as was required under G.S. 15A-1242, as the trial court failed to ascertain whether defendant knew the consequences of his decision, the nature of charges, and the range of permissible punishments. State v. Evans, 153 N.C. App. 313, 569 S.E.2d 673, 2002 N.C. App. LEXIS 1123 (2002).

Trial court at defendant's revocation hearing failed to comply with the requirements of G.S. 15A-1242 regarding defendant's decision to proceed pro se because the verbal exchange between the trial court and defendant presented no indication defendant understood or appreciated the consequences of defendant's decision to proceed pro se or comprehended the nature of the proceedings and the range of permissible punishments. State v. Jackson, 190 N.C. App. 437, 660 S.E.2d 165, 2008 N.C. App. LEXIS 877 (2008).

Trial court erred in allowing defendant to discharge his attorney and proceed pro se in the middle of trial because it failed to make proper inquiries pursuant to G.S. 15A-1242 before releasing defendant's counsel; the trial court made no inquiry as to defendant's understanding of his right to counsel, his understanding of the charge and possible punishment, or the consequences of proceeding without counsel, and although defendant made it clear he wanted to proceed on his own and keep counsel on stand by to help him, the trial court had an obligation to conduct the inquiry pursuant to G.S. 15A-1242 prior to allowing defendant to proceed. State v. McLeod, — N.C. App. —, 682 S.E.2d 396, 2009 N.C. App. LEXIS 1067 (2009).

Adequate Inquiry Not Made. — Trial court did not make an adequate determination pursuant to G.S. 15A-1242 and N.C. Const., Art. I, § 23 that defendant's decision to proceed pro se was knowingly, intelligently, and voluntarily made because: (1) defendant did not show that defendant appreciated the consequences of proceeding without counsel, or that defendant understood that murder was punishable by death; (2) it was not sufficient that defendant agreed that defendant had been afforded excellent legal counsel, or that defendant claimed the decision was made without "haste" and was "something that (defendant had) thought about for quite some time"; and (3) that defendant's responses were clear and succinct and that defendant was calm and revealed no sign of confusion, reticence, or hesitation could not substitute for the required inquiry. State v. Moore, 362 N.C. 319, 661 S.E.2d 722, 2008 N.C. LEXIS 493 (2008).

Inquiry Not Required Where Defendant Forfeits Right to Counsel. — The defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed pro se, without conducting an inquiry pursuant to this section, where: he was twice appointed counsel as an indigent, each time releasing his appointed counsel and retaining private counsel, was disruptive in the courtroom, and assaulted his attorney, resulting in an additional month's delay in the trial. State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000).

Failure to Record Bench Conferences and In-Chamber Proceedings. — Although trial court's partial denial of defendant's motion for complete recordation, insofar as it precluded recordation of bench conferences and in-chamber proceedings concerning jury instructions, may have constituted error under the applicable statutes, defendant was not prejudiced as a result thereof. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

Remand for Noncompliance. — Where the record reflected that this section was not complied with, the judgment would be vacated and the case remanded for a determination of whether defendant was entitled to have counsel appointed to represent her. State v. Wells, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Because a trial court failed to comply with G.S. 15A-1242 as it failed to properly inform defendant regarding the range of permissible punishments that he faced, and its conclusion that he was not entitled to appointed counsel was also erroneous as defendant faced a fine of greater than $500, his speeding convictions had to be reversed and the matter had to be remanded for a new trial. State v. Taylor, 187 N.C. App. 291, 652 S.E.2d 741, 2007 N.C. App. LEXIS 2358 (2007).

Who Must Make Inquiry. — The inquiry required by this section need not be made by the presiding trial judge, but may be made at a preliminary hearing by another trial judge. State v. Kinlock, 152 N.C. App. 84, 566 S.E.2d 738, 2002 N.C. App. LEXIS 861 (2002), aff'd, 357 N.C. 48, 577 S.E.2d 620 (2003).

Standby Counsel Not a Satisfactory Substitute. — Neither the statutory responsibilities of standby counsel under G.S. 15A-1243, nor the actual participation of standby counsel, is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver. State v. Dunlap, 318 N.C. 384, 348 S.E.2d 801 (1986).

New Trial Where Judge Did Not Advise Defendant. — Where the trial judge did not advise defendant of the consequences of her decision to proceed pro se, or the nature of the charges and proceedings and the range of permissible punishments, defendant was entitled to a new trial. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Where the trial judge failed to make the inquiry mandated by this section before permitting the defendant to proceed to trial without counsel, the defendant was entitled to a new trial. State v. Dunlap, 318 N.C. 384, 348 S.E.2d 801 (1986).

Where the trial court failed to make any inquiry of defendant concerning whether he understood and appreciated the dangers and disadvantages of self-representation or whether he understood the nature of the charges, proceedings, and the range of permissible punishment he faced and there was nothing in the record which showed defendant understood or appreciated the consequences of proceeding pro se nor was there anything in the record which showed defendant understood the nature of the charges and proceedings and the range of permissible punishments. Having a bench conference with defense counsel was insufficient to satisfy the mandate of this section, therefore, defendant was entitled to a new trial. State v. Pruitt, 322 N.C. 600, 369 S.E.2d 590 (1988).

New probation revocation hearing was required where the trial court failed to conduct an inquiry as required by G.S. 15A-1242 to ensure that defendant's waiver of the right to counsel was knowing and intelligent before allowing defendant to proceed without the assistance of counsel; the fact that defendant signed a waiver did not dispose of the requirement of conducting an inquiry pursuant to G.S. 15A-1242. State v. Debnam, 168 N.C. App. 707, 608 S.E.2d 795, 2005 N.C. App. LEXIS 450 (2005).

New Trial Where Proceedings Were Not Recorded. — Although the State noted in its brief that the trial judge addressed defendant pursuant to this section, where the proceedings were not recorded by the court reporter, so that the record was silent as to what questions were asked of defendant and what his responses were, defendant was entitled to a new trial. State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986), cert. denied, 319 N.C. 225, 353 S.E.2d 409 (1987).

Having refused to cooperate with appointed counsel and chosen to represent himself, defendant could not later complain that he was entitled to substitute counsel because he would not cooperate with the first one. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Fact that defendant chose to represent himself only because trial court refused to appoint substitute counsel did not constitute a violation of his constitutional rights, as an indigent defendant has the right to appointed counsel, but not to counsel of his choice. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Presumption from Written Waiver Certified by Court. — When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary. State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757, cert. denied, 330 N.C. 444, 412 S.E.2d 79 (1991).

Defendant knowingly, intelligently, and voluntarily waived her right to counsel where the trial judge explained to the defendant the maximum penalties for the charges against her and emphasized the seriousness of her plight, and defendant stated on several occasions during the judge's explanations that she understood her situation completely, that she did not want counsel to represent her, and that she wanted to represent herself. State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Trial judge made the appropriate inquiry under G.S. 15A-1242 as to whether defendant's waiver of counsel was knowing, intelligent, and voluntary, because: (1) the trial judge informed defendant of the right of assistance of counsel, including the right to a court-appointed attorney if defendant was entitled to one; (2) the trial judge made sure that defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve 11-15 months in prison; and (3) cognizant of those facts, defendant waived her right to counsel. Because defendant's waiver of counsel was knowing, intelligent, and voluntary, the trial judge acted properly in revoking defendant's probation, pursuant to G.S. 15A-1344, for her probation violations and activating her prison sentence. State v. Whitfield, 170 N.C. App. 618, 613 S.E.2d 289, 2005 N.C. App. LEXIS 1090 (2005).

The defendant's waiver of counsel was knowing, intelligent and voluntary where the trial court apprised the defendant, who, on the day of the trial, rid himself of his attorney of more than a year in the name of strategy, not only of his right to counsel—though not necessarily his right to "fire" counsel and have more appointed—but also of the possible consequences of his "less-than-prudent" decision. Additionally, the trial court asked the counsel to remain for the duration of the trial and the defendant continued to confer with him, thus availing himself of his expertise and experience. State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849, 2000 N.C. App. LEXIS 601 (2000).

Contrary to defendant's assertion, the trial court did not impose a jail sentence in the absence of a voluntary waiver of counsel; the record showed that defendant was advised of the charges and the possible sentence and understood the law regarding waiver of counsel, but unequivocally refused representation by an attorney because defendant had personal convictions against representation by attorneys. State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002), appeal dismissed, 356 N.C. 442, 573 S.E.2d 162 (2002).

Because defendant had nearly eight months within which to retain private counsel after waiving court-appointed counsel, and failed to do so, his conduct amounted to an obstruction and delay of the proceedings; also, because defendant filed a written waiver, defendant was presumed to knowingly and voluntarily have waived his right to appointed counsel and forfeited his right to proceed with the counsel of his choice. State v. Quick, 179 N.C. App. 647, 634 S.E.2d 915, 2006 N.C. App. LEXIS 2026 (2006).

Judgment Vacated Where Transcript Showed Failure to Follow Procedure. — Where although the court signed a certification indicating that the procedure set out under this section had been followed, the transcripts, taken at the time the waiver was signed and at the time at which defendant entered his guilty plea, show that the proper procedure was not followed, the judgment entered would be vacated and the case would be remanded for a determination of whether defendant was entitled to have counsel appointed to represent him in the action. State v. Hardy, 78 N.C. App. 175, 336 S.E.2d 661 (1985).

Request to Proceed Pro Se Properly Granted. — Trial court properly granted defendant's request to proceed pro se where the trial court conducted the required inquiry and entered an order committing defendant to mental hospital for evaluation of his competency to proceed and defendant was found to be competent to proceed to trial and waive representation by an attorney. State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997).

Based on defendant's prior experience with a capital trial, his familiarity with the criminal justice system and the detailed warnings and explanations of the consequences of proceeding pro se provided by the trial court, there was not error in the decision to allow defendant to proceed pro se. State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997).

The defendant's waiver of appointed counsel and his decision to proceed pro se were knowing and voluntary, where he completed a waiver of counsel form that followed this section and was certified by the trial court. State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999).

Trial court complied with statutory requirements prior to allowing defendant to proceed without counsel by repeatedly advising defendant of his right to have an attorney present, advising defendant that if he could not afford an attorney, one would be appointed for him, attempting to appoint an attorney for defendant, to which defendant clearly and unequivocally objected, informing defendant of the consequences of his action, including the fact that he would not have the assistance of an attorney, that he would be held to the same standards as an attorney, and that the trial court would not act as his attorney during trial, engaging in a lengthy discussion with defendant about the nature of the charges to ensure that he understood them, and informing defendant of the possible punishments for all charges if convicted; therefore, defendant's decision to waive counsel was voluntary, knowing, and intelligent. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Trial court sufficiently ensured that defendant's waiver of counsel at his probation revocation hearing was knowing and voluntary in that (1) both defendant and the trial court completed a Waiver of Counsel form, (2) the trial court's discussion with defendant in open court apprised defendant of his right to counsel, directly advised defendant that, while he had a constitutional right to self-representation, his appointed counsel would continue to represent him unless defendant affirmatively chose to excuse her and to proceed pro se, and (3) where even after defendant discharged his appointed counsel and signed the written waiver of his right to assistance of counsel, the trial court offered defendant the opportunity to request a continuance for the purpose of hiring a private attorney, which defendant declined; although the trial judge did not directly ask defendant if he was aware of the nature of the charges and proceedings, the prosecutor announced the charges in open court and defendant confirmed to the trial court his awareness that he was facing an active prison sentence. State v. Hill, 168 N.C. App. 391, 607 S.E.2d 670, 2005 N.C. App. LEXIS 259 (2005), cert. denied, 359 N.C. 324, 611 S.E.2d 839 (2005).

Trial court did not err in permitting defendant to waive his right to counsel and allowing him to proceed pro se where the record showed that the trial court fully complied with the requirements set forth in G.S. 15A-1242 before allowing defendant to waive his right to counsel. State v. Hoover, 174 N.C. App. 596, 621 S.E.2d 303, 2005 N.C. App. LEXIS 2467 (2005), cert. denied, 360 N.C. 488, 632 S.E.2d 766 (2006), appeal dismissed, 360 N.C. 540, 634 S.E.2d 543 (2006).

Trial court did not err in allowing defendant to proceed pro se with standby counsel as the court fully complied with G.S. 15A-1242 because on two separate occasions prior to defendant's jury trial defendant waived his right to counsel, and the trial court in both instances engaged in and applied the appropriate statutory inquiry and safeguards to defendant's election to proceed pro se in that the trial court found defendant understood the nature of the charges, the proceedings, his rights to the assistance of counsel and to self-representation, and the range of permissible punishments. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

In a hearing for revocation of defendant's probation, the trial court adequately complied with the requirements

of G.S. 15A-1242; (1) the trial court judge advised defendant that if she were found guilty of a probation violation she could face a severe sentence, (2) the trial court apprised defendant that she had a right to counsel, and (3) defendant indicated that she intended to proceed without counsel. State v. Proby, 168 N.C. App. 724, 608 S.E.2d 793, 2005 N.C. App. LEXIS 436 (2005).

Applied in State v. Brincefield, 43 N.C. App. 49, 258 S.E.2d 81 (1979); State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980); State v. Simmons, 56 N.C. App. 34, 286 S.E.2d 898 (1982); State v. McCrowre, 312 N.C. 478, 322 S.E.2d 775 (1984); State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996).

Cited in State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983); State v. Messick, 88 N.C. App. 428, 363 S.E.2d 657 (1988); State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997); State v. Jackson, 128 N.C. App. 626, 495 S.E.2d 916 (1998); State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998).

§ 15A-1243. Standby counsel for defendant representing himself.

When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion. Appointment and compensation of standby counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. (1977, c. 711, s. 1; 2000-144, s. 30.)

Legal Periodicals. — For article, "Hybrid Representation: Standing the Two-Sided Coin on Its Edge," 38 Wake Forest L. Rev. 55 (2003).

OFFICIAL COMMENTARY

This section is based upon A.B.A. Standards, Function of the Trial Judge § 6.7.

A concurrent amendment to G.S. 7A-452 provides for compensation of standby counsel.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

CASE NOTES

Standby Counsel Not Sufficient Absent Voluntary Waiver of Right to Counsel. — Neither the statutory responsibilities of standby counsel under this section, nor the actual participation of standby counsel, is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver. State v. Dunlap, 318 N.C. 384, 348 S.E.2d 801 (1986).

Neither the statutory responsibilities of standby counsel, nor the actual participation of standby counsel is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver. State v. Pruitt, 322 N.C. 600, 369 S.E.2d 590 (1988).

Waiver of Right to Counsel. — Trial court erred by allowing standby counsel's motion, filed over pro se defendant's objection, that he and other attorney be appointed as counsel to represent defendant for the limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel. State v. Thomas, 346 N.C. 135, 484 S.E.2d 368 (1997).

Request for Standby Counsel Does Not Negate Waiver of Counsel. — When the trial court granted defendant's request to appoint standby counsel for a defendant who was allowed to represent himself, defendant's request did not negate his knowing and voluntary waiver of counsel. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

Intervention by Motion. — When trial court allowed attorney, in his capacity as standby counsel, to intervene by motion in a case, over defendant's objection, it exceeded the authority granted by statute. State v. Thomas, 346 N.C. 135, 484 S.E.2d 368 (1997).

Appointment of standby counsel is a discretionary matter for the trial judge; thus, the standard of review is abuse of discretion. State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Appointment of Court-Appointed Counsel as Standby Counsel Held Proper. — Trial court did not abuse its discretion in appointing as standby counsel, court-appointed counsel removed on motion of defendant, where defendant did not attempt to replace standby counsel, did not question his competence, and conferred with counsel repeatedly during trial. See State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Denial of Standby Counsel Held Proper. — Defendant had no right to standby counsel, and the court did not abuse its discretion in denying such counsel where defendant requested it, the motion was granted, defendant changed his mind and elected not to use standby counsel, defendant later requested such counsel again, and the court refused. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980), appeal dismissed, 301 N.C. 723, 276 S.E.2d 285 (1981).

Participation of Standby Counsel Upheld. — Where standby counsel participated only "when called upon" by defendant and in a manner that was not at odds with defendant's right to conduct his own defense, trial court did not err in permitting such participation. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222, 1999 N.C. App. LEXIS 857 (1999), appeal dismissed, cert. denied, 351 N.C. 119, 541 S.E.2d 468 (1999).

Applied in State v. Brincefield, 43 N.C. App. 49, 258 S.E.2d 81 (1979); State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981); State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983).

Cited in State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Worrell, 190 N.C. App. 387, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008).

§§ 15A-1244 through 15A-1250: Reserved for future codification purposes.

ARTICLE 74 TO 77.

§§ 15A-1251 through 15A-1300: Reserved for future codification purposes.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

OFFICIAL COMMENTARY

This Subchapter attempts to gather in one place many of the provisions relating to sentencing and correctional procedures which previously were scattered among Chapter 15, Chapter 148 and case law. In addition it makes some substantial modification in current law or practice. Although in many provisions there is no longer any substantial identity between the two, this Subchapter used as a starting point the sentencing provisions of the Study Draft of the Federal Criminal Code. It might be helpful to point out some of the approaches incorporated in that federal study draft which were rejected by the Commission. Among these are the possibility of unconditional discharge of a person who had been convicted of an offense, a requirement that to place a defendant in prison rather than on probation required an affirmative finding of particular reasons by the court, the prohibition of a suspended sentence at the time probation was imposed and the use instead of a hearing to determine whether imprisonment should be imposed in case of a probation violation, and very substantial (as much as five years) mandatory parole as part of the sentence to imprisonment.

This Subchapter does not attempt to deal with "sentencing" that occurs without a judgment, particularly the matters of continuing prayer for judgment or the entry of a prejudgment conditional discharge under G.S. 90-96.

Although unrelated to sentencing, it was felt that provisions for commitment of persons found not guilty by reason of insanity appropriately could be located here as a "disposition of defendants."

Article 78.

Order of Commitment to Imprisonment.

Editor's Note. — The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified.

When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. When the commitment is to a sentence of imprisonment, the commitment must include the identification and class of the offense or offenses for which the defendant was convicted and, if the sentences are consecutive, the maximum sentence allowed by law upon conviction of each offense for the punishment range used to impose the sentence for the class of offense and prior record or conviction level, and, if the sentences are concurrent or consolidated, the longest of the maximum sentences allowed by law for the classes of offense and prior record or conviction levels upon conviction of any of the offenses. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 4; 1993, c. 538, s. 11; 1994, Ex. Sess., c. 24, s. 14(b).)

OFFICIAL COMMENTARY

This section provides a blanket authorization for the preparation of orders of commitment when there is no other specific authorization. Specific provision for pretrial commitment is contained in G.S. 15A-521. G.S. 15A-1353 provides for the commitment of convicted defendants. This general provision would provide authority for commitment orders in connection with imprisonment for contempt and other instances when no specific provision is made.

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

CASE NOTES

Cited in State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987); State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

§§ 15A-1302 through 15A-1310: Reserved for future codification purposes.

Article 79.

§§ 15A-1311 through 15A-1320: Reserved for future codification purposes.

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

Editor's Note. — The "Official Comments" under this Article are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

§ 15A-1321. Automatic civil commitment of defendants found not guilty by reason of insanity.

(a) When a defendant charged with a crime, wherein it is not alleged that the defendant inflicted or attempted to inflict serious physical injury or death, is found not guilty by reason of insanity by verdict or upon motion pursuant to G.S. 15A-959(c), the presiding judge shall enter an order finding that the defendant has been found not guilty by reason of insanity of a crime and committing the defendant to a State 24-hour facility designated pursuant to G.S. 122C-252. The court order shall also grant custody of the defendant to a law enforcement officer who shall take the defendant directly to that facility. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes.

(b) When a defendant charged with a crime, wherein it is alleged that the defendant inflicted or attempted to inflict serious physical injury or death, is found not guilty by reason of insanity, by verdict, or upon motion pursuant to G.S. 15A-959(c), notwithstanding any other provision of law, the presiding judge shall enter an order finding that the defendant has been found not guilty by reason of insanity of a crime and committing the defendant to a Forensic Unit operated by the Department of Health and Human Services, where the defendant shall reside until the defendant's release in accordance with Chapter 122C of the General Statutes. The court order shall also grant custody of the defendant to a law enforcement officer who shall take the defendant directly to the facility. Proceedings not inconsistent with this section shall thereafter be in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. (1977, c. 711, s. 1; 1983, c. 380, s. 3; 1985, c. 589, s. 10; 1987, c. 596, s. 6; 1991, c. 37, s. 1; 1998-212, s. 12.35B(a).)

OFFICIAL COMMENTARY

At the same time that recent constitutional decisions have focused on the commitment for incapacity of persons charged with crimes, parallel developments in the area of purely civil commitment have resulted in substantially modified and improved civil commitment procedure. This Article will take advantage of that new procedure.

There are three occasions for the consideration of standards of mental competency, each to be measured by a different test. Thus, in chronological order, the first test relates to the person's mental capacity to commit the crime, that is whether he has sufficient understanding and competency for society to hold him accountable for his acts. The second time at which a question of mental capacity is raised is when the trial occurs. The entirely different question then is whether the person has sufficient competency and understanding to participate in the trial and understand the significance of the events. For a person to have been found not guilty by reason of insanity, he must have failed the first test and passed the second test. At this juncture, society is faced with an individual who has been determined not responsible for a crime, but who is competent for some purposes. There must then be a determination whether that person is mentally incompetent and dangerous so that he must be committed on a basis unrelated to the fact that he has been accused of a crime and found not guilty. This is the third occasion.

Since the individual has been found not guilty of the crime, he is free from the criminal charge and is free to go if no other procedures are initiated. This Article provides that if it does appear to the judge that there is a question as to whether the person is mentally ill and dangerous, he may take the initial steps required to begin the standard procedures for determining whether or not a person should be civilly committed in accordance with the normal civil commitment procedure.

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For note, "State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina?," see 69 N.C.L. Rev. 1484 (1991).

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under former G.S. 122-84.1, or under this section as it read prior to the 1991 amendment.*

Determination of Danger to Self or Others. — The gist of this section is that the trial judge shall hold a defendant who is acquitted on the grounds of insanity for further hearings to determine whether he is imminently dangerous to himself or others. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Request for Instruction. — Denial of defendant's request for a modified jury instruction regarding post-verdict commitment procedures after a verdict of not guilty by reason of insanity was not erroneous because the trial court properly instructed the jury on the "central meaning of the statute," and its instruction substantially complied with defendant's request. State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007), review denied, appeal dismissed, 362 N.C. 366, 663 S.E.2d 431 (N.C. 2008).

Instruction Required upon Request of Defendant Interposing Insanity Defense. — Upon request, a defendant who interposed a defense of insanity to a criminal charge was entitled to a jury instruction by the trial judge setting out commitment procedures. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978); State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Failure to instruct as to this section might tend to cause the jury to return a verdict of guilty to ensure that the defendant would be incarcerated for the safety of the public and for his own safety; by giving the gist of this section, the court removes this confusion and puts the trial back upon an even keel; and giving a more detailed instruction than requested by defendant did not result in prejudicial error. State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982).

Pattern Jury Instruction as to Commitment Hearing Procedures. — Pattern jury instruction in N.C.P.I. — Crim. 304.10 which informed the jury of the commitment hearing procedures in this section and G.S. 15A-1322 adequately charged the jury regarding procedures under acquittal on the ground of insanity. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Effect of Finding of Not Guilty by Reason of Insanity. — A finding of not guilty by reason of insanity is not the same as an acquittal, nor does it result in defendant's being found guilty of a lesser degree of homicide. It simply means that the defendant is absolved from criminal responsibility for his act and cannot be punished for it. Instead, defendant, upon appropriate findings by the trial court, may be involuntarily committed to a state mental health facility. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

For example of proper jury instruction regarding involuntary commitment procedures should defendant be found not guilty by reason of insanity and concomitant responsive argument by district attorney, see State v. Coppage, 94 N.C. App. 630, 381 S.E.2d 169, cert. denied, 325 N.C. 547, 385 S.E.2d 503 (1989), decided prior to 1991 amendment.

Applied in State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

Cited in State v. Linville, 300 N.C. 135, 265 S.E.2d 150 (1980); In re Hayes, 151 N.C. App. 27, 564 S.E.2d 305, 2002 N.C. App. LEXIS 648 (2002).

§ 15A-1322. Temporary restraint.

If the judge finds that there are reasonable grounds to believe that the defendant-respondent is mentally ill, as defined in G.S. 122C-3, and is dangerous to himself or others, and the judge determines upon appropriate findings of fact that it is appropriate to proceed under the provisions of this Article, he may order that the respondent be held under appropriate restraint pending proceedings under G.S. 15A-1321. (1977, c. 711, s. 1; 1985, c. 589, s. 12.)

CASE NOTES

Pattern Jury Instruction as to Commitment Hearing Procedures. — Pattern jury instruction in N.C.P.I. — Crim. 304.10 which informed the jury of the commitment hearing procedures in G.S. 15A-1321 and 15A-1322, pursuant to Article 5 of Chapter 122C, G.S. 122C-201 et seq., adequately charged the jury regarding procedures under acquittal on the ground of insanity. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

§§ 15A-1323 through 15A-1330: Reserved for future codification purposes.

ARTICLE 81.

General Sentencing Provisions.

OFFICIAL COMMENTARY

This Article collects various provisions that apply to sentencing without regard to the nature of the sentence.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1331. Authorized sentences; conviction.

(a) The criminal judgment entered against a person in either district or superior court shall be consistent with the provisions of Article 81B of this Chapter and contain a sentence disposition consistent with that Article, unless the offense for which his guilt has been established is not covered by that Article.

(b) For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest. (1977, c. 711, s. 1; 1993, c. 538, s. 12; 1994, Ex. Sess., c. 24, s. 14(b).)

OFFICIAL COMMENTARY

This section collects in one place the possible sentence alternatives available upon conviction, but is intended to have no substantive impact. For example, if a provision defining an offense provided only a fine upon conviction, this section would not override it and permit improvement as well.

Legal Periodicals. — For article discussing the presentence diagnostic program in North Carolina, see 9 N.C. Cent. L.J. 133 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

CASE NOTES

In using the word "adjudged" in subsection (b) of this section with respect to determining when a person has been "convicted" of an offense, the legislature was not referring to the formal entry of judgment by the court but rather to the return by the jury of a verdict of guilty. State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

Plea of No Contest Considered Conviction. — Defendant was convicted of the prior offense for purposes of assessing prior record level points when he entered plea of no contest, even though no final judgment had been entered. State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

Plea of Guilty Followed by Judgment Continued Was a Prior Conviction. — Defendant's guilty plea to assault on a female was a prior conviction for purposes of North Carolina's Structured Sentencing Act, even though the trial court which accepted the plea granted defendant's prayer for judgment continued, and the trial court which accepted defendant's guilty plea to felony breaking and entering two years later did not err when it considered the earlier judgment as a conviction before it sentenced defendant. State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889, 2004 N.C. App. LEXIS 1136 (2004).

The Fair Sentencing Act does not require a defendant to forego all possible defenses before he may take advantage of statutory mitigating factors. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Sentence fixing identical minimum and maximum terms of imprisonment is invalid. State v. Teat, 24 N.C. App. 621, 211 S.E.2d 816, cert. denied, 286 N.C. 726, 213 S.E.2d 725 (1975); State v. Teachey, 26 N.C. App. 338, 215 S.E.2d 805, appeal dismissed, 288 N.C. 512, 219 S.E.2d 348 (1975), decided under former law.

On Resentencing, Judge Is Free to Deviate from Prior Sentence. — Where a new sentencing hearing has been ordered, the judge is free to deviate from the terms of the original sentence under G.S. 15A- 1331(a); however, on resentencing, a trial judge cannot impose a term of years greater than the term of years imposed by the original sentence, regardless of whether the new aggravating factors occurred before or after the date of the original sentence. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Improper Correction of Sentence. — After granting defendant's motion for appropriate relief which correctly alleged that a prior trial judge had improperly corrected his sentence outside of defendant's presence when he discovered that the original sentence violated the Structured Sentencing Act, the trial judge properly resentenced defendant to the same amount of time. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Prior Record Level at Resentencing. — For purposes of calculating a defendant's prior record level under G.S. 15A-1340.14(a) at resentencing, a trial court may consider the defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's resentencing; under G.S. 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by G.S. 15A-1331(b) on the date a judgment is entered. State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007).

Convicted Felon. — Irregardless of whether a criminal defendant pleads guilty or no contest, where a felony conviction is ultimately adjudicated, the defendant is thereafter a convicted felon for the purposes of N.C. Gen. Stat. § 14-404 and prohibited from obtaining a hand gun. Friend v. State, 169 N.C. App. 99, 609 S.E.2d 473, 2005 N.C. App. LEXIS 535 (2005), cert. denied, — N.C. —, 614 S.E.2d 533 (2005).

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); In re Gallimore, 59 N.C. App. 338, 296 S.E.2d 509 (1982); State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Graham, 149 N.C. App. 215, 562 S.E.2d 286, 2002 N.C. App. LEXIS 133 (2002).

Cited in State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978); State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751 (1984); State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998); State v. McNeill, 158 N.C. App. 96, 580 S.E.2d 27, 2003 N.C. App. LEXIS 929 (2003).

§ 15A-1331A. Forfeiture of licensing privileges after conviction of a felony.

(a) The following definitions apply in this section:

(1) Licensing agency. — Any department, division, agency, officer, board, or other unit of State or local government that issues licenses for licensing privileges.

(2) Licensing privilege. — The privilege of an individual to be authorized to engage in an activity as evidenced by the following licenses: regular and commercial drivers licenses, occupational licenses, hunting licenses and permits, and fishing licenses and permits.

(3) Occupational license. — A licensure, permission, certification, or similar authorization required by statute or rule to practice an occupation or business. The term does not include a tax license issued under Chapter 105 of the General Statutes, Article 7 of Chapter 153A of the General Statutes, or Article 9 of Chapter 160A of the General Statutes.

(b) Upon conviction of a felony, an individual automatically forfeits the individual's licensing privileges for the full term of the period the individual is placed on probation by the sentencing court at the time of conviction for the offense, if:

(1) The individual is offered a suspended sentence on condition the individual accepts probation and the individual refuses probation, or

(2) The individual's probation is revoked or suspended, and the judge makes findings in the judgment that the individual failed to make reasonable efforts to comply with the conditions of probation.

(c) Whenever an individual's licensing privileges are forfeited under this section, the judge shall make findings in the judgment of the licensing privileges held by the individual known to the court at that time, the drivers license number and social security number of the individual, and the beginning and ending date of the period of time of the forfeiture. The terms and conditions of the forfeiture shall be transmitted by the clerk of court to the Division of Motor Vehicles, in accordance with G.S. 20-24 and to the licensing agencies specified by the judge in the judgment. A licensing agency, upon receiving notice from the clerk of court, shall require the individual whose licensing privileges were forfeited to surrender the forfeited license issued by the agency and shall not reissue a license to that individual during the period of forfeiture as stated in the notice. Licensing agencies are authorized to establish procedures to implement this section.

(d) Notwithstanding any other provision of this section, the court may order that an individual whose licensing privileges are forfeited under this section be granted a limited driving privilege in accordance with the provisions of G.S. 20-179.3. (1994, Ex. Sess., c. 20, ss. 1, 5.)

§ 15A-1332. Presentence reports.

(a) Presentence Reports Generally. — To obtain a presentence report, the court may order either a presentence investigation as provided in subsection (b) or a presentence commitment for study as provided in subsection (c).

(b) Presentence Investigation. — The court may order a probation officer to make a presentence investigation of any defendant. The court may order the investigation only after conviction unless the defendant moves for an earlier presentence investigation. A motion for an earlier presentence investigation may be addressed only to the judge of the session of court for which the defendant's case is calendared or, if the case has not been calendared, to a resident superior court judge if the case is in the jurisdiction of the superior court or to the chief district court judge if the case is in the jurisdiction of the district court. When the court orders a presentence investigation, the probation officer must promptly investigate all circumstances relevant to sentencing and submit either a written report or an oral report either on the record or with defense counsel and the prosecutor present. The report may include sentence recommendations only if such recommendations are requested by the court.

(c) Presentence Commitment for Study. — When the court desires more detailed information as a basis for determining the sentence to be imposed than can be provided by a presentence investigation, the court may commit a defendant to the Department of Correction for study for the shortest period necessary to complete the study, not to exceed 90 days, if that defendant has been charged with or convicted of any felony or a Class A1 or Class 1 misdemeanor crime or crimes for which he may be imprisoned for more than six months and if he consents. The period of commitment must end when the study is completed, and may not exceed 90 days. The Department must conduct a complete study of a defendant committed to it under this subsection, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the availability of resources or programs appropriate to the defendant. Upon completion of the study or the end of the 90-day period, whichever occurs first, the Department of Correction must release the defendant to the sheriff of the county in which his case is docketed. The Department must forward the study to the clerk in that county, including whatever recommendations the Department believes will be helpful to a proper resolution of the case. When a defendant is returned from a presentence commitment for study, the conditions of pretrial release which obtained for the defendant before the commitment continue until judgment is entered, unless the conditions are modified under the provisions of G.S. 15A-534(e). (1977, c. 711, s. 1; 1981, c. 377, s. 1; 1993, c. 538, s. 13; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 507, s. 19.5(e).)

OFFICIAL COMMENTARY

This section provides for two kinds of presentence reports: A presentence report rendered by a probation officer, (referred to in this Article as a "presentence investigation") and a presentence in-custody study of the defendant by the Department of Correction (referred to in this Article as a "presentence commitment for study"). The provisions in subsection (b) on presentence investigation by a probation officer are substantially similar to present law, except this subsection makes presentence reports entirely discretionary with the judge, and permits the investigation only after guilt has been established, unless the defendant moves for an earlier presentence investigation. The Commission was concerned about the outcome of the trial being affected by the gathering of evidence which, although inadmissible, might still be influential. Since the defendant in many cases, however, might be interested in obtaining sentencing as soon as possible following determination of guilt, the defendant should have the option of having the presentence report available immediately upon conviction if he so desires.

As a further safeguard, any presentence report must be known, or capable of being known, to the defendant or his lawyer. Thus, there can be no off-the-record oral report to the judge out of the presence of the defense counsel and district attorney. Subsection (c) is also similar to the provisions in present law except for the restriction that the presentence commitment for study be used only with the consent of the defendant. The Commission felt that the possibility of depriving the defendant of his liberty for a substantial period in a case in which he might be expected to be placed on probation was a possibility which should be avoided; therefore the procedure was made available only if the defendant consents.

Editor's Note. — Session Laws 2009-451, s. 19.14, provides: "The Department of Correction and the Administrative Office of the Courts shall conduct a feasibility study of conducting pre-sentence investigations on all offenders convicted of felonies for which the sentencing judge has the option of intermediate or active punishments. This feasibility study shall be conducted as a pilot implementation, incorporating a variety of districts across the State reflecting both rural and urban settings, as well as diversity of programming available within the district.

"The Department of Correction and the Administrative Office of the Courts shall report the results of the study by May 1, 2010, to the Chairs of the House of Representatives and Senate Appropriations Committees, the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety, and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee."

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

CASE NOTES

In sentencing, the trial court is not confined to the evidence relating to the offense charged. It may inquire into such matters as age, character, education, environment, habits, mentality, propensities and record of the person about to be sentenced. And the court may inquire into alleged acts of misconduct in prison. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

§ 15A-1333. Availability of presentence report.

(a) Presentence Reports and Sentencing Services Information Not Public Records. — A written presentence report, the record of an oral presentence report, and information obtained in the preparation of a sentencing plan by a sentencing services program under Article 61 of Chapter 7A are not public records and may not be made available to any person except as provided in this section.

(b) Access to Reports. — The defendant, his counsel, the prosecutor, or the court may have access at any reasonable time to a written presentence report or to any record of an oral presentence report. Access to a sentencing plan and information obtained in the preparation of a sentencing plan shall be in accordance with the comprehensive sentencing services program plan developed pursuant to G.S. 7A-774.

(c) Expunging Reports. — On motion of the defendant, the court in its discretion may order a written presentence report, the record of an oral presentence report, or a sentencing plan expunged from the court record. (1977, c. 711, s. 1; 2000-67, s. 15.9(c).)

OFFICIAL COMMENTARY

This section is aimed at forbidding any use of the presentence report except in connection with the case for which it was made. Under subsection (b) only the defendant, his counsel, the prosecutor, or the court may obtain access to the report and the court may later expunge any report if the defendant seeks such expunction.

§ 15A-1334. The sentencing hearing.

(a) Time of Hearing. — Unless the defendant waives the hearing, the court must hold a hearing on the sentence. Either the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing.

(b) Proceeding at Hearing. — The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

(c) Sentence Hearing in Other District. — The judge who orders a presentence report may, in his discretion, direct that the sentencing hearing be held before him in another county or another district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, during or after the session in which the defendant was convicted. If sentence is imposed in a county other than the one where the defendant was convicted, the clerk of the county where sentence is imposed must forward the records of the sentencing proceeding to the clerk of the county of conviction.

(d) Sentencing in Capital Cases. — Sentencing in capital cases is governed by Article 100 of this Chapter.

(e) Procedure Applicable when Certain Prior Convictions May Be Used. — The procedure in G.S. 15A-980 governs if the State seeks to use a prior conviction in a sentencing hearing. (1977, c. 711, s. 1; 1983, c. 513, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 66.)

OFFICIAL COMMENTARY

Primarily, this section codifies common law and constitutional provisions. It is not intended to require that the sentencing hearing be distinct from the trial itself. Under this section a sentencing hearing may be held immediately upon the return of the verdict or other determination of guilt. Subsection (b) contains a provision prohibiting in-court comments on sentencing by anyone other than one called as a witness. This was aimed at deterring incidents which sometimes occur in the more informal setting of a sentencing hearing. Subsection (c) presents the innovation of a sentencing hearing in a district other than the one where the trial was held, but only in cases in which the judge has ordered a presentence report.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

For 1984 survey, "Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy," see 63 N.C.L. Rev. 1122 (1985).

CASE NOTES

I. General Consideration.
II. Evidence.

I. GENERAL CONSIDERATION.

This section — not a part of Article 100 — has no application to capital sentencing proceedings which are conducted pursuant to G.S. 15A-2000. This, the only remnant of the common law right of allocution remaining in capital cases is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Hearing Must Be Fair and Just. — It would be unreasonable to require that all information in a presentence report be free of hearsay, nor should the formal rules of evidence apply to the testimony of witnesses in a sentencing hearing; but the sentencing hearing must be fair and just, and the trial court must provide the defendant with full opportunity to controvert hearsay and other representations in aggravation of punishment. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

Subsection (b) Codifies Prior Law. — Subsection (b) of this section codifies the long standing rule in North Carolina that upon the conduct of a sentencing hearing, the court is permitted wide latitude and the rules of evidence are not strictly enforced. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

Appropriate Considerations in Imposing Sentence. — In determining the proper sentence to impose upon a convicted defendant, it is appropriate for the trial judge to inquire into such matters as the age, character, education, environment, habits, mentality, propensities, and record of the person about to be sentenced. Such an inquiry is needed if the imposition of the criminal sanction is to best serve the goals of the substantive criminal law. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

At a sentencing hearing the court may inquire into such matters as age, character, education, environment, habits, mentality, propensities, and record of a defendant, and may also inquire into alleged acts of misconduct in prison. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982).

Victim impact statements may be used at sentencing hearings, except in capital cases. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

Defendant Was Not Prejudiced by Allowing Victim's Attorney to Address the Court. — Although it was error to allow victim's attorney, who was not called as a witness at the sentencing hearing, to address the court, defendant was not prejudiced by the attorney's summary of defendant's criminal record and the attorney's statement that he thought defendant deserved a jail sentence; defendant's record had already been detailed to the court by the prosecutor and, in light of defendant's history of threats and violence toward his wife and the serious nature of the current charge, the attorney's comment did not contribute to defendant's receiving the sentence he did. State v. Jackson, 119 N.C. App. 285, 458 S.E.2d 235 (1995).

Clerk's Comment Not Violative of G.S. 15A-1334. — General Assembly did not intend by specifying in G.S. 15A-1334(b) who could "comment to the court on sentencing" to prohibit routine communication between trial courts and clerks of court during sentencing proceedings. As a result, the trial court's imposition of consecutive sentences against defendant was not error even though the trial court did not realize that it had not specified whether defendant's sentences were to run consecutively until an assistant superior court clerk informed the trial court of that fact at defendant's sentencing. State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

In determining the existence of aggravating factors, the trial court may rely on evidence presented at the sentencing hearing, or, when a defendant pleads guilty, on the circumstances surrounding the offense, including factual allegations contained in the indictment or other criminal process, despite the fact that the State fails to present evidence at sentencing. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Hearing Outside of Defendant's Presence. — The trial court acted within its discretion, under this section, in conducting the sentencing hearing after defendant fled the courthouse. State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201, 2001 N.C. App. LEXIS 138 (2001).

Failure to Hold Hearing Not Prejudicial Where Defendant Had No Evidence to Submit. — Where, after the jury returned with its verdict, the trial judge asked if counsel were ready for the sentencing hearing, and then proceeded to sentence defendant without conducting the hearing as required by statute, inasmuch as defense counsel had conceded in oral argument that she had no further evidence to submit at the hearing, the defendant was not prejudiced by the trial judge's failure to conduct the hearing. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Court Need Not Ask If Defendant Wishes to Address Court. — Trial court did not violate this section by sentencing defendant without first asking him if he wished to personally address the court, there having been sufficient compliance with the section where defendant's counsel was given the opportunity to speak in defendant's behalf. State v. Martin, 53 N.C. App. 297, 280 S.E.2d 775 (1981).

It is clear that this section, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf. State v. McRae, 70 N.C. App. 779, 320 S.E.2d 914 (1984), discretionary review denied, 313 N.C. 175, 326 S.E.2d 35 (1985).

Defendant's Rights Chilled. — Trial judge's statement, that having the defendant in a murder trial testify "would be a big mistake," regardless of the reasoning behind the statement, effectively chilled the defendant's right to testify in his own behalf. State v. Griffin, 109 N.C. App. 131, 425 S.E.2d 722 (1993).

After sentence had been entered, it was too late in the proceedings for defendant to inform the court of mitigating factors relevant to sentencing or to plead for leniency. State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (1999).

Federal Rules of Criminal Procedure Compared. — Unlike F.R.Cr.P., Rule 32(a), this section does not mandate that a personal invitation to speak personally on his own behalf prior to sentencing be directed to the defendant himself rather than to his attorney. State v. Griffin, 57 N.C. App. 684, 292 S.E.2d 156, cert. denied, 306 N.C. 560, 295 S.E.2d 477 (1982).

A clear distinction exists between F.R.Cr.P., Rule 32(a) and subsection (b) of this section: The federal statute requires the district court affirmatively to afford a defendant an opportunity to speak before sentencing, while subsection (b) of this section provides simply that a defendant "may make a statement in his own behalf." Had the legislature intended for this section to impose the same requirement as the federal statute, it would have plainly said so. While it may be the better practice for the trial court specifically to inquire if the defendant wishes to speak prior to sentencing, this section does not command this practice. State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

Opportunity to Prepare for Hearing. — Though the demands on the time of trial judges are very onerous, and they have broad discretion in conducting the business of the courts, the sentencing process, especially since the Fair Sentencing Act was adopted, is nevertheless an important part of any trial that must be fairly processed, and a hearing that a defendant has no opportunity to prepare for is not the kind of hearing that the act requires. State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

The defendant's rights to a fair trial and to equal protection of the law under the State and Federal Constitutions, and his rights pursuant to this section, were violated by the trial court's refusal to permit him to address the court prior to sentencing. State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

Trial court properly allowed the State time to obtain a superceding indictment relating to the habitual felon charge which changed the date of the occurrence of defendant's first felony; this defect was only technical in nature and its presence in the original indictment did not deprive defendant of sufficient notice that he was being prosecuted as an habitual felon. State v. Gant, 153 N.C. App. 136, 568 S.E.2d 909, 2002 N.C. App. LEXIS 1072 (2002), cert. denied, 356 N.C. 440, 572 S.E.2d 792 (2002).

Denial of Opportunity to Speak on Posttrial Motion. — Defendant was not denied the opportunity permitted by this section to make a statement in his own behalf where he made a statement at his sentencing hearing, and was only denied the opportunity to speak during the post-trial motion after the sentence was imposed. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Continuance Within Discretion of Trial Judge. — Whether to allow a continuance of the sentencing hearing lies within the discretion of the judge upon a showing of what he determines to be good cause. State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979), cert. denied, 300 N.C. 560, 270 S.E.2d 113 (1980).

Motion to continue sentencing hearing is addressed to the discretion of the trial judge who may grant it on good cause. State v. Blandford, 66 N.C. App. 348, 311 S.E.2d 338 (1984).

Good Cause Must Be Shown for Continuance. — Before a continuance of the sentencing hearing will be granted the defendant must show "good cause." That determination is within the trial judge's discretion. In re Gallimore, 59 N.C. App. 338, 296 S.E.2d 509 (1982); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Good Cause Was Not Shown. — Where defendant argued that judge misapprehended the law and believed he had to sentence defendant to consecutive life terms for the rape and sex offense convictions and defendant contended that continuance would have enabled him to present evidence that might have resulted in concurrent rather than consecutive life terms, defendant did not demonstrate good cause to continue hearing since judge did not labor under a mistaken notion that statutes mandated consecutive life sentences for four of defendant's convictions and at hearing, State explicitly asked for consecutive terms, and defendant explicitly asked that sentences run concurrently. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Where the defendant offers no reason why the hearing should not proceed, the trial court does not abuse its discretion in denying the request for a continuance. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

No Duty of State to Move for Sentence Following Continuance. — There was no duty of the state to move for the imposition of a sentence within 30 days from the time the prayer for judgment was continued, and when it failed to do so, the court did not lose its jurisdiction to impose a sentence. State v. Absher, 335 N.C. 155, 436 S.E.2d 365 (1993).

Trial in One County and Sentencing in Another. — The court was authorized by subsection (c) of this section to enter judgment and commitment against defendant in one county upon a verdict of guilty returned by a jury after trial in another county, where the court had ordered a presentence report, since defendant had been adjudged guilty in the latter county, even though prayer for judgment was continued in that county. State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

Showing Required on Appeal. — A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. State v. Lane, 39 N.C. App. 33, 249 S.E.2d 449 (1978).

Applied in State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980); State v. Withers, 311 N.C. 699, 319 S.E.2d 211 (1984).

Cited in State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985); State v. Haislip, 79 N.C. App. 656, 339 S.E.2d 832 (1986); State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986); State v. Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); State v. Lea, 156 N.C. App. 178, 576 S.E.2d 131, 2003 N.C. App. LEXIS 82 (2003).

II. EVIDENCE.

Different evidentiary rules govern trial and sentencing procedures. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

Formal Rules of Evidence Inapplicable at Sentence Hearing. — At the sentencing hearing, the defendant and the prosecutor may present witnesses and arguments on facts relevant to the sentencing hearing. However, the formal rules of evidence do not apply at the hearing. State v. Cooke, 87 N.C. App. 613, 361 S.E.2d 764 (1987).

Formal rules of evidence do not apply at sentencing hearings. State v. Graham, 61 N.C. App. 271, 300 S.E.2d 716, modified and aff'd, 309 N.C. 587, 308 S.E.2d 311 (1986).

Trial court did not err in admitting hearsay evidence of an alleged bribe offered to the witness by defendant at defendant's sentencing; further, the use of this hearsay evidence did not violate the Confrontation Clause. State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370, 2007 N.C. App. LEXIS 486 (2007), cert. denied, appeal dismissed, 361 N.C. 574, 2007 N.C. LEXIS 885 (2007).

Clerk's Comment on Omission of Sentence Details Not Prejudicial Error. — No prejudicial error pursuant to G.S. 15A-1443(a) existed in the trial court's change of the sentences from concurrent to consecutive after a comment by the clerk because the clerk merely gave the trial court notice as to an omission in the details of the sentence imposed, and did not change the trial judge's mind and the trial court's statement to defendant at the outset of the sentencing hearing that it planned to impose a significant sentence supported its later assertions that it was its intention to impose consecutive, not concurrent, sentences. State v. Mead, 184 N.C. App. 306, 646 S.E.2d 597, 2007 N.C. App. LEXIS 1456 (2007).

Informal evidentiary procedures used at sentencing hearing were not dispositive of the question of the credibility of the State's evidence, inasmuch as this section expressly suspends application of the formal rules of evidence to a sentencing hearing. State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

Use of Probationary Status to Increase Sentence. — Defendant's Sixth Amendment right to a jury trial was not violated by the use of his probationary status to increase his sentence because his voluntary declaration in open court during his G.S. 15A-1334(b) presentencing statement, that he was on probation at the time of the offenses, was an admission of the necessary facts relied on by the trial court to increase his sentence. State v. Cupid, 361 N.C. 417, 646 S.E.2d 348, 2007 N.C. LEXIS 593 (2007).

The trial court committed no error by allowing an unsworn victim impact statement at the sentencing hearing where the rules of evidence do not apply. State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896, 2000 N.C. App. LEXIS 794 (2000).

Judge should not base his sentence solely on "unsolicited whispered representations" or "rank hearsay." State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

Trial court did not violate this section by calling a detective on its own motion to testify at defendant's sentencing hearing. State v. Smith, 41 N.C. App. 600, 255 S.E.2d 210 (1979).

Defendant's escape pending his trial was clearly relevant information for the court to consider at sentencing hearing. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982).

Evidence Held Proper Despite Inadmissibility at Trial. — In a first-degree rape case, there was no merit to defendant's contention that the trial court erred in admitting testimony at his sentencing hearing by a woman who recognized defendant as the man who raped her several days before the rape in question, though this testimony would not have been admissible at the guilt phase of the trial, since formal rules of evidence do not apply at a sentencing hearing, and there was no showing of abuse of discretion, as the sentence of life imprisonment for the rape conviction was mandated by statute. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

A new sentencing hearing is required when a judge conducts an in camera victim input session and pronounces judgment without the defendant having an opportunity to refute any of the matters urged by the victim's statement. State v. Midyette, 87 N.C. App. 199, 360 S.E.2d 507 (1987), aff'd, 322 N.C. 108, 366 S.E.2d 440 (1988).

Insufficiency of Proof of Prior Convictions Not Waived. — While defendant may have waived challenge to the competency of assistant prosecutor's statements as to his prior convictions, defendant was not required to object at sentencing hearing in order to assert the insufficiency of the remarks as a matter of law to prove his prior convictions by a preponderance of the evidence. State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988).

§ 15A-1335. Resentencing after appellate review.

When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section embodies generally the rule of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 89 S. Ct. 2089, 23 L. Ed. 2d 656 (1969), but does not allow a more severe sentence even if intervening factors would argue for a more severe sentence, as the Pearce decision permits.

Legal Periodicals. — For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

CASE NOTES

Section applies to situation where trial judge is weighing aggravating and mitigating factors on resentencing a defendant or on sentencing a defendant after a new trial, and prohibits the trial judge from imposing a more severe sentence because of reweighing aggravating factors or because of new aggravating factors. State v. Williams, 74 N.C. App. 728, 329 S.E.2d 709 (1985).

This section did not apply on resentencing where the judge did not weigh aggravating factors but imposed the minimum sentence of 14 years prescribed by G.S. 14-87(d). State v. Williams, 74 N.C. App. 728, 329 S.E.2d 709 (1985).

Section does not apply to a de novo appeal from the district court to the superior court. On appeal, de novo, the slate is clean; the possibility of a more severe sentence being imposed is a risk inherent to this type of review. State v. Burbank, 59 N.C. App. 543, 297 S.E.2d 602 (1982).

Section Does Not Prevent Imposition of Sentence Prescribed by Statute. — While this section has been interpreted to prohibit the trial court from imposing a more severe sentence because of reweighing factors in aggravation or because of finding new factors in aggravation, where the trial court is required by statute to impose a particular sentence on resentencing, this section does not prevent the imposition of a more severe sentence. State v. Kirkpatrick, 89 N.C. App. 353, 365 S.E.2d 640 (1988).

Manner of Consolidating Convictions May Be Changed on Remand. — While this section prohibits trial courts from imposing stiffer sentences upon remand than were originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand. State v. Ransom, 80 N.C. App. 711, 343 S.E.2d 232, cert. denied, 317 N.C. 712, 347 S.E.2d 450 (1986).

Sentence imposed on defendant after a remand for resentencing did not run afoul of G.S.

15A-1335; the trial court could properly change the manner in which several convictions had been consolidated for purposes of resentencing, and the new sentence that was imposed, 131 to 176 months' imprisonment, was less severe than the original sentence of 179 to 233 months' imprisonment. State v. Moffitt, 185 N.C. App. 308, 648 S.E.2d 272, 2007 N.C. App. LEXIS 1737 (2007).

Resentencing Upheld. — Where defendant was originally given a 20 year prison sentence, based on 13 counts of breaking or entering and 13 counts of larceny, and after the 20 year sentence was overturned on grounds that the original sentence was in error because it consolidated crimes punishable by a maximum sentence of ten years yet sentenced defendant to 20 years in violation of G.S. 15A-1340.4(b), defendant was sentenced to six three year prison sentences or a total of 18 years imprisonment, it was held that the trial court did not err in changing the way defendant's convictions were consolidated and that the sentence imposed did not violate this section. State v. Ransom, 80 N.C. App. 711, 343 S.E.2d 232, cert. denied, 317 N.C. 712, 347 S.E.2d 450 (1986).

Where defendant's case was remanded on appeal on grounds that defendant was improperly given a separate sentence in an habitual felon court, it was not error for the trial court to increase defendant's sentence on resentencing from three years to 15 years. State v. Kirkpatrick, 89 N.C. App. 353, 365 S.E.2d 640 (1988).

Irrespective of whether defendants' original death sentences were concurrent or consecutive, trial court did not violate statute by entering consecutive life sentences on remand; life sentences could not be considered greater sentence than death. State v. Oliver, 155 N.C. App. 209, 573 S.E.2d 257, 2002 N.C. App. LEXIS 1593 (2002), appeal dismissed, cert. denied, 357 N.C. 254, 583 S.E.2d 45 (2003).

Defendant's sentence on remand was not more severe than his original sentence on a conviction for second-degree sexual offense where he was originally sentenced to 92 to 120 months imprisonment and he was ultimately resentenced for the same conviction to 91 to 119 months imprisonment with credit for time served. State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007).

More Severe Sentence Imposed in Violation of Statute. — Where, in consolidated indictments having equal presumptive terms, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally. State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993).

Because, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally. State v. Nixon, 119 N.C. App. 571, 459 S.E.2d 49 (1995).

The trial court's imposition of a greater sentence on resentencing violated this section where the trial court first sentenced the defendant as a Class B2 felon to a term of imprisonment of 196 to 245 months under the Structured Sentencing Act (G.S. 15A-1340.10 et seq.), but at the defendant's resentencing hearing, the trial court sentenced the defendant as a Class C felon to a term of life imprisonment under the Fair Sentencing Act (G.S. 15A-1340.1 et seq.). State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001).

Defendant's indictment for felonious possession of drug paraphernalia was invalid, as the charge was not supported by any statute, and the appellate court lacked jurisdiction to hear defendant's appeal; thus, after defendant's plea and sentence were set aside pursuant to defendant's motion for appropriate relief, a sentence of 135 to 175 months' imprisonment for attempted possession of cocaine was contrary to G.S. 15A-1335 when defendant's original sentence was only 101 to 131 months' imprisonment for the same offense. State v. Wagner, 356 N.C. 599, 572 S.E.2d 777 (2002).

Resentencing to Comply with Plea Agreement. — Where defendant's original sentence was the result of a negotiated plea agreement, when the trial court determined that an administrative error had been made on the judgments, the trial court did not err by correcting the error and resentencing defendant in compliance with his original plea agreement. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

Section Not Applicable When Original Plea Vacated. — Relief under G.S. 15A-1335 not available to defendant who successfully challenged his sentence for his plea bargained entry of guilty to attempted possession of cocaine while having a status as an habitual felon, and upon the vacation of his plea and the setting aside of his sentence was indicted for attempted possession of cocaine and felonious possession of drug paraphernalia and received a longer sentence than his original sentence upon his conviction. State v. Wagner, 148 N.C. App. 658, 560 S.E.2d 174, 2002 N.C. App. LEXIS 47 (2002).

Applied in State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979); State v. Safrit, 47 N.C. App. 189, 266 S.E.2d 719 (1980); State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Smith, 73 N.C. App. 637, 327 S.E.2d 44 (1985); State v. Hanes, 77 N.C. App. 222, 334

S.E.2d 444 (1985); State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985).

Cited in State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000).

§ 15A-1336. Compliance with criminal case firearm notification requirements of the federal Violence Against Women Act.

The Administrative Office of the Courts, in cooperation with the North Carolina Coalition Against Domestic Violence and the North Carolina Governor's Crime Commission, shall develop a form to comply with the criminal case firearm notification requirements of the Violence Against Women Act of 2005. (2007-294, s.2)

Editor's Note. — Session Laws 2007-294, s. 2, effective July 28, 2007, was codified as this section at the direction of the Revisor of Statutes.

Session Laws 2007-294, s. 2, provides in part: "The form shall be available for use by the courts no later than December 31, 2007."

§§ 15A-1337 through 15A-1340: Reserved for future codification purposes.

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§§ 15A-1340.1 through 15A-1340.7: Repealed by Session Laws 1993, c. 538, s. 14.

Cross References. — As to structured sentencing of persons convicted of crimes, see G.S. 15A-1340.10 et seq.

Editor's Note. — Prior to its repeal, G.S. 15A-1340.4 had been amended by Session Laws 1994, Extra Session, c. 7, s. 4, and by Session Laws 1994, Extra Session, c. 22, s. 21, both effective May 1, 1994, and applicable to offenses committed on or after that date.

§§ 15A-1340.8, 15A-1340.9: Reserved for future codification purposes.

ARTICLE 81B.

Structured Sentencing of Persons Convicted of Crimes.

Editor's Note. — Many of the cases annotated in this Article were decided prior to the Structured Sentencing Act which became effective October 1, 1994.

Part 1. General Provisions.

§ 15A-1340.10. Applicability of structured sentencing.

This Article applies to criminal offenses in North Carolina, other than impaired driving under G.S. 20-138.1 and failure to comply with control measures under G.S. 130A-25, that occur on or after October 1, 1994. This Article does not apply to violent habitual felons sentenced under Article 2B of

Chapter 14 of the General Statutes. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 22, s. 35; c. 24, s. 14(a), (b); 1993 (Reg. Sess., 1994), c. 767, s. 17.)

Parole Eligibility Report. — Session Laws 2009-451, s. 19.8(a)-(c), provides: "(a) The Post-Release Supervision and Parole Commission shall, with the assistance of the North Carolina Sentencing and Policy Advisory Commission and the Department of Correction, analyze the amount of time each inmate who is eligible for parole on or before July 1, 2010, has served compared to the time served by offenders under Structured Sentencing for comparable crimes. The Commission shall determine if the person has served more time in custody than the person would have served if sentenced to the maximum sentence under the provisions of Article 81B of Chapter 15A of the General Statutes. The 'maximum sentence,' for the purposes of this section, shall be calculated as set forth in subsection (b) of this section.

"(b) For the purposes of this section, the following rules apply for the calculation of the maximum sentence:

"(1) The offense upon which the person was convicted shall be classified as the same felony class as the offense would have been classified if committed after the effective date of Article 81B of Chapter 15A of the General Statutes.

"(2) The minimum sentence shall be the maximum number of months in the presumptive range of minimum durations in Prior Record Level VI of G.S. 15A-1340.17(c) for the felony class determined under subdivision (1) of this subsection. The maximum sentence shall be calculated using G.S. 15A-1340.17(d), (e), or (e1).

"(3) If a person is serving sentences for two or more offenses that are concurrent in any respect, then the offense with the greater classification shall be used to determine a single maximum sentence for the concurrent offenses. The fact that the person has been convicted of multiple offenses may be considered by the Commission in making its determinations under subsection (a) of this section.

"(c) The Post-Release Supervision and Parole Commission shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and to the Chairs of the House of Representatives and Senate Appropriations Committees, and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by April 1, 2010. The report shall include the following: the class of the offense for which each parole-eligible inmate was convicted and whether an inmate had multiple criminal convictions. The Commission shall reinitiate the parole review process for each offender who has served more time than that person would have under Structured Sentencing as provided by subsections (a) and (b) of this section.

"The Commission shall also report on the number of parole-eligible inmates reconsidered in compliance with this section and the number who were actually paroled."

For similar prior provisions, see Session Laws 2005-276, ss. 17.28(a)-(c), as amended by Session Laws 2006-66, s. 16.5, and Session Laws 2007-323, s. 17.11(a)-(c).

Editor's Note. — Session Laws 2007-165, s. 7, provides: "The Department of Correction shall issue Requests for Information for continuous alcohol monitoring equipment and monitoring services to consider the development of pilot programs for the use of alcohol monitoring systems for offenders supervised by the Division of Community Corrections as an intermediate punishment pursuant to Article 81B of Chapter 15A of the General Statutes or as a condition of probation. The RFIs shall require separate submissions as follows:

"(1) For use as an intermediate punishment:

"a. One submission for equipment, maintenance, and technical support.

"b. One submission for equipment, maintenance, technical support, and monitoring services.

"(2) For use as a condition of probation:

"a. One submission for equipment, maintenance, and technical support.

"b. One submission for equipment, maintenance, technical support, and monitoring services.

"The Department shall design the RFIs to use the most recent, cost-effective technology available; the Department shall not restrict vendors to the specifications of any equipment currently used by the courts as evidence of abstinence from alcohol by an offender. The RFIs shall be issued by January 1, 2008."

Session Laws 2007-165, s. 8, provides: "The Department of Correction shall report to the Chairs of the House of Representatives and Senate Appropriations Committees, the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety, and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by October 1, 2008, on the following:

"(1) The Department's evaluation of continuous alcohol monitoring systems as evidence of an offender's abstinence from alcohol.

"(2) The results of the Requests for Information issued in the 2007-2008 fiscal year for continuous alcohol monitoring of offenders supervised by the Division of Community Corrections.

"(3) The Department's recommendations for implementing continuous alcohol monitoring, including:

"a. An evaluation of the costs and benefits of alcohol monitoring technology.

"b. The size and characteristics of the offender population and the proposed number of offenders to be monitored.

"c. The contractual and internal costs of the monitoring program.

"d. The proposed caseloads for probation officers who would supervise offenders using continuous alcohol monitoring technology.

"e. Whether the State should conduct a pilot program for continuous alcohol monitoring in limited jurisdictions or statewide.

"The Department shall also explore funding options through grants and other sources, including the possibility of charging a fee to offenders to partially offset the costs of the program. The Department shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on any funds identified."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5, is a severability clause.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Legal Periodicals. — For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For comment on the North Carolina Fair Sentencing Act, see 14 N.C. Cent. L.J. 517 (1984).

For survey, "Using the Fair Sentencing Act to Protect the Criminal Defendant," see 9 Campbell L. Rev. 127 (1986).

For article, "A Progress Report on the North Carolina Sentencing and Policy Advisory Commission," see 28 Wake Forest L. Rev. 421 (1993).

For article, "North Carolina's Fair Sentencing Act: An Ineffective Scarecrow," see 28 Wake Forest L. Rev. 519 (1993).

For note, "State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate Punishment," see 72 N.C.L. Rev. 1672 (1994).

For recent development, "Structured Sentencing and the Puzzling Statutory Maximum Punishment: Apprendi's Impact on North Carolina Sentencing Law," see 80 N.C.L. Rev. 1033 (2002).

For article, "The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power," see 84 N.C. L. Rev. 1935 (2006).

CASE NOTES

Discretion to Impose Consecutive or Concurrent Sentences. — The imposition of consecutive sentences does not violate double jeopardy, as first degree burglary and common law robbery are distinct crimes. State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998), cert. denied, 349 N.C. 237, 516 S.E.2d 605 (1998).

Legislative Intent. — Assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly in enacting North Carolina's Structured Sentencing Act. State v. West, 180 N.C. App. 664, 638 S.E.2d 508, 2006 N.C. App. LEXIS 2498 (2006), appeal dismissed, cert. denied, 361 N.C. 368, 644 S.E.2d 562 (2007).

Construction with Fair Sentencing Act. — Court disagreed with defendant who asserted that there was no outright ban against consolidating offenses committed before the implementation of the Structured Sentencing Act with offenses committed after the act was implemented; crimes committed earlier were controlled by the Fair Sentencing Act. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Testimony that sex offense occurred when a victim was around seven years old — a time frame arguably covering more than a year with the critical date at its center — supported only a suspicion or conjecture that the crime occurred prior to October 1, 1994, the effective date of the Structured Sentencing Act [G.S. 15A-1340.10 through 15A-1340.23], and was not sufficient to meet the State's burden of establishing that defendant should be sentenced under the prior Fair Sentencing Act [G.S. 15A-1340.1 through 15A-1340.7, repealed]. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

Since there was inadequate evidence for the appeals court to conclude that two of the sex offenses occurred while the more severe Fair Sentencing Act [G.S. 15A-1340.1 through 15A-1340.7, repealed] was effective, and before it was replaced by the Structured Sentencing Act (SSA) [G.S. 15A-1340.10 through 15A-1340.23], the appeals court reversed and remanded those sentences for resentencing under the SSA. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

Structured sentencing applies to criminal offenses in North Carolina that occur on or after October 1, 1994, and if the offense occurs prior to October 1, 1994, a defendant is required to be sentenced to life in prison as a Class B felon under the Fair Sentencing Act [G.S. 15A-1340.1 through 15A-1340.7, repealed]. On the other hand, if the crime takes place on or after October 1, 1994, the trial court is required to sentence defendant as a Class B1 felon to a term of months under the Structured Sentencing Act [G.S. 15A-1340.10 through 15A-1340.23]. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

Construction with Habitual Felon Act. — The Structured Sentencing Act, G.S. 15A-1340.10 to 15A-1340.23, does not irreconcilably conflict with the Habitual Felon Act, G.S. 14-7.1 to 14-7.6. State v. Parks, 146 N.C. App. 568, 553 S.E.2d 695, 2001 N.C. App. LEXIS 982 (2001), cert. denied, appeal dismissed, 355 N.C. 220, 560 S.E.2d 355 (2002), cert. denied, 537 U.S. 832, 123 S. Ct. 140, 154 L. Ed. 2d 49 (2002).

Failing to Register as a Sexual Offender. — Failing to register as a sexual offender was not a status but was a separate crime, and therefore defendant was not subjected to double jeopardy or a violation of the Structured Sentencing Act by including his rape conviction in calculating his prior record level for sentencing; defendant's conviction of failing to register as a sexual offender was affirmed. State v. Harrison, 165 N.C. App. 332, 598 S.E.2d 261, 2004 N.C. App. LEXIS 1153 (2004), cert. denied, — N.C. —, 604 S.E.2d 922 (2004).

When in Doubt, Less Harsh Punishment Imposed. — It may fairly be said to be a presupposition of United States law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

Plain Language Not Violated. — Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the plain language of G.S. 15A-1340.10. State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Court's Exercise of Discretion Resulted in Gender Discrimination. — Writ of habeas corpus was issued because the petitioner's prima facie claim of gender discrimination was unrebutted by the respondent where the 19 year-old petitioner was sentenced to between 23 and 36 years whereas a similarly situated 16 year-old female co-defendant received probation and eight months of time already served. The court found no mitigating or aggravating circumstances but, rather, the totality of the evidence, including arguments of the prosecutor and statements of the court, indicated that the two were equally culpable; and where both were due to be sentenced as adults. Williams v. Currie, 103 F. Supp. 2d 858, 2000 U.S. Dist. LEXIS 9888 (M.D.N.C. 2000).

Evidence Sufficient for Sentencing under Structured Sentencing Act. — Trial court did not err in classifying the charges of second-degree rape and second-degree sexual offense as Class C felonies rather than Class D felonies because the trial testimony of the two victims established that the incidents that were the bases for each of the charges against defendant occurred after October 1, 1994, and the evidence was sufficient to permit the trial court to sentence defendant under the Structured Sentencing Act. State v. Lawrence, — N.C. App. —, 667 S.E.2d 262, 2008 N.C. App. LEXIS 1742 (2008).

Trial Court Erred in Applying Incorrect Sentencing Grid. — Defendant's sentences for second-degree sex offense and second-degree rape were vacated because defendant under the grid from Structured Sentencing II instead of Structured Sentencing I; the date of each of those offenses was between October 1, 1994 and December 1, 1995, and the trial court imposed sentences that exceeded the maximum sentences permitted under Structured Sentencing I for second-degree sex offense and second-degree rape. State v. Lawrence, — N.C. App. —, 667 S.E.2d 262, 2008 N.C. App. LEXIS 1742 (2008).

Applied in State v. Brown, 146 N.C. App. 299, 552 S.E.2d 234, 2001 N.C. App. LEXIS 864 (2001).

Cited in State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138

(1999); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001); State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002); State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State v. McQueen, 181 N.C. App. 417, 639 S.E.2d 131, 2007 N.C. App. LEXIS 154 (2007).

Decisions Under Prior Law

Editor's Note. *— Some of the cases cited below were decided under former G.S. 15A-1340.1, 15A-1340.4, and 15A-1380.1.*

Minimum Sentence for Armed Robbery to Be Greater Than Presumptive Class D Sentence. — General Assembly intended to impose a minimum sentence for armed robbery greater than the presumptive sentence for a Class D felony, and also intended that the minimum be irreducible, except for credit for good behavior, notwithstanding any other provision of law. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988); State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

The Fair Sentencing Act (FSA) specifically provided that it was applicable only to felonies occurring on or after July 1, 1981; accordingly, since the offenses for which defendant was charged and convicted occurred before the effective date of the FSA, the trial court correctly applied pre-FSA law. State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Application of Article. — Sentencing of a person convicted of a felony that occurred on or after the effective date of former Article 81A was subject to this Article; a minimum term of imprisonment would not be imposed on such a person. State v. Leggett, 61 N.C. App. 295, 300 S.E.2d 823 (1983).

The Fair Sentencing Act clearly mandates that the act is applicable only to felonies that occur on or after July 1, 1981. Therefore, it was error for trial judge to aggravate a charge on the basis of evidence relating to a pre-Act crime. State v. Jones, 66 N.C. App. 274, 311 S.E.2d 351 (1984).

The Fair Sentencing Act was inapplicable where the defendant was sentenced under G.S. 15A-2000 for convictions of three counts of first-degree murder, and not under the Fair Sentencing Act. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

The principal purpose of former Article 81A was to provide guidelines and a basis for determining an appropriate punishment for the crime of which the defendant was adjudged guilty, not crimes with which he was charged. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The trial judge still has discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within his sound discretion. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

For the purposes of sentencing under the Fair Sentencing Act, a preponderance of the evidence does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the mind of the sentencing judge by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances. State v. Atkins, 66 N.C. App. 67, 310 S.E.2d 629, rev'd on other grounds, 311 N.C. 272, 316 S.E.2d 306 (1984).

The trial court should find nonstatutory mitigating factor when defense counsel has made a specific request therefor, and when the evidence is substantial, uncontradicted and manifestly credible. State v. Corley, 75 N.C. App. 245, 330 S.E.2d 819, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Judge Must Justify Deviation from Presumptive Term. — The Fair Sentencing Act requires that a sentencing judge justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by a preponderance of the evidence. State v. Hill, 105 N.C. App. 489, 414 S.E.2d 73 (1992).

But the judge is not required to justify the weight he or she attaches to any particular factor, and it is within the court's discretion to either increase or decrease a sentence from the presumptive term based upon its conclusion that the factors in aggravation outweigh factors in mitigation or vice versa. State v. Hill, 105 N.C. App. 489, 414 S.E.2d 73 (1992).

Judging Relative Weight of Aggravating and Mitigating Factors. — A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa. State v. Daniels, 319 N.C. 452, 355 S.E.2d 136 (1987).

A trial judge's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that the judge abused his discretion. State v. Daniels, 319 N.C. 452, 355 S.E.2d 136 (1987).

The weight to be given any particular aggravating or mitigating factor rests in the trial court's sound discretion, and the balance struck by the court will not be disturbed if there is support in the record for the determination. State v. Corley, 75 N.C. App. 245, 330 S.E.2d 819, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Judge Need Not Justify Decision. — The trial court did not abuse its discretion by failing to give sufficient credit during sentencing to the substantial assistance defendant gave that enabled the State to secure guilty pleas of defendant's codefendants, because a trial judge need not justify the weight he attaches to any aggravating or mitigating factor. State v. Ocasio, 344 N.C. 568, 476 S.E.2d 281 (1996).

Appeal of Sentence Not Exceeding Presumptive Term. — Pursuant to G.S. 15A-1444(a1), a defendant who had entered a plea of guilty to a felony was not entitled to appeal as a matter of right unless his sentence exceeded the presumptive term set by former G.S. 15A-1340.4; however, he could petition for review of the issue by writ of certiorari. State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

Consolidated Offenses. — In order to support a sentence for consolidated offenses varying from the presumptive, each offense had to be treated by the trial court separately, and separately supported by findings tailored to the individual offense and applicable only to that offense. State v. Corley, 75 N.C. App. 245, 330 S.E.2d 819, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

A failure to make separate findings in aggravation and mitigation for each of several consolidated offenses will be deemed harmless error when the factors as found apply equally to each of the consolidated offenses. State v. Corley, 75 N.C. App. 245, 330 S.E.2d 819, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Joined Offenses Should Not Be Used as Aggravating Factor. — A sentencing judge may not use a joined or joinable offense in aggravation and this prohibition applies to both convictions for joined offenses and to the acts which form the substance of those joined offenses. State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995).

Course of Conduct Should Not Have Been Considered Where Offenses Joined. — Where the offenses of first-degree murder and assault with a deadly weapon were joined offenses for which defendant was convicted contemporaneously with his conviction for second-degree murder, a Class C felony covered by the Fair Sentencing Act, finding these offenses to have established a "course of conduct" in aggravation of second-degree murder, violated the prohibition of such factors in State v. Westmoreland, 314 N.C. 442, 334 S.E.2d 223 (1985); therefore, defendant is entitled to resentencing in the second-degree murder case, in which the "course of conduct" aggravating factor will not be considered. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

The Fair Sentencing Act did not require a defendant to forego all possible defenses before he may take advantage of the statutory mitigating factors. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Discretion to Impose Consecutive or Concurrent Sentences. — Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, former G.S. 15A-1340.1 et seq., it left substantially intact G.S. 15A-1354(a), which vested the sentencing judge with discretion to impose either consecutive or concurrent sentences. Since G.S. 15A-1354(a) was in effect when the legislature enacted the Fair Sentencing Act, the legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, the legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the legislature, there was nothing inherent in consecutive sentencing which violated the Fair Sentencing Act, former G.S. 15A-1340.1 et seq. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Remand for new sentencing hearing is required where the trial court makes both appropriate and inappropriate findings in aggravation or mitigation of a presumptive criminal sentence, since the reviewing court cannot determine whether the erroneous findings affected the sentence. Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), modified and aff'd, 314 N.C. 80, 331 S.E.2d 682 (1985).

An offense was a prior conviction under the Fair Sentencing Act only if the judgment had been entered and the time for appeal has expired, or the conviction has been upheld on appeal. State v. Southern, 71 N.C. App. 563, 322 S.E.2d 617 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 898, aff'd, 314 N.C. 110, 331 S.E.2d 688 (1985).

For discussion and rejection of "real offense sentencing" by North Carolina Supreme Court, see State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

In pronouncing judgment under the Fair Sentencing Act, the court must look first to the trial at which the defendant was convicted. State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983), aff'd, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

Imposition of consecutive sentences for rape, first-degree sex offense, first-degree burglary and armed robbery violated neither the Fair Sentencing Act, former G.S. 15A-1340.1 et seq., nor any constitutional proportionality requirement. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Consideration of Defendant's Prison Conduct Between Original and Resentencing Hearings. — It was reversible error for the trial court to fail to consider the defendant's prison conduct between his original sentencing hearing and his resentencing hearing, for purposes of mitigation. State v. Corley, 75 N.C. App. 245, 330 S.E.2d 819, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

The Fair Sentencing Act was an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act established rules which determined what evidence a sentencing judge could consider in aggravating a crime covered by the act; first, a conviction could not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined or by acts which formed the gravamen of these convictions; second, evidence used to prove an element of a crime could not also be used to prove a factor in aggravation of that same crime; third, the same item of evidence could not be used to prove more than one factor in aggravation; fourth, acts which could have been, but were not, the basis for other joinable criminal convictions could be used to aggravate the conviction for which defendant was being sentenced; finally, evidence used in proving an element of one crime could also be used to support an aggravating factor of a separate, though joined, crime for which defendant was being sentenced. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

One of the primary purposes of sentencing is to impose a punishment commensurate with the injury the offense has caused, taking into consideration factors which may diminish or enhance the offender's culpability. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Article Established Guidelines. — Former Article 81A did not eliminate the existing discretionary system; it only established certain guidelines for trial judges, which if correctly observed, still left an open door for disparity of sentences. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Ordinarily, a resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

"The Offense" Referred to Offense Defendant Convicted of. — As it was used in former G.S. 15A-1340.4(a)(1), the phrase "the offense" clearly referred to the offense for which the defendant was convicted or to which defendant tendered a plea of guilty. State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988).

Duty of Judge to Examine Evidence. — A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors, even absent a request by counsel. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Legislature Determines Factors to Be Considered. — The power to determine those statutory mitigating and aggravating factors which must be considered by the sentencing judge lies solely within the discretion of the Legislature. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Judge Must Consider Aggravating and Mitigating Factors. — Unless a sentence has been agreed to during plea bargaining, a sentencing judge is required to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense. Such circumstances might include facts concerning both a dismissed charge as well as the admitted offense. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Under former G.S. 15A-1340.4(a) judges had to consider all aggravating and mitigating factors before imposing a prison term other than the presumptive term. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

If the trial court imposes a sentence greater than the presumptive term for any conviction, it must consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Consideration of Victim Impact Statements. — While receiving victim impact statements advocating a sentence is "a practice not to be encouraged," the practice does not constitute reversible error. State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995).

Findings of Factors of Aggravation and Mitigation Required. — Where the conviction for the sale of cocaine, a Class H felony, has a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

When Statutory Factor Must Be Found. — Sentencing court is required to find a statutory factor only when the evidence supporting that factor is uncontradicted, substantial, and manifestly credible. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Finding of Factor Required Where Evidence Uncontradicted, Substantial and Credible. — When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, it is error for the trial court not to find that factor. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Findings Not Required After Guilty Plea. — Where defendant pled guilty pursuant to a plea arrangement as to sentence, the trial court was not required to make finding as to aggravating or mitigating factors. State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

Former G.S. 15A-1340.4 did not require that only aggravating or mitigating factors listed therein be considered. The court could use any factors which were supported by a preponderance of the evidence and were reasonably related to the purposes of sentencing. State v. Setzer, 61 N.C. App. 500, 301 S.E.2d 107 (1983), cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

In addition to specified factors which must be considered, the sentencing judge may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. It is error, however, to consider factors such that the severity of the sentence imposed relates to the defendant's plea of not guilty. State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982).

Although pecuniary gain was not a factor enumerated, former G.S. 15A-1340.4 did not limit a trial judge to the aggravating and mitigating factors enumerated therein, and the question whether to increase the sentence above the presumptive term remained within the trial court's discretion. State v. Barnes, 116 N.C. App. 311, 447 S.E.2d 478 (1994).

Age of Defendant. — The fact that defendant was 17 years old, without more, did not classify defendant as immature under the statute. State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

Evidence Proving Offense Not Properly Used to Aggravate Sentence. — As evidence necessary to prove the offense may not be used to prove any factor in aggravation, where the evidence that the defendant took a deadly weapon with him into the victim's neighborhood was so closely connected to the evidence possibly used by the jury to find that the killing was done with malice, it was error for the trial court to consider the use of the pistol again in sentencing. State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994).

Age as an Aggravating Factor When an Element of the Offense. — Where age is an element of the offense, as with taking indecent liberties with children, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime committed against him than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. If, however, the evidence shows that the victim was not more vulnerable than any other victim of the same crime would have been, the statutory aggravating factor that the victim was "very young" cannot properly be found. State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (1994).

Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

All circumstances which are transactionally related to the admitted offense must be considered during sentencing. State v. Wood, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

The trial court must consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense. This is so regardless of whether such factors were specifically listed under former G.S. 15A-1340.4(a)(1), and regardless of whether the State specifically requests a finding in this regard. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If They Are Reasonably Related to the Purposes of Sentencing. — The court could use an aggravating factor not set forth in former G.S. 15A-1340.4(a)(1) if it reasonably related to the purposes of sentencing. State v. Nichols, 66 N.C. App. 318, 311 S.E.2d 38, cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Former G.S. 15A-1340.4 did not purport to grant trial judge the discretion to create new aggravating factors. Rather, the statute listed several aggravating factors which the trial judge was required to consider and also authorized him to consider any other aggravating factors that he found were proved by a preponderance of the evidence, and that were reasonably related to the purposes of sentencing. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

But the trial judge may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing. State v. Baucom, 66 N.C. App. 298, 311 S.E.2d 73 (1984).

Burden of Proving Aggravating and Mitigating Factors. — The state has the burden of proving that aggravating factors exist, whereas the defendant has the burden of proving that mitigating factors are present. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Factors Must Be Supported by Preponderance of Evidence. — The trial judge may consider aggravating and mitigating factors supported by evidence not used to prove an essential element as long as those factors are reasonably related to the purposes of sentencing. Such factors must be supported by a preponderance of the evidence. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Findings in aggravation and mitigation must be proved by a preponderance of the evidence. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Aggravating Factor Not Shown. — Where the record did not support the court's conclusion that defendant committed the crimes for pecuniary gain, the court erred in finding pecuniary gain as an aggravating factor. State v. Barnes, 116 N.C. App. 311, 447 S.E.2d 478 (1994).

Aggravating Factor Not Proved by Evidence of Element of Offense. — Because proof of embezzlement necessarily involves proof of a position of trust, the trial court erred in finding as an aggravating factor that defendant violated a position of trust. State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (1998).

Embezzlement Occurring Over a Period of Time. — Where the district attorney chose to proceed with a single indictment charging embezzlement over a period of time that began before October 1, 1994, and ended after that date, the trial court was required to sentence defendant under the Structured Sentencing Act. State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (1998).

Presumption Evidence Sufficient to Aggravate Sentence. — Absent any indication to the contrary in the record, the Supreme Court will presume the trial court in making its findings of fact relied only on evidence which was proper to consider. Thus, without any indication in the record to the contrary, the Supreme Court will presume that the trial court did not improperly aggravate the sentence with evidence necessary to prove the crime. State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994).

Separate Factors in Aggravation Cannot Be Found on the Same Evidence. — The trial court improperly found two factors in aggravation based upon the same evidence. Therefore, defendant was entitled to a new sentencing hearing on his convictions for burglary and kidnapping. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Where the trial court found in aggravation of the defendant's conspiracy conviction that the offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws and that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws and the trial court used the same item of evidence — that the defendant had conspired to murder a law enforcement officer who was interfering with their drug trade — as the basis for finding both aggravating factors, constituted error. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

Absent Rebuttal, Factual Allegations in Indictment Deemed Admitted by Guilty Plea. — Where a defendant pled guilty to an indictment which contained factual allegations which could be the basis for the finding of an aggravating circumstance, and failed to challenge or present any evidence to rebut these factual allegations, they were deemed admitted and could be utilized by the trial court to establish the existence of the aggravating factor. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Defendant Who Pleads Guilty May Present Evidence. — Even where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment or other criminal process which could be used to establish the existence of an aggravating circumstance. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Behavior Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Behavior Prior to Resentencing. — As G.S. 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and his resentencing hearing in order to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Because a trial court's calculation of an inmate's parole eligibility did not disturb his 40-year sentence, a question as to whether the trial court erred in concluding that the 40-year sentence violated the presumptive term provision of former G.S. 15A-1340.4 (see now G.S. 15A-1340.10), part of the Fair Sentencing Act, was immaterial. Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

Judge Held Not Required to Find Aggravating and Mitigating Factors. — Where defendant was charged, convicted and sentenced for four separate violations of G.S. 14-100, the trial judge was not required to find aggravating and mitigating factors in sentencing defendant, even though charges against defendant were consolidated for trial and for hearing on judgments, as they were not consolidated for judgment and thus did not exceed maximum ten-year term for the offense. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

No Right of Appeal Where Findings Not Required. — Since the court was not required under former G.S. 15A-1340.4(b) to make findings of aggravating and mitigating factors to support the sentence imposed, defendant had no appeal as of right pursuant to G.S. 15A-1444(a1). State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (1994).

§ 15A-1340.11. Definitions.

The following definitions apply in this Article:

(1) Active punishment. — A sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended. Special probation, as defined in G.S. 15A-1351, is not an active punishment.

(2) Community punishment. — A sentence in a criminal case that does not include an active punishment, an intermediate punishment, or any of the conditions of probation listed in subdivision (6) of this section.

(3) Day-reporting center. — A facility to which offenders are required, as a condition of probation, to report on a daily or other regular basis at specified times for a specified length of time to participate in activities

such as counseling, treatment, social skills training, or employment training.

(3a) Drug treatment court program. — Program to which offenders are required, as a condition of probation, to comply with the rules adopted for the program as provided for in Article 62 of Chapter 7A of the General Statutes and to report on a regular basis for a specified time to participate in:
  a. Court supervision.
  b. Drug screening or testing.
  c. Drug or alcohol treatment programs.

(4) Repealed by Session Laws 1997-57, s. 2.

(4a) House arrest with electronic monitoring. — Probation in which the offender is required to remain at his or her residence. The court, in the sentencing order, may authorize the offender to leave the offender's residence for employment, counseling, a course of study, vocational training, or other specific purposes and may modify that authorization. The probation officer may authorize the offender to leave the offender's residence for specific purposes not authorized in the court order upon approval of the probation officer's supervisor. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition.

(5) Intensive supervision. — Probation that requires the offender to submit to rules adopted by the Division of Community Corrections for intensive supervision, including, but not limited to, multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.

(6) Intermediate punishment. — A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:
  a. Special probation as defined in G.S. 15A-1351(a).
  b. Assignment to a residential program.
  c. House arrest with electronic monitoring.
  d. Intensive supervision.
  e. Assignment to a day-reporting center.
  f. Assignment to a drug treatment court program.

(7) Prior conviction. — A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:
  a. In the district court, and the person has not given notice of appeal and the time for appeal has expired; or
  b. In the superior court, regardless of whether the conviction is on appeal to the appellate division; or
  c. In the courts of the United States, another state, the armed services of the United States, or another country, regardless of whether the offense would be a crime if it occurred in North Carolina,

regardless of whether the crime was committed before or after the effective date of this Article.

(8) Residential program. — A program in which the offender, as a condition of probation, is required to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations. (1993, c. 538, s. 1;

1994, Ex. Sess., c. 14, s. 17; c. 24, s. 14(b); 1997-57, s. 2; 1997-80, s. 6; 1999-306, s. 2; 2004-128, s. 3; 2009-372, s. 5; 2009-547, s. 6.)

Editor's Note. — Session Laws 2009-372, s. 19 is a severability clause.

Effect of Amendments. — Session Laws 2009-372, s. 5, effective December 1, 2009, and applicable to offenses committed on or after that date, in subdivision (4a), deleted "electronically" at the end of the last sentence; in subdivision (5), substituted "supervision" for "probation" in the heading, and substituted "rules adopted by the Division of Community Corrections for intensive supervision, including, but not limited to" for "supervision by officers assigned to the Intensive Supervision Program established pursuant to G.S. 143B-262(c), and to comply with the rules adopted for that Program. Unless otherwise ordered by the court, intensive supervision also requires" near the middle; and in subdivision (6)d. substituted "supervision" for "probation."

Session Laws 2009-547, s. 6, effective December 1, 2009, and applicable to offenses committed on or after that date, in subdivision (4a), deleted "unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training" at the end of the first sentence, and added the present second and third sentences.

Legal Periodicals. — For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Plea of No Contest Considered Conviction. — Defendant was convicted of the prior offense for purposes of assessing prior record level points when he entered the plea of no contest even though no final judgment had been entered. State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

Plea of Guilty Followed by Judgment Continued Was a Prior Conviction. — Defendant's guilty plea to assault on a female was a prior conviction for purposes of North Carolina's Structured Sentencing Act, even though the trial court which accepted the plea granted defendant's prayer for judgment continued, and the trial court which accepted defendant's guilty plea to felony breaking and entering two years later did not err when it considered the earlier judgment as a conviction before it sentenced defendant. State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889, 2004 N.C. App. LEXIS 1136 (2004).

Prior Record Level at Resentencing. — For purposes of calculating a defendant's prior record level under G.S. 15A-1340.14(a) at resentencing, a trial court may consider the defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's resentencing; under G.S. 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by G.S. 15A-1331(b) on the date a judgment is entered. State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007).

Defendant's guilty plea followed by probation under § 90-96 was a "conviction" for the purposes of the Structured Sentencing Act and thus furnished a legitimate basis for the trial court's determination of defendant's sentence. State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999).

Applied in State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001).

Cited in State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998); State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001); State v. West, 180 N.C. App. 664, 638 S.E.2d 508, 2006 N.C. App. LEXIS 2498 (2006); State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Decisions Under Prior Law

Editor's Note. *— The cases below were decided under former G.S. 15A-1340.2.*

Convictions in which prayer for judgment was continued and no fines or other conditions imposed constituted "prior convictions" under the Fair Sentencing Act. State v. Southern, 314 N.C. 110, 331 S.E.2d 688 (1985).

Time of Prior Conviction. — Based on former G.S. 15A-1340.2(4), at a resentencing hearing, a judge could aggravate a sentence under former G.S. 15A-1340.4(a)(1) with a conviction that was entered after defendant's conviction and first sentencing on April 5, 1991, but before his resentencing on December 9, 1993. State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (1995).

§ 15A-1340.12. Purposes of sentencing.

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b).)

Legal Periodicals. — For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For survey, "Using the Fair Sentencing Act to Protect the Criminal Defendant," see 9 Campbell L. Rev. 127 (1986).

CASE NOTES

Improper Aggravation. — Trial court erred in using the degradation of the victim in an attempted rape as an aggravating factor for sentencing; the factor was not reasonably related to the purposes of sentencing, and a new sentencing hearing was required. State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002).

Trial court erred when it relied on a copy of a warrant issued by the State of Florida to find that defendant was on pretrial release and was also a fugitive from justice when he committed second-degree murder because the fact that Florida issued a warrant supported a finding of only one aggravating factor, and the appellate court vacated defendant's sentence for second-degree murder and remanded the case for resentencing. State v. Beck, 163 N.C. App. 469, 594 S.E.2d 94, 2004 N.C. App. LEXIS 405 (2004), appeal dismissed, 358 N.C. 546, 599 S.E.2d 558 (2004).

Appellate court vacated the trial court's judgment sentencing defendant for second-degree murder because it was unclear from the record whether the trial court used its finding that defendant participated in a robbery with one other person as a statutory or non-statutory aggravating factor to depart from the presumptive sentence, but it was clear that use of that finding as a statutory aggravating factor under G.S. 15A-1340.16(d)(2) would have been error. State v. Hurt, 163 N.C. App. 429, 594 S.E.2d 51, 2004 N.C. App. LEXIS 406 (2004), rev'd in part, and aff'd in part, 361 N.C. 325, 643 S.E.2d 915 (2007).

New sentencing hearing was required, following defendant's plea of guilty pursuant to a plea agreement to second-degree murder, because the trial court erred by finding as non-statutory aggravating factors that defendant committed felony murder but was not charged with it and that defendant voluntarily entered the affray in which she shot the victim. State v. Byrd, 164 N.C. App. 522, 596 S.E.2d 860, 2004 N.C. App. LEXIS 972 (2004).

Habitual Felon Sentence Proper. — Where defendant was sentenced within the presumptive range as a Level VI habitual felon, because he was given a very favorable plea bargain in which twenty-one felony offenses were consolidated for judgment with the original ten felony offenses such that defendant received no additional time for these twenty-one felonies, his sentence was upheld pursuant to G.S. 15A-1340.12, and counsel was not ineffective for failing to object to the sentence as violative of the Eighth Amendment and on grounds that legislative policy considerations constitute ineffective assistance of counsel. State v. Cummings, 174 N.C. App. 772, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005).

Court's Questioning Was Proper. — Trial court did not abuse its discretion in questioning witnesses in front of the jury to clarify the evidence and testimony being presented. The court's questioning during the sentencing phase, when no jury was present, was also proper. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Probation Condition Held Proper. — G.S. 15A-1343(b2)(4) imposed a mandatory condition prohibiting defendant from living with a minor, and did not permit exceptions for defendant's own children; where defendant was convicted of taking indecent liberties with a child arising from his sexual misconduct with his minor sister-in-law, G.S. 15A-1343(b2)(4) was a valid probation condition, and did not violate due process even though it prohibited defendant from living with his own child. State v. Strickland, 169 N.C. App. 193, 609 S.E.2d 253, 2005 N.C. App. LEXIS 522 (2005).

Trial court's finding that defendant joined with one other person in committing the offense differed significantly from the aggravator of G.S. 15A-1340.16(d)(2), and thus was not a proper statutory aggravator; however, it was a proper nonstatutory aggravator since it increased defendant's culpability, but, since the sentence exceeded the "statutory maximum" and the increased penalty and was supported only by judicial findings of fact, it violated Blakely. State v. Hurt, 359 N.C. 840, 616 S.E.2d 910, 2005 N.C. LEXIS 837 (2005), vacated in part on other grounds, and aff'd in part, 361 N.C. 325, 643 S.E.2d 915 (2007).

Applied in State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Cited in State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); State v. Borders, 164 N.C. App. 120, 594 S.E.2d 813, 2004 N.C. App. LEXIS 740 (2004).

Decisions Under Prior Law

***Editor's Note.** — The cases cited below were decided under former G.S. 15A-1340.3.*

Stated goals of former Article 81A should have been to guide trial judges in pronouncing sentence. State v. Jones, 59 N.C. App. 472, 297 S.E.2d 132 (1982), cert. denied, 307 N.C. 579, 299 S.E.2d 651 (1983).

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, it is not clear the extent to which the act limited the sentencing discretion of the trial judge. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act was an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The trial judge still has discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within his sound discretion. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

Former Sections 15A-1340.3 and 15A-1340.4 did not require that factors which increased the defendant's culpability be a part of the actions which constituted the crime in order to be aggravating factors. State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991).

In sentencing defendant the trial judge is not required to ignore the facts and evidence of the case. Therefore, matters considered and labeled by the trial court as "aggravating" factors are proper and relevant for consideration for purposes of sentencing. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

In determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

When a defendant pleads guilty to murder in the second degree, a determination by the preponderance of the evidence in the sentencing phrase that he premeditated and deliberated the killing is reasonably related to the purposes of sentencing. Such aggravating factors may be considered in determining an appropriate sentence for the killer. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

To allow trial court to ignore uncontradicted, credible evidence of either an aggravating or a mitigating factor would render the requirement that he consider the statutory factors meaningless, and would be counter to the objective that the punishment imposed take "into account factors that may diminish or increase the offender's culpability," as required under former G.S. 15A-1340.3. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

A factor that increases an offender's culpability is reasonably related to the purposes of sentencing. State v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991).

An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to increase the offender's culpability. State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

It is error for aggravating factor to be based on circumstances which are part of very essence of crime, because it can be presumed that the legislature was guided by this unfortunate fact when it established presumptive sentences. State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

A defendant's dangerousness to others may be legitimately considered as an aggravating factor. State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983).

Under former §§ 15A-1340.3 and 15A-

1340.4, the victim's age was a statutory aggravating factor which the court could consider in an arson case regardless of whether the arson resulted in a death. The court therefore did not aggravate the sentence for arson based on defendant's conviction on the joined murder charge. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Pecuniary Gain as Nonstatutory Aggravating Factor. — To find as a nonstatutory aggravating factor that the defendant committed the crimes of murder, conspiracy to commit murder, and solicitation to commit murder for pecuniary gain would be consistent with the purposes of sentencing as set out in former G.S. 15A-1340.3. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Where defendant pleaded guilty to possession of stolen property, and she received this property as the result of a crime in which she participated and in which the victim received serious injuries, this increased her culpability. State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991).

Scope of Review. — Because it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the severity of the sentence in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983).

Court erred in finding as factors in aggravation that sentence given was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the legislature and were presumably considered in determining presumptive sentences. While both factors served as legitimate purposes for imposing an active sentence, neither could form the basis for increasing or decreasing a presumptive term because neither related to the character or conduct of the offender. State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983).

Even if defendant's child had not been harmed by the burning of his apartment, if the burning resulted in sufficient charring to constitute arson, defendant would be guilty of first-degree arson and the child's vulnerability because of its young age could still have been used to aggravate defendant's arson conviction. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Mental Injury in Excess of Injury Normally Present. — The State proved by a preponderance of the evidence, as an additional factor in aggravation, that the victim's mental and emotional injury in this case was in excess of the injury normally present in the offense. The uncontradicted evidence before the trial court at the resentencing hearing was that three years and eight months after defendant's attack on her, the victim was still experiencing nightmares in which she saw defendant laughing while raping and strangling her, and was still feeling that something was wrong with her as a result of defendant's attack; in addition, there was evidence that the victim's trauma was the result of extraordinary circumstances not inherent in second-degree rape. State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989).

Part 2. Felony Sentencing.

§ 15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.

(a) Application to Felonies Only. — This Part applies to sentences imposed for felony convictions.

(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. — Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment.

(c) Minimum and Maximum Term. — The judgment of the court shall contain a minimum term of imprisonment that is consistent with the class of offense for which the sentence is being imposed and with the prior record level for the offender. The maximum term of imprisonment applicable to each minimum term of imprisonment is, unless otherwise provided, as specified in

G.S. 15A-1340.17. The maximum term shall be specified in the judgment of the court.

(d) Service of Minimum Required; Earned Time Authorization. — An offender sentenced to an active punishment shall serve the minimum term imposed. The maximum term may be reduced to, but not below, the minimum term by earned time credits awarded to an offender by the Department of Correction or the custodian of the local confinement facility, pursuant to rules adopted in accordance with law.

(e) Deviation from Sentence Ranges for Aggravation and Mitigation; No Sentence Dispositional Deviation Allowed. — The court may deviate from the presumptive range of minimum sentences of imprisonment specified for a class of offense and prior record level if it finds, pursuant to G.S. 15A-1340.16, that aggravating or mitigating circumstances support such a deviation. The amount of the deviation is in the court's discretion, subject to the limits specified in the class of offense and prior record level for mitigated and aggravated punishment. Deviations for aggravated or mitigated punishment are allowed only in the ranges of minimum and maximum sentences of imprisonment, and not in the sentence dispositions specified for the class of offense and prior record level, unless a statute specifically authorizes a sentence dispositional deviation.

(f) Suspension of Sentence. — Unless otherwise provided, the court shall not suspend the sentence of imprisonment if the class of offense and prior record level do not permit community or intermediate punishment as a sentence disposition. The court shall suspend the sentence of imprisonment if the class of offense and prior record level require community or intermediate punishment as a sentence disposition. The court may suspend the sentence of imprisonment if the class of offense and prior record level authorize, but do not require, active punishment as a sentence disposition.

(g) Dispositional Deviation for Extraordinary Mitigation. — Except as provided in subsection (h) of this section, the court may impose an intermediate punishment for a class of offense and prior record level that requires the imposition of an active punishment if it finds in writing all of the following:

(1) That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
(2) Those factors substantially outweigh any factors in aggravation.
(3) It would be a manifest injustice to impose an active punishment in the case.

The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court. The extraordinary mitigating factors which the court finds shall be specified in its judgment.

(h) Exceptions When Extraordinary Mitigation Shall Not Be Used. — The court shall not impose an intermediate sanction pursuant to subsection (g) of this section if:

(1) The offense is a Class A or Class B1 felony;
(2) The offense is a drug trafficking offense under G.S. 90-95(h) or a drug trafficking conspiracy offense under G.S. 90-95(i); or
(3) The defendant has five or more points as determined by G.S. 15A-1340.14. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 14, ss. 18, 18.1, 19; c. 22, s. 9; c. 24, s. 14(b); 1995, c. 375, s. 1.)

Editor's Note. — Subsection (g1) was redesignated as subsection (h) at the direction of the Revisor of Statutes.

Legal Periodicals. — For case law survey as to excessive punishment, see 45 N.C.L. Rev. 910 (1967).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For comment on the North Carolina Fair

Sentencing Act, see 14 N.C. Cent. L.J. 517 (1984).

For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

For comment, "North Carolina's Fair Sentencing Act: Is it Fair?," see 20 Wake Forest L. Rev. 165 (1984).

For survey, "Using the Fair Sentencing Act to Protect the Criminal Defendant," see 9 Campbell L. Rev. 127 (1986).

For note on State v. Moore, 317 N.C. 275, 345 S.E.2d 217 (1986), and judicial discretion versus determinate sentencing under the Fair Sentencing Act, see 65 N.C.L. Rev. 1296 (1987).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

For article, "*State v. Vandiver*: Whither Judicial Discretion under the North Carolina Fair Sentencing Act?," see 67 N.C.L. Rev. 1316 (1989).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For comment clarifying the law of parties in North Carolina as to punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

CASE NOTES

Constitutionality. — Habitual felon statute under G.S. 15A-1340.13 does not violate the Eighth Amendment, as nothing in the Eighth Amendment prohibits the legislature from enhancing punishment for habitual offenders. State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Extraordinary Mitigation. — The trial court's finding of extraordinary mitigation did not give it discretion under this section to deviate from the applicable sentencing ranges for a defendant sentenced as a Class C felon with a prior record level IV, because extraordinary mitigation is only intended as a tool for dispositional deviation, not as a tool to reduce the minimum term of an active sentence. State v. Messer, 142 N.C. App. 515, 543 S.E.2d 195, 2001 N.C. App. LEXIS 143 (2001).

Trial court did not err in concluding that there were no factors in defendant's case that warranted a finding, pursuant to G.S. 15A-1340.13(g)(1), that there existed extraordinary mitigation factors justifying imposition of a lesser punishment. The trial court was correct in finding that the sheer number of mitigating factors present did not permit a trial court to find as a result that an extraordinary mitigating existed. State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Deviation Not Required Where Mitigating Factors Found. — Trial judge properly determined that defendant had accepted responsibility for his actions and that he admitted responsibility by pleading guilty, which were both mitigating factors, and further found that there were no aggravating factors; however, the judge had discretion pursuant to G.S. 15A-1340.13(e) and G.S. 15A-1340.16(a), (b) to impose a sentence within the presumptive range. State v. Bivens, 155 N.C. App. 645, 573 S.E.2d 259, 2002 N.C. App. LEXIS 1611 (2002), cert. denied, 356 N.C. 680, 577 S.E.2d 895 (2003).

State's burden of proof with respect to the existence and classification of defendant's alleged prior conviction was not satisfied by defense counsel's alleged stipulation; defense counsel's statement that worksheet indicated no prior felony convictions was not a stipulation to the prior misdemeanor listed on the worksheet. State v. Alexander, 167 N.C. App. 79, 604 S.E.2d 361, 2004 N.C. App. LEXIS 2073 (2004).

Defendant's habitual offender sentence pursuant to G.S. 15A-1340.13 was remanded for resentencing, where the State's presentation of a prior record level worksheet did not meet its burden of establishing prior convictions under G.S. 15A-1340.14(f), as defendant did not stipulate to the contents of the worksheet. State v. English, 171 N.C. App. 277, 614 S.E.2d 405, 2005 N.C. App. LEXIS 1211 (2005).

Proof of Prior Offenses Insufficient. — Where defendant, in pleading nolo contendere, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Proper Calculation of Defendant's Prior Record Level. — Appellate court erred in ordering a new sentencing hearing for defendant because the trial court properly calculated defendant's prior record level in sentencing defendant to a minimum term of imprisonment of 80 months to a maximum term of 105 months where, pursuant to G.S. 15A-1340.13(b) and G.S. 15A-1340.14(f), defendant stipulated to defendant's prior record level and the trial court used a reliable method to calculate defendant's prior record level; specifically, the trial court's methodology included relying on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to consult defendant's prior record level worksheet, and the trial court's knowledge of the plea agreement between defendant and the State. State v. Alexander, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005).

Trial court erred in adding a 15th point to defendant's prior record level and sentencing him at prior record level V under circumstances in which, for sentencing, the trial court consolidated the convictions, the "most serious" offense in each consolidated judgment was first-degree sexual offense, a class B1 felony; pursuant to G.S. 15A-1340.15(b), the trial court was required to sentence defendant according to his prior record level for that offense, and the relevant prior offenses included two misdemeanors and the class F felonies of indecent liberties with a minor, failure to register as a sex offender, and felonious restraint, none of which included all of the elements of first-degree sexual offense, and thus the trial court erred in adding a 15th point. State v. Prush, 185 N.C. App. 472, 648 S.E.2d 556, 2007 N.C. App. LEXIS 1822 (2007).

Trial court did not err in imposing an active sentence in defendant's case because defendant pled guilty to multiple felonies. Pursuant to G.S. 15A-1340.13(g), the trial court acted within its discretion in determining that there were no extraordinary factors present that warranted a lesser, intermediate sentence. State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Defendant who pled guilty to multiple felonies did not show, pursuant to G.S. 15A-1340.13(g)(2), (3), that there existed any extraordinary mitigation factors or that a manifest injustice would occur if the trial court imposed active punishment in defendant's case rather than an intermediate, lesser punishment. As a result, the trial court did not err in ordering that defendant serve an active sentence. State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Applied in State v. Van Trusell, 144 N.C. App. 445, 548 S.E.2d 560, 2001 N.C. App. LEXIS 444 (2001); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Cited in State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996); State v. Caldwell, 125 N.C. App. 161, 479 S.E.2d 282 (1996); State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998); State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (1999); State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174, 2001 N.C. App. LEXIS 322 (2001); State v. Streeter, 146 N.C. App. 594, 553 S.E.2d 240, 2001 N.C. App. LEXIS 989 (2001); State v. Wagner, 356 N.C. 599, 572 S.E.2d 777 (2002); State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005); State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006); State v. West, 180 N.C. App. 664, 638 S.E.2d 508, 2006 N.C. App. LEXIS 2498 (2006); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Decisions Under Prior Law

I. General Consideration.
II. Discretion of Court in Weighing Factors and Imposing Sentence.
III. Sentencing, Generally.
IV. Appellate Review.
V. Additional Sentencing Factors.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases cited below were decided under former G.S. 15A-1340.4 and 15A-1340.7.*

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, it is not clear the extent to which the act limited the sentencing discretion of the trial judge. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act was an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act established rules which determined what evidence a sentencing judge could consider in aggravating a crime covered by the act; first, a conviction could not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined or by acts which formed the gravamen of these convictions; second, evidence used to prove an element of a crime could not also be used to prove a factor in aggravation of that same crime; third, the same item of evidence could not be used to prove more than one factor in aggravation; fourth, acts which could have been, but were not, the basis for other joinable criminal convictions could be used to aggravate the conviction for which defendant was being sentenced; finally, evidence used in proving an element of one crime could also be used to support an aggravating factor of a separate, though joined, crime for which defendant was being sentenced. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

One of the primary purposes of sentencing is to impose a punishment commensurate with the injury the offense has caused, taking into consideration factors which may diminish or enhance the offender's culpability. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Ordinarily, a resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

"The Offense" Referred to Offense Defendant Convicted of. — As it was used in former G.S. 15A-1340.4(a)(1), the phrase "the offense" clearly referred to the offense for which the defendant was convicted or to which defendant tendered a plea of guilty. State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988).

Duty of Judge to Examine Evidence. — A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors, even absent a request by counsel. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Legislature Determines Factors to Be Considered. — The power to determine those statutory mitigating and aggravating factors which must be considered by the sentencing judge lies solely within the discretion of the legislature. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Judge Must Consider Aggravating and Mitigating Factors. — Unless a sentence has been agreed to during plea bargaining, a sentencing judge is required to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense. Such circumstances might include facts concerning both a dismissed charge as well as the admitted offense. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Under former G.S. 15A-1340.4(a) judges had to consider all aggravating and mitigating factors before imposing a prison term other than the presumptive term. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985); State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If the trial court imposed a sentence greater than the presumptive term for any conviction, it had consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Weighing of factors in aggravation or mitigation is within the sound discretion of the trial judge, once he determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sentence is within his discretion so long as it does not exceed the maximum punishment set by the legislature. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

Findings of Factors of Aggravation and Mitigation Required. — Where the conviction for the sale of cocaine, a Class H felony, has a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

When Statutory Factor Must Be Found. — Sentencing court is required to find a statutory factor only when the evidence supporting that factor is uncontradicted, substantial, and manifestly credible. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Finding of Factor Required Where Evidence Uncontradicted, Substantial and Credible. — When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, it is error for the trial court not to find that factor. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Former § 15A-1340.4 did not require that only aggravating or mitigating factors listed therein be considered. The court could use any factors which were supported by a preponderance of the evidence and were reasonably related to the purposes of sentencing. State v. Setzer, 61 N.C. App. 500, 301 S.E.2d 107 (1983), cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

In addition to specified factors which must be considered, the sentencing judge may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. It is error, however, to consider factors such that the severity of the sentence imposed relates to the defendant's plea of not guilty. State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982).

Former G.S. 15A-1340.4 did not limit a trial judge to the aggravating and mitigating factors enumerated therein. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Cocaine Addiction. — Where defendant presented no evidence compelling a conclusion that her culpability was significantly reduced by her cocaine addiction, the trial court properly refused to find the addiction as a mitigating factor during sentencing. State v. Wilson, 121 N.C. App. 720, 468 S.E.2d 475 (1996).

Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

All circumstances which are transactionally related to the admitted offense must be considered during sentencing. State v. Wood, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

The trial court must consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense. This is so regardless of whether such factors were specifically listed under former G.S. 15A-1340.4(a)(1), and regardless of whether the State specifically requests a finding in this regard. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If They Are Reasonably Related to the Purposes of Sentencing. — The court could use an aggravating factor not set forth in former G.S. 15A-1340.4(a)(1) if it reasonably related to the purposes of sentencing. State v. Nichols, 66 N.C. App. 318, 311 S.E.2d 38, cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Former G.S. 15A-1340.4 did not purport to grant trial judge the discretion to create new aggravating factors. Rather, the statute listed several aggravating factors which the trial judge was required to consider and also authorized him to consider any other aggravating factors that he found were proved by a preponderance of the evidence, and that were reasonably related to the purposes of sentencing. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

But the trial judge may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing. State v. Baucom, 66 N.C. App. 298, 311 S.E.2d 73 (1984).

Burden of Proving Aggravating and Mitigating Factors. — The state has the burden of proving that aggravating factors exist, whereas the defendant has the burden of proving that mitigating factors are present. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Factors Must Be Supported by Preponderance of Evidence. — The trial judge may consider aggravating and mitigating factors supported by evidence not used to prove an essential element as long as those factors are reasonably related to the purposes of sentencing. Such factors must be supported by a preponderance of the evidence. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Findings in aggravation and mitigation must be proved by a preponderance of the evidence. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Separate Factors in Aggravation Cannot be Found on the Same Evidence. — The trial court improperly found two factors in aggravation based upon the same evidence. Therefore, defendant was entitled to a new sentencing hearing on his convictions for burglary and kidnapping. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Absent Rebuttal, Factual Allegations in Indictment Deemed Admitted by Guilty Plea. — Where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance, and fails to challenge or present any evidence to rebut these factual allegations, they are deemed admitted and may be utilized by the trial court to establish the existence of the aggravating factor. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Defendant Who Pleads Guilty May Present Evidence. — Even where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment or other criminal process which could be used to establish the existence of an aggravating circumstance. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Behavior Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Behavior Prior to Resentencing. — As G.S. 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and his resentencing hearing in order to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Judge Held Not Required to Find Aggravating and Mitigating Factors. — Where defendant was charged, convicted and sentenced for four separate violations of G.S. 14-100, the trial judge was not required to find aggravating and mitigating factors in sentencing defendant, even though charges against defendant were consolidated for trial and for hearing on judgments, as they were not consolidated for judgment and thus did not exceed maximum ten-year term for the offense. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

II. DISCRETION OF COURT IN WEIGHING FACTORS AND IMPOSING SENTENCE.

Former Article 81A did not remove, nor intend to remove, all discretion from the sentencing judge. Judges still had discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which was a matter within their sound discretion. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982), rev'd on other grounds, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982); State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988); State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

Former Article 81A did not remove all discretion from trial judges. It was necessary that trial judges be permitted great latitude in ascertaining the true existence of aggravating and mitigating circumstances. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The question whether to increase the sentence above the presumptive term, and if so, to what extent remains within the trial judge's discretion. The sentence will not be disturbed if the record supports the court's determination. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

Weighing of Factors. — The weight to be given aggravating and mitigating factors is clearly within the sound discretion of the trial judge, whose decision will not be disturbed absent an abuse of that discretion. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

Weighing Factors Is Not Simple Matter of Mathematics. — The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982), rev'd on other grounds, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983); State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982); State v. Jones, 59 N.C. App. 472, 297 S.E.2d 132 (1982); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982).

The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. State v. Davis, 58 N.C. App. 330, 293

S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Watson, 311 N.C. 252, 316 S.E.2d 293 (1984).

The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. The number of factors found is only one consideration in determining which factors outweigh others. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982), modified on other grounds and aff'd, 308 N.C. 379, 302 S.E.2d 230 (1983).

As former G.S. 15A-1340.4(a) allowed, the court was free to emphasize one factor more than another, as the discretionary weighing of mitigating and aggravating factors did not lend itself to a simple mathematical formula. State v. Sandlin, 61 N.C. App. 421, 300 S.E.2d 893, cert. denied, 464 U.S. 995, 104 S. Ct. 491, 78 L. Ed. 2d 685, cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

But Is Within the Discretion of the Sentencing Judge. — Weighing of aggravating and mitigating factors is within the sound discretion of the sentencing judge. State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982); State v. Taylor, 74 N.C. App. 326, 328 S.E.2d 27, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985); State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

The balancing of the properly found factors in aggravation and mitigation is left to the sound discretion of the trial judge. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Weight attached to particular aggravating or mitigating circumstances in a case is within the discretion of the trial judge. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984); State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984), cert. denied, 313 N.C. 610, 332 S.E.2d 82 (1985).

Except for maximum sentence limitations in former G.S. 14-1.1, the severity of a sentence imposed pursuant to this Article, insofar as it is based on a weighing of aggravating and mitigating factors, is within the discretion of the judge. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

It is within the trial court's discretion to determine the weight given to each aggravating or mitigating factor. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

As Is Decision to Impose Sentence Above Presumptive Term. — Upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent remains within the trial judge's discretion. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Watson, 311 N.C. 252, 316 S.E.2d 293 (1984).

Once the trial judge determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sentence is within his discretion, so long as it does not exceed the maximum punishment set by the legislature. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Once a trial court has found, by a preponderance of the evidence, that aggravating factors outweigh mitigating factors, the court has the discretion not only to increase the sentence above the presumptive term, but also to determine to what extent the sentence will be increased. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Once the trial court determines that an aggravating factor outweighs a mitigating factor, it is within the sound discretion of the trial court to decide the extent to which the sentence may exceed the presumptive term. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Or Sentence Below Presumptive Term. — Upon a finding of one or more mitigating factors and no aggravating factors, the question of whether to reduce the sentence below the presumptive term, and if so, to what extent, is within the trial court's discretion. State v. Cain, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986).

Finding of an equal number of aggravating and mitigating factors is not determinative. The finding that the sole factor in aggravation outweighed the sole factor in mitigation was in the court's discretion. State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982).

The discretionary task of a trial court to weigh factors in mitigation and aggravation is not merely an application of simple mathematics; thus, the fact that there are more mitigating factors than aggravating factors is not determinative. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Court May Emphasize One Factor More Than Another. — Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Howard, 99 N.C. App. 347, 393 S.E.2d 139 (1990).

A trial court may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Former G.S. 15A-1340.4 not remove all discretion in sentencing from trial judges. Fact that the number of mitigating factors were greater than the number of aggravating ones did not preclude the trial judge from finding that the aggravating factors outweighed the mitigating ones. State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982), modified on other grounds and aff'd, 308 N.C. 379, 302 S.E.2d 230 (1983).

Single Aggravating Factor May Support Sentence Greater Than Presumptive Term. — A finding of a single factor in aggravation supported by a preponderance of evidence is sufficient to support a sentence greater than the presumptive term. State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984), cert. denied, 313 N.C. 513, 329 S.E.2d 400, cert. denied, 313 N.C. 610, 332 S.E.2d 82 (1985).

Judge need not justify weight accorded any factor supported by preponderance of evidence. State v. Howard, 99 N.C. App. 347, 393 S.E.2d 139 (1990).

Balance Struck by Judge Not Disturbed if Supported by Evidence. — The balance struck by the trial judge in considering circumstances in aggravation and mitigation will not be disturbed if there is support in the record for his determination. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982), rev'd on other grounds, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983); State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982); State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983), aff'd, 310 N.C. 209, 311 S.E.2d 806 (1984); State v. Baucom, 66 N.C. App. 298, 311 S.E.2d 73 (1984); State v. Mitchell, 67 N.C. App. 549, 313 S.E.2d 201 (1984); State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Trial judges continue to have great discretion with respect to balancing factors found in aggravation against factors found in mitigation, and this balancing process, if correctly carried out, will not be disturbed on appeal. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Lack of Rational Basis Is Abuse of Discretion. — When there is no rational basis for the manner in which the aggravating and mitigating factors are weighed by the sentencing judge, his decision will amount to an abuse of discretion. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

Where the trial judge determined that a single aggravating factor of prior convictions outweighed the two mitigating factors of physical condition and aiding in the apprehension of another felon, there was no abuse of discretion in imposing a 40-year sentence for robbery with a dangerous weapon. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Discretion Not Abused. — Judge's failure to find nonstatutory mitigating factors, even when supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent a showing of an abuse of that discretion. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Under former G.S. 15A-1340.4, it was not an abuse of the court's discretion to find that one aggravating factor out-weighed five mitigating factors in light of evidence that supported the conclusion that the defendant conspired to murder her husband. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

The trial judge acted within his discretion when he imposed maximum terms of imprisonment with regard to defendant's convictions for breaking or entering into a motor vehicle and felonious larceny, after finding, as aggravating factors, unrelated convictions which had occurred 20 years in the past. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

Remand for Resentencing. — When an aggravating factor is incorrect and is overturned on appeal, the trial judge could not properly have balanced the aggravating and mitigating factors, and therefore the case must be remanded for resentencing. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Discretion as to Severity of Sentence Limited by former § 15A-1340.4. — Except for maximum sentence limitations in former G.S. 15A-1340.4, the severity of a sentence imposed pursuant to the Fair Sentencing Act, G.S. 15A-1340.1 et seq., insofar as it was based on a weighing of aggravating and mitigating factors, was within the discretion of the judge. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

Showing of Atrocity and Cruelty. — There was sufficient evidence to support the trial court's finding that three assaults were heinous, atrocious, or cruel where defendant broke open ex-girlfriend's door and began shooting and all three victims suffered multiple gunshot wounds. The initial act of firing the weapon and injuring the three victims was sufficient to support a conviction for assault with a deadly weapon with intent to kill inflicting serious injury in each case, the additional shots which resulted in further injury to each victim were not necessary to the conviction.

State v. Evans, 120 N.C. App. 752, 463 S.E.2d 830 (1995).

Permanent Disability. — Court did not err in finding as a nonstatutory aggravating factor that the injuries to victims resulted in permanent disability, this factor was not based on the same evidence used to support the aggravating factor that the offense was especially heinous, atrocious, or cruel. State v. Evans, 120 N.C. App. 752, 463 S.E.2d 830 (1995).

III. SENTENCING, GENERALLY.

Former § 15A-1340.4 provided for three methods of sentencing. These methods were in the disjunctive. The statute made no provision for finding aggravating or mitigating factors if two or more crimes were consolidated for judgment, and it was therefore error for the trial court to enhance presumptive sentence by more than the maximum for any of the charges. State v. Ransom, 74 N.C. App. 716, 329 S.E.2d 673 (1985), aff'd, 80 N.C. 711, 343 S.E.2d 232 (1986).

The Fair Sentencing Act did not take away the trial judge's discretion to impose either consecutive or concurrent sentences. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Constitutionality of Consecutive Sentences. — The imposition of consecutive sentences for conspiracy to commit armed robbery, first-degree murder, armed robbery, second-degree burglary, and breaking or entering and larceny does not violate any constitutional proportionality requirement. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Trial judge has the discretion to impose either consecutive or concurrent sentences. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

When Sentence Other Than Presumptive Sentence Could Be Imposed. — Under former G.S. 15A-1340.4, the judge could impose a sentence other than the presumptive sentence if he found aggravating or mitigating factors. He could also impose a sentence other than the presumptive sentence pursuant to a plea bargain. The third way he could impose a sentence other than a presumptive sentence was by consolidating two or more charges for judgment. In addition, the judge could, without finding aggravating or mitigating factors, impose a sentence other than the presumptive sentence so long as the sentence complied with the three requirements set forth in this section, including the requirements that the sentence imposed was not for a term longer than the maximum term for any of the charges consolidated. State v. Ransom, 74 N.C. App. 716, 329 S.E.2d 673 (1985), aff'd, 80 N.C. 711, 343 S.E.2d 232 (1986).

Presumptive Sentence Set by Criminal Statute. — In cases in which a statute mandated that an offender be punished as a felon of one of the classifications of former G.S. 15A-1340.4(f), but set a minimum sentence greater than the presumptive sentence established in former G.S. 15A-1340.4(f), the minimum sentence set out in the criminal statute became the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The Fair Sentencing Act's presumptive sentences set out in former G.S. 15A-1340.4(f) did not apply if a separate statute provided its own presumptive sentence, as G.S. 90-95 does. State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1989).

Factors Contributing to Service Greater Than Presumptive Term to Be Set Out. — A trial judge was required to consider all of the aggravating and mitigating factors listed in former G.S. 15A-1340.4 before imposing a sentence greater than the presumptive term, but was only required to set out in the judgment the factors that he determined by the preponderance of the evidence were present. State v. Greime, 97 N.C. App. 409, 388 S.E.2d 594 (1990).

Departure from Presumptive Sentence Through Weighing of Factors. — A court can depart from the presumptive sentence by weighing mitigating and aggravating factors that are proved by a preponderance of the evidence. If aggravating factors outweigh mitigating factors, the court may impose punishment up to the statutory maximum. Conversely, if mitigating factors preponderate, the court may impose a sentence less than the presumptive sentence. The court must explain its reasons for enhancing or reducing a sentence. United States v. Price, 812 F.2d 174 (4th Cir. 1987).

Presumptive Sentence for Second Degree Murder. — Murder in the second degree was a Class C felony, and therefore the judge sentencing a defendant who was found guilty of such a crime had to impose a 15-year term of imprisonment unless aggravating or mitigating factors merited imposition of a longer or shorter term. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Burden of Showing Invalidity of Sentence in Excess of Presumptive Term. — Defendant sentenced to a term in excess of the presumptive sentence bears the burden of showing that the sentence imposed is invalid due to an abuse of discretion on the part of the trial judge or on the basis of procedural conduct or other circumstances prejudicial to him. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

A preponderance of the evidence is sufficient to prove an aggravating factor supporting a sentence in excess of the presumptive term. State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986).

In imposing a prison term in excess of 15-year presumptive sentence for Class C felony of second-degree murder under former G.S. 15A-1340.4(f)(1), the sentencing judge had to consider the statutory aggravating and mitigating factors set out in former G.S. 15A-1340.4(a), and could consider other aggravating and mitigating factors if reasonably related to the purposes of sentencing. State v. Lloyd, 89 N.C. App. 630, 366 S.E.2d 912, cert. denied, 322 N.C. 483, 370 S.E.2d 232 (1988).

Sentence in Excess of Presumptive Term Upheld. — Evidence that assault victim was beaten, shot in the back of the head, driven over by a car, and left on the highway with his leg caught up underneath the car held to justify a sentence in excess of the presumptive term. State v. Poole, 82 N.C. App. 117, 345 S.E.2d 466 (1986), cert. denied, 318 N.C. 700, 351 S.E.2d 757 (1987).

It was not an abuse of discretion for the trial judge to impose a sentence in excess of the presumptive term for second degree murder merely because only two aggravating factors (prior conviction and premeditation and deliberation) were found as compared to seven mitigating factors. State v. Carter, 318 N.C. 487, 349 S.E.2d 580 (1986).

Twenty-five-year sentence for robbery with a dangerous weapon held valid, just and in accordance with the purposes of the Fair Sentencing Act. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Sentence Other Than Presumptive One Upheld. — The trial judge did not err where he consolidated defendant's offenses for sentencing, made findings of factors in aggravation and mitigation, and imposed a sentence other than the presumptive sentence, but which did not exceed the maximum term for the most serious felony so consolidated. State v. Phillips, 84 N.C. App. 302, 352 S.E.2d 273, cert. denied, 319 N.C. 462, 356 S.E.2d 12 (1987).

Life Sentence Upheld. — Sentencing judge did not abuse his discretion in balancing the aggravating and mitigating factors and in sentencing defendant to the maximum term of life imprisonment. The judge found one aggravating factor, that defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement, and the record reflected that defendant had been convicted of at least eight offenses which were punishable by confinement in excess of 60 days. In mitigation, the judge found that defendant was suffering from a mental condition which significantly reduced his culpability and that the relationship between defendant and victim was an extenuating circumstance. It was entirely reasonable for the sentencing judge to find that the aggravating factor found, involving multiple convictions, outweighed the factors found in mitigation. State v. Bolinger, 320 N.C. 596, 359 S.E.2d 459 (1987).

Increased Sentence on Remand Upheld. — Where defendant's case was remanded on appeal on grounds that defendant was improperly given a separate sentence in an habitual felon court, it was not error for the trial court to increase defendant's sentence on resentencing from three years to 15 years. State v. Kirkpatrick, 89 N.C. App. 353, 365 S.E.2d 640 (1988).

The trial court acted under a misapprehension of law when it sentenced a defendant to a presumptive term of three years for marijuana offenses under G.S. 90-95(b)(2). State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991).

Aggravating and Mitigating Factors. — In deciding upon the length of a sentence of imprisonment differing from the presumptive term listed in subsection (f) of former G.S. 15A-1340.4, a judge had to consider 16 possible aggravating factors and 14 possible mitigating factors listed in subsection (a) of former G.S. 15A-1340.4. He could also consider any aggravating and mitigating factors that he found were proved by the preponderance of the evidence, and that were reasonably related to the purposes of sentencing, whether or not such aggravating and mitigating factors were set forth in subsection (a) of former G.S. 15A-1340.4. However, evidence necessary to prove an element of the offense could not be used to prove any factor in aggravation. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Imposition of a mandatory sentence of life imprisonment for first-degree sexual offense was not so disproportionate as to constitute a violation of U.S. Const., Amend. VIII. State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985).

Habitual Felons. — Defendant's sentences were not excessive where defendant was an habitual offender, sentenced to fourteen years of imprisonment, the minimum sentence allowed under the habitual felon statute. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

Imposition of a 30-year sentence for a habitual felon who under the facts could have received a maximum sentence of life imprisonment under former G.S. 15A-1340.4 was within constitutional limits and did not constitute cruel and unusual punishment. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

IV. APPELLATE REVIEW.

Under the Fair Sentencing Act, the appellate courts have more supervision over sentencing judgments of the trial divisions than they did before that Act. State v. Wortham, 318 N.C. 669, 351 S.E.2d 294 (1987).

The Fair Sentencing Act does not allow appeal of a presumptive sentence as of right. State v. Cain, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986).

Appeal of Right from Sentence in Excess of Presumptive Term. — When a convicted felon is given a sentence in excess of a presumptive sentence, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Consolidation of Presumptive Sentences. — When indictments or convictions with equal presumptive terms were consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms were totaled to arrive at the sentence, the sentence, for purposes of appellate review, because of the provisions of former G.S. 15A-1340.4(a), would be deemed to be equally attributable to each indictment or conviction if nothing else appeared in the record. State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993).

Deletion of Aggravating Factor Following Notice of Appeal. — Trial judge has authority to change the judgment, so as to delete a factor found in aggravation, after it has been entered and after defendant has given notice of appeal, where the amendment was made during the session, since all orders and judgments are in fieri during the session and may be amended or vacated by the court during the session, even though notice of appeal has been entered. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982).

Scope of Review. — In sentencing review, the Court of Appeals looks not for errors in judgment, but only for errors of law. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

A ruling committed to a trial judge's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Remand for New Hearing. — Because it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the severity of the sentence in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, such case must be remanded for a new sentencing hearing. State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983); State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983), aff'd, 310 N.C. 209, 311 S.E.2d 886 (1984); State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983); State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985); State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985); State v. Long, 316 N.C. 60, 340 S.E.2d 392 (1986); State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987); State v. Taylor, 74 N.C. App. 326, 328 S.E.2d 27, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985); State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983).

Finding Aggravating Factor for Misdemeanor Conviction Nonprejudicial Error. — The trial court did not need to find an aggravating factor for the breaking and entering count since the defendant was convicted of a misdemeanor which was not subject to former G.S. 15A-1340.4(b). The finding of an aggravating factor for the misdemeanor conviction, therefore, was superfluous and nonprejudicial error. The extent of punishment for misdemeanors is referred to the discretion of the trial court and its sentence may not be interfered with by the appellate court, except in cases of manifest and gross abuse. State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992).

Where trial judge stated his intended sentence even before evidence was presented to the jury on the issue of guilt, the appellate court could not conclude that the sentence imposed was based solely upon the evidence, the argument of counsel and the aggravating and mitigating factors found by the trial judge, and the case would be remanded for a new sentencing hearing. State v. Cannon, 326 N.C. 37, 387 S.E.2d 450 (1990).

Sentence Influenced by Insistence on Jury Trial. — Where it could reasonably be inferred from the language of the trial judge that sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury was abridged, and a new sentencing hearing would result. State v. Cannon, 326 N.C. 37, 387 S.E.2d 450 (1990).

Harmless Error in Factors Found. — Where defendant's sentence of 10 years imprisonment for four consolidated convictions of first degree kidnapping was less than the presumptive sentence for that crime, and trial judge found no mitigating factors, any error in the aggravating factors found was harmless so far as defendant's sentence for kidnapping was concerned. State v. Long, 316 N.C. 60, 340 S.E.2d 392 (1986).

V. ADDITIONAL SENTENCING FACTORS.

Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. State v. Stone, 71 N.C. App. 417, 322 S.E.2d 413 (1984).

Conduct Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Presentencing. — As G.S. 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus, it could not be said from such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Minimum Sentence Under § 14-87 Irreducible Except for Good Behavior. — The following factors lead to the conclusion that the General Assembly considered the relationship between G.S. 14-87 and former Article 81A. First, G.S. 14-87 was rewritten as part of Session Laws 1979, c. 760. Second, the rewritten version specifically referred to former G.S. 15A-1340.7, which allowed credit for good behavior. Third, the General Assembly amended the last part of G.S. 14-87(a) in the 1979 second session changing the phrase "... punished as a Class D felon" to "... guilty of a Class D felony." These factors lead to the conclusion that the General Assembly intended to impose a minimum sentence for armed robbery greater than the presumptive sentence for a Class D felony and also intended that the minimum be irreducible, except for credit for good behavior, notwithstanding any other provision of law. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Consideration of Age of Rape Victim. — Due to the General Assembly giving children under 13 greater protection from first-degree rape than victims over 13, the rape of a victim under 13 by a defendant at least 12 and at least four years older than the victim made the defendant more blameworthy, because rape victims under 13 were in fact more vulnerable to the crime of rape than they would otherwise be if older than 12. This did not, however allow the age of the victim to be considered in sentencing for first-degree rape, because (1) age is an element of first-degree rape under G.S. 14-27.2(a)(1) and as such could not be considered an aggravating factor upon sentencing for that crime under former G.S. 15A-1340.4(a)(1)(p), and (2) first-degree rape was a Class B felony which carried a mandatory life sentence without consideration of aggravating and mitigating factors, under former G.S. 14-1.1. State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971); State v. Sligh, 27 N.C. App. 668, 219 S.E.2d 801 (1975).

Excessive Sentence Cannot Be Sustained. — See State v. Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951).

Excessive Judgment Vacated and Remanded. — See State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

Credit for Pretrial Detention. — A prisoner should be given credit for time spent in custody prior to commitment where he has been given a maximum sentence. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Same — Failure to Give Credit Violates Constitution. — North Carolina's failure to give a prisoner credit for time served before trial where he has received a maximum sentence violates the Constitution in two ways. First, it constitutes multiple punishment for a single offense, thereby offending the double jeopardy clause of the Fifth Amendment which is applicable to the states through the Fourteenth Amendment. Second, the fact that only those accused who are unable to raise bail are subjected to extra pretrial incarceration when their prison time exceeds the statutory maximum is an invidious discrimination against the poor in violation of the equal protection clause of the Fourteenth Amendment. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

The State's refusal to give a prisoner credit for pretrial detention is an unconstitutional discrimination on the basis of wealth prohibited by the Fourteenth Amendment. Wealthy defendants (except where no bail is allowed) are able to remain out of prison until conviction and sentencing; the poor stay behind bars. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Same — Pretrial Custody Added to Sentence Cannot Exceed Statutory Maximum Punishment. — The time a prisoner spends in custody prior to trial when added to the sentence to be served upon commitment cannot total more than the statutory maximum punishment for the crime involved. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Same — New Conviction. — The constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Where Felony and Misdemeanor Counts Consolidated for Judgment. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed was in excess of that permissible upon conviction of the misdemeanor was immaterial and was not prejudicial where it did not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

§ 15A-1340.14. Prior record level for felony sentencing.

(a) Generally. — The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section.

(b) Points. — Points are assigned as follows:

(1) For each prior felony Class A conviction, 10 points.

(1a) For each prior felony Class B1 conviction, 9 points.

(2) For each prior felony Class B2, C, or D conviction, 6 points.

(3) For each prior felony Class E, F, or G conviction, 4 points.

(4) For each prior felony Class H or I conviction, 2 points.

(5) For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.

(6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.

(7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

For purposes of determining prior record points under this subsection, a conviction for a first degree rape or a first degree sexual offense committed prior to the effective date of this subsection shall be treated as a felony Class B1 conviction, and a conviction for any other felony Class B offense committed prior to the effective date of this subsection shall be treated as a felony Class B2 conviction. G.S. 15A-1340.16(a5) specifies the procedure to be used to determine if a point exists under subdivision (7) of this subsection. The State must provide a defendant with written notice of its intent to prove the existence of the prior record point under subdivision (7) of this subsection as required by G.S. 15A-1340.16(a6).

(c) Prior Record Levels for Felony Sentencing. — The prior record levels for felony sentencing are:

(1) Level I — Not more than 1 point.
(2) Level II — At least 2, but not more than 5 points.
(3) Level III — At least 6, but not more than 9 points.
(4) Level IV — At least 10, but not more than 13 points.
(5) Level V — At least 14, but not more than 17 points.
(6) Level VI — At least 18 points.

In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.

(d) Multiple Prior Convictions Obtained in One Court Week. — For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

(e) Classification of Prior Convictions From Other Jurisdictions. — Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

(f) Proof of Prior Convictions. — A prior conviction shall be proved by any of the following methods:

(1) Stipulation of the parties.
(2) An original or copy of the court record of the prior conviction.
(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing. If asked by the defendant in compliance with G.S. 15A-903, the prosecutor shall furnish the defendant's prior criminal record to the defendant within a reasonable time sufficient to allow the defendant to determine if the record available to the prosecutor is accurate. Upon request of a sentencing services program established pursuant to Article 61 of Chapter 7A of the General Statutes, the district attorney shall provide any information the district attorney has about the criminal record of a person for whom the program has been requested to provide a sentencing plan pursuant to G.S. 7A-773.1. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 22, s. 10; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, ss. 11-13; 1995, c. 507, s. 19.5(f); 1995 (Reg. Sess., 1996), c. 742, s. 15; 1997-80, s. 7; 1997-486, s. 1; 1999-306, s. 3; 1999-408, s. 3; 2005-145, s. 2; 2009-555, s. 1.)

Editor's Note. — Session Laws 2005-145, s. 5, effective June 30, 2005, which rewrote this section, provides in part: "Prosecutions for offenses committed before June 30, 2005, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2009-555, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, revised the point totals for prior record levels throughout subdivisions (c)(1) through (c)(6).

Legal Periodicals. — For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Definitions. — Under this section, "prior felony conviction" refers only to a prior entry of a plea of guilty or no contest; it does not refer to the sentence imposed for committing the prior felony. State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998), aff'd, 350 N.C. 88, 511 S.E.2d 638 (1999).

Scoring Common Law Offenses. — The trial court properly assessed the defendant's prior common law misdemeanor kidnapping offense as second degree kidnapping, to reflect its classification at the time of the current offense. State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998), cert. denied, 349 N.C. 374, 525 S.E.2d 189 (1998).

The three types of takings prohibited by Md. Code Ann., Crim. Law § 7-104 are similar to the North Carolina common law regarding taking and asportation because in both states, the law is focused on the perpetrator placing the property under his control and depriving the owner of control over it; defendant's Maryland conviction for theft was substantially similar to the North Carolina offense of misdemeanor larceny for sentencing purposes under G.S. 15A-1340.14. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Juvenile Offenses. — Because defendant juvenile was adjudicated delinquent and committed to the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center, he was not "imprisoned" and it was error to have assigned a sentencing point pursuant to G.S. 15A-1340.14(b)(7). State v. Tucker, 154 N.C. App. 653, 573 S.E.2d 197, 2002 N.C. App. LEXIS 1540 (2002), cert. denied, 356 N.C. 691, 578 S.E.2d 597 (2003).

The Court Should Impose an Enhanced Sentence for the Underlying Felonies, Not for Being a Habitual Felon. — The trial court erred in imposing the habitual felon sentence in a separate judgment from the principal felony convictions, and directing that the latter run at the expiration of the habitual felon sentence. On remand, the court should calculate defendant's prior record level pursuant to this section and impose sentences upon the "underlying felonies as . . . Class C felonies." State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000).

Determination of Prior Record Level. — The trial court improperly assigned Class C level points for a Class H conviction, even though the conviction had resulted in a Class C level sentence. State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998), aff'd, 350 N.C. 88, 511 S.E.2d 638 (1999).

Trial court impermissibly assigned points to defendant's three prior DWI convictions where those same three DWI convictions were the basis for her habitual DWI charge. State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999).

Where an erroneous assessment of three points on a worksheet under G.S. 15A-1341.14(b)(6), (b)(7), (d) caused defendant to receive an erroneous prior record level, the matter had to be remanded for resentencing. State v. McNeill, 158 N.C. App. 96, 580 S.E.2d 27, 2003 N.C. App. LEXIS 929 (2003).

Trial court did not err in finding defendant was on probation at the time he committed the offense of assault with a deadly weapon with intent to kill and in adding an additional point to his prior record level determination, as the State handed up evidence to the trial court that allowed for that finding. State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601, 2003 N.C. App. LEXIS 1438 (2003).

Defendant was assigned the improper number of points at sentencing, where the trial court assigned defendant a point for defendant's prior conviction of misdemeanor financial car fraud; as of the time of the prior offense, which was the applicable time period pursuant to G.S. 15A-1340.14(c), the classification for misdemeanor financial card fraud was a class two misdemeanor, which was assigned zero points under former G.S.15A-1340.14(b). State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003), appeal dismissed, cert. denied, 357 N.C. 581, 589 S.E.2d 363 (2003).

In sentencing defendant, trial court did not err by assigning a prior record level three based on defendant's prior offenses; while the trial court found that level because it determined that defendant had eight record points, even if defendant's argument that one record point was improperly determined was taken into account, defendant would still have a prior record level of three, as that level was assigned where a defendant had at least five points but no more than eight. State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311, 2005 N.C. App. LEXIS 144 (2005), cert. denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

Trial court incorrectly determined defendant's prior record level, using prior crimes that were not proven by sufficient evidence. State v. Silas, 168 N.C. App. 627, 609 S.E.2d 400, 2005 N.C. App. LEXIS 456 (2005), aff'd in part, modified in part, 360 N.C. 377, 627 S.E.2d 604 (2006).

In a prosecution for murder and related crimes, when a trial court found defendant was on probation when he committed the crime of discharging a firearm into occupied property and increased his prior record level points from eight to nine, and his prior record level from III to IV, under G.S. 15A-1340.14(b)(7) and (c)(4), the sentence enhancement that defendant committed the crime while on probation did not have to be alleged in the indictment, as sentencing factors did not have to be stated in an indictment. State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319, 2005 N.C. App. LEXIS 1776 (2005), rev'd, in part, 361 N.C. 418, 645 S.E.2d 761 (2007), remand 652 S.E.2d 17, 2007 N.C. App. LEXIS (2007) (Blakeley error held harmless).

In a prosecution for murder and related crimes, when a trial court found defendant was on probation when he committed the crime of discharging a firearm into occupied property and increased his prior record level points from eight to nine, and his prior record level from III to IV, under G.S. 15A-1340.14(b)(7) and (c)(4), it was error not to submit the issue of whether defendant was on probation when he committed the crime to a jury, as: (1) any fact, other than a prior conviction, that increased the penalty for a crime beyond the prescribed presumptive range had to be submitted to a jury and proved beyond a reasonable doubt; (2) defendant's probationary status did not have the procedural safeguards of having been previously submitted to a jury or proved beyond a reasonable doubt; and (3) defendant's acknowledgment, at sentencing, that he was on probation at the time of the crime was not a knowing and intelligent waiver of his right to a jury determination of this issue because, at the time of his sentencing, Blakely and Allen had not been decided, so he was unaware of his right to have a jury decide the question. State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319, 2005 N.C. App. LEXIS 1776 (2005), rev'd, in part, 361 N.C. 418, 645 S.E.2d 761 (2007), remand 652 S.E.2d 17, 2007 N.C. App. LEXIS (2007) (Blakeley error held harmless).

Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the plain language of G.S. 15A-1340.01. State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Since G.S. 15A-1340.14(d) did not prohibit the use of multiple convictions obtained in different courts in the same week, defendant's assignment of error, that the trial court erred by including in its calculation of his prior record level two separate convictions received on the same day in the same county, was overruled.

State v. Fuller, 179 N.C. App. 61, 632 S.E.2d 509, 2006 N.C. App. LEXIS 1674 (2006).

Trial court did not err in calculating defendant's prior record by including his driving while impaired convictions even though those convictions were also elements of his habitual impaired driving convictions; the trial court's calculation of defendant's prior record level did not represent a double-counting of convictions. State v. Hyden, 175 N.C. App. 576, 625 S.E.2d 125, 2006 N.C. App. LEXIS 179 (2006).

The trial court properly determined defendant's prior convictions as well as his habitual and non-habitual felon status on the basis of defense counsel's stipulations. State v. Scott, 180 N.C. App. 462, 637 S.E.2d 292, 2006 N.C. App. LEXIS 2378 (2006).

For purposes of calculating a defendant's prior record level under G.S. 15A-1340.14(a) at resentencing, a trial court may consider the defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's resentencing; under G.S. 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by G.S. 15A-1331(b) on the date a judgment is entered. State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007).

Trial court did not err in calculating defendant's prior record level, as it was proven by stipulation as permitted by G.S. 15a-1340.14(f)(1). State v. Spencer, 187 N.C. App. 605, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Trial court properly assigned one prior conviction point in sentencing because attempted felonious larceny, which was the present offense, was a lesser included offense of felonious larceny, which was a prior conviction, and thus all of the elements of the present offense were included in the prior conviction for G.S. 15A-1340.14(b)(6) purposes; further, G.S. 14-72 related solely to punishment for the separate crime of larceny, did not change the nature of the crime, and the elements remained the same. Thus, for purposes of G.S. 15A-1340.14(b)(6), it did not matter under what provision of G.S. 14-72 the prior larceny convictions were established. State v. Ford, — N.C. App. —, 672 S.E.2d 689, 2009 N.C. App. LEXIS 113 (2009).

Use of Same Factors to Increase Prior Record Level and Aggravate Sentence Not Prohibited. — Although defendant contended that using the same factors to increase his prior record level and aggravate his sentence violated "his state and federal rights," defendant failed to point to any specific right, and instead, argued that such a procedure was improper; the General Assembly had not provided any statutory right prohibiting use of the same factors to increase a defendant's prior record level and aggravate his sentence. State v. Moore, 188 N.C. App. 416, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Calculation Proper Even Though Not Found by Jury or Admitted by Defendant. — Trial court was not precluded from assigning a point in the calculation of defendant's prior record level where all the elements of the present offense were included in a prior offense even though the same was neither found by the jury beyond a reasonable doubt nor admitted by defendant. State v. Poore, 172 N.C. App. 839, 616 S.E.2d 639, 2005 N.C. App. LEXIS 1774 (2005).

Defendant's habitual offender sentence pursuant to G.S. 15A-1340.13 was remanded for resentencing; the State's presentation of a prior record level worksheet did not meet its burden of establishing prior convictions under G.S. 15A-1340.14(f), as defendant did not stipulate to the contents of the worksheet. State v. English, 171 N.C. App. 277, 614 S.E.2d 405, 2005 N.C. App. LEXIS 1211 (2005).

Trial court erred in determining defendant's prior record level pursuant to G.S. 15A-1340.14(e), as the State failed to show that defendant's prior conviction in New York was substantially similar to a class I misdemeanor in North Carolina. State v. Ayscue, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Enhanced sentence imposed on defendant's drug convictions had to be remanded for resentencing, because error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review, G.S. 15A-1446(d)(5), (18), and the trial court failed to satisfy its burden under G.S.15A-1340.14(e) to show that defendant's Texas convictions were substantially similar to corresponding Class I North Carolina felony offenses. State v. Huu The Cao, 175 N.C. App. 434, 626 S.E.2d 301, 2006 N.C. App. LEXIS 185 (2006).

Trial court erred in sentencing defendant as a level IV offender on his conviction of second-degree murder, as the trial court erred in finding that a prior New York conviction of N.Y. Penal Law § 120.05 was substantially similar to North Carolina's offense of simple assault set forth in G.S. 14-33(a), as the North Carolina offense required serious injury to the victim and the New York offense did not; furthermore, under G.S. 14-2.5, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit, and defendant's prior New York conviction for attempted second-degree assault should have been treated as a class 3 misdemeanor, which would have not had any point value for prior record purposes. State v. Hanton, 175 N.C. App. 250, 623 S.E.2d 600, 2006 N.C. App. LEXIS 45 (2006).

Trial court did not err in sentencing defendant based on defendant's stipulation as to his prior criminal history, which was sufficient to prove that defendant had enough prior criminal history points to be sentenced within a certain sentencing range; even if it was conceded that only one of defendant's two prior convictions on the same date should have been counted in the prior criminal history, the sentencing points still would have allowed for sentencing in the same range, and thus any error in sentencing defendant was harmless. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

Appellate court erred in ordering a new sentencing hearing for defendant because the trial court properly calculated defendant's prior record level in sentencing defendant to a minimum term of imprisonment of 80 months to a maximum term of 105 months where, pursuant to G.S. 15A-1340.13(b) and G.S. 15A-1340.14(f), defendant stipulated to defendant's prior record level and the trial court used a reliable method to calculate defendant's prior record level; specifically, the trial court's methodology included relying on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to consult defendant's prior record level worksheet, and the trial court's knowledge of the plea agreement between defendant and the State. State v. Alexander, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005).

Harmless Error. — The defendant's assignment of error to two of the ten points the court used to determined that his record level was level IV did not result in reversal, although one of the points was based on insufficient evidence that he was on probation while committing the current offenses, because he was correctly found to have nine prior record points which still left his point range within level IV. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

Where the defendant took issue with only one of the 21 prior record points found by the trial court, based on the trial court's allegedly erroneous finding that all the elements of the defendant's offense were included in a prior offense, the error was harmless, even assuming that one point was erroneously assessed, because the defendant would still have a prior record level of VI with 20 prior record points as Level VI was assigned to defendants who had at least 19 prior record points. State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

Although defendant's sentence was based on 11 prior offense points, and defendant's points admitted or proven only totaled nine, there was no error because record level was same for either total. State v. Chivers, 180 N.C. App. 275, 636 S.E.2d 590, 2006 N.C. App. LEXIS 2330 (2006).

Any error in the trial court's calculation of defendant's prior record assessment was harmless under circumstances in which defendant claimed that five of the 29 points were improperly assessed, so his correct point total was 24; assuming arguendo that the trial court improperly included all five points, subtracting them still left defendant's prior record level at VI, and thus defendant was correctly sentenced within the presumptive range of an offender with a prior record level VI. State v. Lindsay, 185 N.C. App. 314, 647 S.E.2d 473, 2007 N.C. App. LEXIS 1715 (2007).

Any Blakely error in determining that defendant discharged a firearm into occupied property while defendant was on probation, which increased defendant's prior record level points, was harmless as defendant admitted that defendant was on probation on the date of an offense since defendant's prior record level worksheet showed that defendant received eight points for prior convictions, and defendant received one point for purposes of G.S. 15A-1340.14(b)(7) for committing the offense while on probation; the State and defense counsel signed the prior record level worksheet, and defense counsel agreed that defendant had one prior record level point because defendant was on probation at the time of the offense. State v. Wissink, 187 N.C. App. 185, 652 S.E.2d 17, 2007 N.C. App. LEXIS 2249 (2007).

Any alleged error in the trial court's treatment of a prior breaking or entering incident was harmless because, even without the habitual felon conviction, defendant would still have had at least 19 prior record points and would have properly been assigned a prior record level of VI. State v. Massey, — N.C. App. —, 672 S.E.2d 696, 2009 N.C. App. LEXIS 146 (2009).

Proof of Criminal History. — A computerized printout not under seal was admissible to prove prior criminal history, as it contained a detailed record of defendant's criminal history with sufficient identifying information to give it the indicia of reliability. State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998), cert. denied, 349 N.C. 237, 516 S.E.2d 605 (1998).

The State failed to prove by a preponderance of the evidence that defendant was the same person convicted of the prior crimes listed on his prior record level worksheet where the State did not submit any evidence tending to prove that fact and submitted only the worksheet into evidence. State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002), cert. granted, 356 N.C. 170, 568 S.E.2d 852 (2002).

Despite a defendant's argument that the evidence of his prior criminal record demanded a certified copy before the sentencing court could properly consider it, under G.S. 15A-

1340.14(f)(4), the prior criminal record submitted by the State was sufficiently reliable. State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002).

Trial court did not err in considering defendant's two prior convictions in determining defendant's prior record level; as the burden of proof during the sentencing hearing and the trial's substantive phases were different, collateral estoppel did not apply. State v. Safrit, 154 N.C. App. 727, 572 S.E.2d 863, 2002 N.C. App. LEXIS 1536 (2002), cert. denied, 357 N.C. 65, 579 S.E.2d 571 (2003).

State's unsupported statement that defendant had 11 points, and thus was a record level IV, even if uncontested, did not rise to the level sufficient to meet the catchall provision found in G.S. 15A-1340.14(f)(4), and because there was no stipulation or other evidence of defendant's prior convictions, he had to be resentenced. State v. Bartley, 156 N.C. App. 490, 577 S.E.2d 319, 2003 N.C. App. LEXIS 204 (2003).

State failed to carry its burden of proving each of the defendant's prior convictions by a preponderance of the evidence, as the State submitted no records of conviction, no records from the agencies listed in G.S. 15A-1340.14(f)(3), nor was there any evidence of a stipulation by the parties as to prior record level. A statement by the State in a conversation with the court that the defendant had seven points, and thus was a record level III, if only supported by a prior record level worksheet, was not sufficient to meet the catchall provision found in G.S. 15A-1340.14(f)(4), even if uncontested by the defendant; accordingly, the case was remanded for resentencing. State v. Riley, 159 N.C. App. 546, 583 S.E.2d 379, 2003 N.C. App. LEXIS 1521 (2003).

For State to meet its burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction, the prior conviction may be proved by any of the following methods: (1) Stipulation of the parties; (2) An original or copy of the court record of the prior conviction; (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; (4) Any other method found by the court to be reliable. However, the submission of a worksheet by the State is insufficient to satisfy the State's burden under this statute. State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004).

While defendant essentially stipulated to prior convictions pursuant to G.S. 15A-1340.14(f), but the State presented no evidence that the foreign misdemeanor offenses were substantially similar to offenses classified as Class A1 or Class 1 misdemeanors in North Carolina, as required by G.S. 15A-1340.14(e), a trial court erred in sentencing defendant based upon the prior record level worksheet. State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804, 2004 N.C. App. LEXIS 819 (2004).

Defense counsel stipulated to defendant's prior convictions because defense counsel clearly stated that he had no questions, except regarding a larceny charge, about the worksheet listing the prior convictions and, when probed by the trial court, counsel did not desire a closer look at the case file and agreed to the length of time for which defendant had been imprisoned for that charge; such a stipulation was considered reliable proof of the prior convictions. State v. Joyner, 167 N.C. App. 635, 606 S.E.2d 196, 2004 N.C. App. LEXIS 2318 (2004).

State failed to bear its burden of proving defendant's prior record level where the State submitted only the prior record level worksheet listing the purported convictions of defendant without any supporting court documents or other statutorily authorized means of proof. State v. Jeffery, 167 N.C. App. 575, 605 S.E.2d 672, 2004 N.C. App. LEXIS 2331 (2004).

Defendant's sentence was remanded for resentencing where the appellate record was devoid of any evidence of defendant's previous convictions or a stipulation by defendant regarding a prior record level. State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004).

State, in attempting to prove defendant's prior record level, incorrectly relied on defendant's same two cocaine possession convictions that were also used to establish his habitual felon status. State v. Miller, 168 N.C. App. 572, 608 S.E.2d 565, 2005 N.C. App. LEXIS 345 (2005).

Where defendant, in pleading nolo contendere, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Even though defendant did not disagree with statements made by the prosecutor or the trial court as to his prior convictions, defendant did not clearly stipulate to his prior convictions and the State provided no other proof of prior convictions; therefore, pursuant to G.S. 15A-1340.14(f), the State failed to meet its burden of proving defendant's prior record level, and defendant was entitled to a new sentencing hearing. State v. McIlwaine, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

State met its burden of proving defendant's prior convictions by presenting a certified Division of Criminal Information printout and a certified Division of Motor Vehicle driving history to the court. State v. Jordan, 174 N.C. App. 479, 621 S.E.2d 229, 2005 N.C. App. LEXIS 2481 (2005), cert. denied, — U.S. —, 126 S. Ct. 2900, 165 L. Ed. 2d 926 (2006).

Trial court did not err in determining that the State had met its burden of producing sufficient evidence that defendant was convicted of larceny after breaking and entering or in sentencing defendant as a level IV offender because the Department of Criminal Information report the State introduced to prove defendant's prior conviction was included within the methods of proof set forth in G.S. 15A-1340.14(f); the North Carolina statutory scheme for proving prior convictions does not prioritize the methods of proving prior convictions. State v. Crockett, — N.C. App. —, 667 S.E.2d 537, 2008 N.C. App. LEXIS 1804 (2008).

Prior Out-of-State Conviction. — State met its burden of proving defendant's prior conviction in Virginia, for inflicting bodily injury on an employee of a juvenile detention center in violation of Va. Code Ann. § 18.2-55, was "substantially similar" to a Class A1 or Class 1 misdemeanor as required by G.S. 15A-1340.14(e), for the purpose of considering prior convictions for sentencing defendant for murder, kidnapping, rape, and burglary convictions in North Carolina. Indeed, the Virginia conviction was substantially similar to bodily injury caused in violation of G.S. 14-33(c), a class A1 misdemeanor, for North Carolina purposes. State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008).

Defendant did not raise an objection to the existence of any of the New York convictions listed on the prior record level worksheet; rather, defendant only objected to the assignment of points to defendant's prior convictions in New York. Accordingly, the State of North Carolina satisfied its burden, under G.S. 15A-1340.14(f), of showing the existence of defendant's prior convictions by stipulation of the parties. State v. Hinton, — N.C. App. —, 675 S.E.2d 672, 2009 N.C. App. LEXIS 514 (2009).

Defendant's three out-of-state convictions at issue were classified by the State of North Carolina on the prior record level worksheet as Class I convictions. Thus, the State was not required under G.S. 15A-1340.14(e) to show that the New York offenses were substantially similar to North Carolina offenses because the prosecution only classified the convictions at the default level, Class I. State v. Hinton, — N.C. App. —, 675 S.E.2d 672, 2009 N.C. App. LEXIS 514 (2009).

Copies As Proof. — The State could use a certified computer printout from the Administrative Office of the Courts to establish a prior conviction, where the printout was offered during the defendant's prosecution for impaired driving. State v. Ellis, 130 N.C. App. 596, 504 S.E.2d 787 (1998).

Sentence Did Not Constitute Cruel And Unusual Punishment. — Sentence consistent with G.S. 15A-1340.14 did not constitute cruel and unusual punishment under the Eighth Amendment; the State's use of defendant's prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act, G.S. 14-7.1 et seq., did not constitute cruel and unusual punishment. State v. Hall, 174 N.C. App. 353, 620 S.E.2d 723, 2005 N.C. App. LEXIS 2397 (2005).

No Ex Post Facto Violation. — There was no error in defendant's sentence, as the prohibition on ex post facto laws was not implicated by application of G.S. 15A-1340.14(c); the increased sentence due to the classification change only enhanced defendant's present sentence, and did not punish defendant for defendant's prior conviction. State v. Watkins, — N.C. App. —, 672 S.E.2d 43, 2009 N.C. App. LEXIS 122 (2009).

Where it was unclear whether defendant was stipulating, pursuant to this section, that the out-of-state convictions were substantially similar to certain North Carolina felony charges or just agreeing that he did in fact commit those crimes, the case was remanded. State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376, 2000 N.C. App. LEXIS 1278 (2000).

Stipulation. — Comments by defendant's attorney constituted a stipulation to the prior convictions listed on a worksheet submitted by the State. State v. Eubanks, 151 N.C. App. 499, 565 S.E.2d 738, 2002 N.C. App. LEXIS 766 (2002).

There was no stipulation to defendant's prior record level where defense counsel made no reference to the worksheet in his discussion with the trial court; nor did defendant's plea bargain agreement have sufficient specificity to rise to the level of a stipulation. State v. Jeffery, 167 N.C. App. 575, 605 S.E.2d 672, 2004 N.C. App. LEXIS 2331 (2004).

Under G.S. 14-223, a defendant's prior convictions were properly proven by stipulation after his counsel stated that he saw and stipulated to defendant's prior conviction worksheet and defendant addressed the court but did not object to or refer to his prior convictions. State v. Ellis, 168 N.C. App. 651, 608 S.E.2d 803, 2005 N.C. App. LEXIS 449 (2005).

Based on defense counsel's clear stipulation that defendant was a Level IV felon with ten prior record points, defendant's prior record level was sufficiently proven. Hence, defendant's claim that the trial court committed plain error by sentencing defendant as a Class C, Level IV offender was overruled. State v. Renfro, 174 N.C. App. 402, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005), aff'd, — N.C. —, 627 S.E.2d 463 (2006).

Trial court's findings regarding defendant's prior record points and prior record level were supported by the evidence under G.S. 15A-1340.14(f) as defense counsel stipulated to the convictions shown on a worksheet and found by the trial court to support a felony record level IV. State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

Matter was remanded for resentencing as, inter alia: (1) the parties stipulated to several out-of-state convictions on the prior record level worksheet, the date of the convictions, and their classification; (2) based on the stipulation, the trial court found that defendant had six points for a prior record level of III; and (3) the question of whether a conviction under an out-of-state statute was substantially similar to an offense under North Carolina statutes was a question of law to be resolved by the trial court. State v. Palmateer, 179 N.C. App. 579, 634 S.E.2d 592, 2006 N.C. App. LEXIS 1967 (2006).

Defendant's failure to object prior convictions shown on his worksheet constituted a stipulation of prior convictions for purposes of sentencing. State v. Hurley, 180 N.C. App. 680, 637 S.E.2d 919, 2006 N.C. App. LEXIS 2499 (2006).

Where at sentencing defendant, inter alia, affirmed that he understood that he was pleading guilty to second-degree murder, which carried the total punishment of 294 months imprisonment, defendant confirmed his acceptance of the sentence by initialing the transcript of plea in two separate locations, and defendant did not assert in his appellate brief that any of the prior convictions listed on the worksheet did not, in fact, exist, the appellate court found that defendant thus stipulated to his prior record level. State v. Mullinax, 180 N.C. App. 439, 637 S.E.2d 294, 2006 N.C. App. LEXIS 2384 (2006).

Defense counsel's affirmative statement as to defendant's prior record level constituted a stipulation for purposes of G.S. 15A-1340.14(f). State v. Crawford, 179 N.C. App. 613, 634 S.E.2d 909, 2006 N.C. App. LEXIS 2019 (2006).

Although defendant's stipulation as to his prior record level was sufficient evidence for sentencing at that level, the trial court's assignment of level IV to defendant was an improper conclusion of law because one of the prior convictions included in that calculation should not have been considered, and without its inclusion defendant's prior record level would have been III. State v. Fraley, 182 N.C. App. 683, 643 S.E.2d 39, 2007 N.C. App. LEXIS 806 (2007).

Trial court erred in adding a 15th point to defendant's prior record level and sentencing him at prior record level V under circumstances in which, for sentencing, the trial court consolidated the convictions, the "most serious" offense in each consolidated judgment was first-degree sexual offense, a class B1 felony; pursuant to G.S. 15A-1340.15(b), the trial court was required to sentence defendant according to his prior record level for that offense, and the relevant prior offenses included two misdemeanors and the class F felonies of indecent liberties with a minor, failure to register as a sex offender, and felonious restraint, none of which included all of the elements of first-degree sexual offense, and thus the trial court erred in adding a 15th point. State v. Prush, 185 N.C. App. 472, 648 S.E.2d 556, 2007 N.C. App. LEXIS 1822 (2007).

Sufficient evidence existed to show that defendant was properly sentenced at a prior record level. Defense counsel at sentence stated the prior record level when asked about it and stipulation was one of the ways that the prior record level could be shown. State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

While a stipulation by defendant was binding as to the existence of prior convictions (including the out-of-state convictions), it was not binding as to the substantial similarity of the out-of-state offenses under G.S. 15A-1340.14(e). Remand for a new sentencing hearing was required because the trial court failed to enter any findings that the out-of-state convictions were substantially similar to a North Carolina offense. State v. Chappelle, — N.C. App. —, 667 S.E.2d 327, 2008 N.C. App. LEXIS 1809 (2008), appeal dismissed, review denied, 362 N.C. 684, 670 S.E.2d 568 (2008).

Prior record level finding of the trial court was properly proved by stipulation, signed by both the prosecutor and defense counsel. State v. Hussey, — N.C. App. —, 669 S.E.2d 864, 2008 N.C. App. LEXIS 2236 (2008).

Stipulation as to Prior Out-of-State Convictions Effective. — Defendant's prior New Jersey conviction for possession of a controlled substance on school property was properly included for purposes of determining his prior record level because a stipulation which provided that the State and defendant stipulated to the accuracy of the classification and points assigned to any out-of-state convictions was sufficient to meet the requirement under G.S. 15A-1340.14(3) that the State had to prove that the New Jersey conviction was substantially similar to the North Carolina equivalent. State v. Lee, — N.C. App. —, 666 S.E.2d 867, 2008 N.C. App. LEXIS 1739 (2008).

If a signed stipulation between the State and a defendant encompasses a clear agreement as to the classification and points assigned to a foreign conviction, the State has met its statutory burden of proof under G.S. 15A-1340.14(e) and need not supply additional evidence to prove substantial similarity between the foreign conviction and the North Carolina equivalent for purposes of determining the defendant's prior record level. State v. Lee, — N.C. App. —, 666 S.E.2d 867, 2008 N.C. App. LEXIS 1739 (2008).

Stipulation as to Prior Out-of-State Convictions Ineffective. — Although defendant stipulated to the state's prior record level worksheet, his stipulation was ineffective as to his prior Ohio convictions; the state failed to present evidence that the Ohio offenses were substantially similar to North Carolina offenses. State v. Moore, 188 N.C. App. 416, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Because the State did not present evidence at the sentencing hearing to prove, by a preponderance of the evidence, that defendant's New Jersey contraband possession charge was substantially similar to the North Carolina equivalent, as required by G.S. 15A-1340.14(e), the parties' stipulation was ineffective; accordingly, the case was remanded for resentencing. State v. Lee, — N.C. App. —, 668 S.E.2d 393, 2008 N.C. App. LEXIS 2020 (2008).

Calculating Prior Record Level. — Trial court erred in calculating a defendant's prior record level where it assigned him two prior record points for one of the joined larceny offenses in sentencing him on the second-degree murder conviction, such an assessment was unjust and in contravention of the legislature's intent in enacting North Carolina's Structured Sentencing Act, and the rule of lenity forbade the court from interpreting a statute to increase the penalty placed on defendant in the absence of clear legislative intent. State v. West, 180 N.C. App. 664, 638 S.E.2d 508, 2006 N.C. App. LEXIS 2498 (2006), appeal dismissed, cert. denied, 361 N.C. 368, 644 S.E.2d 562 (2007).

Defendant's claim that defendant's prior record level was improperly calculated pursuant to G.S. 15A-1340.14(a)-(d) had to be rejected. Defendant's argument was based on the contention that prior record level points could not be imposed for the possession of a firearm by a felon and for the felony underlying that offense, but the same conviction was not being used to elevate defendant's sentencing status; possession of a firearm by a felon was a separate substantive offense from defendant's prior felony upon which defendant's status as a felon was based. State v. Goodwin, 190 N.C. App. 570, 661 S.E.2d 46, 2008 N.C. App. LEXIS 1020 (2008).

Appeal Dismissed. — Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Applied in State v. Lee, 150 N.C. App. 701, 564 S.E.2d 597, 2002 N.C. App. LEXIS 650 (2002); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006); In re DRH, — N.C. App. —, 668 S.E.2d 919, 2008 N.C. App. LEXIS 2207 (2008).

Cited in State v. McCrae, 124 N.C. App. 664, 478 S.E.2d 210 (1996); Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997); State v. Smith, 125 N.C. App. 562, 481 S.E.2d 425 (1997); State v. Wagner, 356 N.C. 599, 572 S.E.2d 777 (2002); State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5; State v. Alexander, 167 N.C. App. 79, 604 S.E.2d 361, 2004 N.C. App. LEXIS 2073 (2004); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005); State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005); State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006); State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008); State v. Smith, — N.C. App. —, 668 S.E.2d 612, 2008 N.C. App. LEXIS 2021 (2008).

Decisions Under Prior Law

Defendant's prior convictions will either serve to establish his status as an habitual felon pursuant to § 15-7.1 or to increase his prior record level pursuant to subsection (b); the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time. State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996).

Use of Felony Convictions Consolidated With Other Felonies. — Trial court did not err in using three felony convictions to increase defendant's prior record level where each of those convictions had been consolidated for judgment with a felony conviction used to establish habitual felon status. State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996).

Convictions Obtained in Same Week. — There is nothing in this section and G.S. 14-7.6 to prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained the same week to determine prior record level. State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996).

Points for Probation Violations. — The language of subsection (b)(7) is clear and unambiguous that if a defendant commits an offense while on probation, a point is assessed regardless of the type of conviction for which the probation was imposed. State v. Leopard, 126 N.C. App. 82, 483 S.E.2d 469 (1997).

§ 15A-1340.15. Multiple convictions.

(a) Consecutive Sentences. — This Article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of Sentences. — If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b).)

CASE NOTES

Proper Aggravation. — Where two or more offenses are joined for judgment, one offense may properly be aggravated by evidence needed to prove a separate joined offense; in a case where sexual offense by a person in a parental role was not the most serious crime in the consolidated judgment and thus was not the offense from which defendant's sentence was derived, the aggravator of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role, but rather properly applied to the most serious offense in each of the two consolidated judgments, the statutory sexual offense of a person aged 13, 14, or 15. State v. Tucker, 357 N.C. 633, 588 S.E.2d 853, 2003 N.C. LEXIS 1411 (2003).

Proper Assignment of Points. — Trial court did not err in assigning one point in defendant's prior record level calculation under G.S. 15A-1340.14(b)(5) for conviction of purchase or possession of beer or wine under G.S. 18B-302, as any person who violated any provision of the chapter at issue was guilty of a class one misdemeanor. State v. Frady, 175 N.C. App. 393, 623 S.E.2d 346, 2006 N.C. App. LEXIS 53 (2006).

Trial court erred in adding a 15th point to defendant's prior record level and sentencing him at prior record level V under circumstances in which, for sentencing, the trial court consolidated the convictions, the "most serious" offense in each consolidated judgment was first-degree sexual offense, a class B1 felony; pursuant to G.S. 15A-1340.15(b), the trial court was required to sentence defendant according to his prior record level for that offense, and the relevant prior offenses included two misdemeanors and the class F felonies of indecent liberties with a minor, failure to register as a sex offender, and felonious restraint, none of which included all of the elements of first-degree sexual offense, and thus the trial court erred in adding a 15th point. State v. Prush, 185 N.C. App. 472, 648 S.E.2d 556, 2007 N.C. App. LEXIS 1822 (2007).

Remand for Resentencing. — It could not be determined if the trial court ultimately chose not to consolidate sentences based on the prosecutor's statements or as an exercise of its discretion, pursuant to G.S. 5A-1340.15(b), where: (1) defendant was sentenced, in open court, for felonious breaking and entering and common law robbery, and the trial court initially consolidated the offenses and imposed a single sentence, but, when judgment was imposed, did not provide that the sentence was to run consecutively to a first degree sexual offense sentence, pursuant to G.S. 15A-1354(a); and (2) in open court, the trial court initially consolidated defendant's second degree kidnapping and first degree burglary convictions and imposed a single sentence, but the judgment imposed as to those convictions resulted in separate sentences running consecutively; and (3) the judgments were preceded by statements by the prosecutor that were contrary to the laws on structured sentencing; thus, a remand was required to make this determination and sentence defendant accordingly. State v. Edwards, 164 N.C. App. 130, 595 S.E.2d 213, 2004 N.C. App. LEXIS 728 (2004), cert. denied, 358 N.C. 735, 603 S.E.2d 879 (2004).

Trial court erred in sentencing defendant on defendant's conviction for selling cocaine and, thus, that part of the case had to be remanded for resentencing. The trial court concluded that an additional sentencing point should be added for that offense because defendant's prior offenses included all of the elements of defendant's present conviction for selling cocaine, but the sentencing worksheet revealed that defendant had never been convicted of any offense containing all of the elements of selling cocaine. State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

Defendant had to be re-sentenced because it could be inferred that the trial court, at sentencing, improperly considered defendant's exercise of defendant's right to a trial by jury, and the trial court's statement that consecutive sentences were required if defendant was convicted of multiple felonies after a trial, rather than pleading guilty to one felony, was error under G.S. 15A-1340.15(b), even though the trial court had the discretion to impose consecutive sentences, under G.S. 15A-1340.15(a). State v. Hueto, — N.C. App. —, 671 S.E.2d 62, 2009 N.C. App. LEXIS 62 (2009).

Cited in State v. Lea, 126 N.C. App. 440, 485 S.E.2d 874 (1997); State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007); State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008); State v. Cloer, — N.C. App. —, 678 S.E.2d 399, 2009 N.C. App. LEXIS 1107 (July 7, 2009).

§ 15A-1340.16. Aggravated and mitigated sentences.

(a) Generally, Burden of Proof. — The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(a1) Jury to Determine Aggravating Factors; Jury Procedure if Trial Bifurcated. — The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. Admissions of the existence of an aggravating factor must be consistent with the provisions of G.S. 15A-1022.1. If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense. The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(a2) Procedure if Defendant Admits Aggravating Factor Only. — If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying felony, a jury shall be impaneled to dispose of the felony charge. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the felony trial.

(a3) Procedure if Defendant Pleads Guilty to the Felony Only. — If the defendant pleads guilty to the felony, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

(a4) Pleading of Aggravating Factors. — Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument. Any aggravating factor alleged under subdivision (d)(20) of this section shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924.

(a5) Procedure to Determine Prior Record Level Points Not Involving Prior Convictions. — If the State seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed using the procedures specified in subsections (a1) through (a3) of this section. The State need not allege in an indictment or other pleading that it intends to establish the point.

(a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. — The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

(b) When Aggravated or Mitigated Sentence Allowed. — If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(12a) or (18a), the court, finds that aggravating factors exist or the court finds that mitigating factors exist, the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. — The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. — The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(6a) The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(12a) The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.

(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(19) The serious injury inflicted upon the victim is permanent and debilitating.

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

Notwithstanding the provisions of subsection (a1) of this section, the determination that an aggravating factor under G.S. 15A-1340.16(d)(18a) is present in a case shall be made by the court, and not by the jury. That determination shall be made in the sentencing hearing.

(e) Mitigating Factors. — The following are mitigating factors:

(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.

(2) The defendant was a passive participant or played a minor role in the commission of the offense.

(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

(4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.

(5) The defendant has made substantial or full restitution to the victim.

(6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.

(7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

(9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.

(10) The defendant reasonably believed that the defendant's conduct was legal.

(11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

(12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.

(13) The defendant is a minor and has reliable supervision available.

(14) The defendant has been honorably discharged from the United States armed services.

(15) The defendant has accepted responsibility for the defendant's criminal conduct.

(16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

(17) The defendant supports the defendant's family.

(18) The defendant has a support system in the community.

(19) The defendant has a positive employment history or is gainfully employed.

(20) The defendant has a good treatment prognosis, and a workable treatment plan is available.

(21) Any other mitigating factor reasonably related to the purposes of sentences. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 7, s. 6; c. 22, s. 22; c. 24, s. 14(b); 1995, c. 509, s. 13; 1997-443, ss. 19.25(w), 19.25(ee); 2003-378, s. 6; 2004-178, s. 2; 2004-186, s. 8.1; 2005-101, s. 1; 2005-145, s. 1; 2005-434, s. 4; 2007-80, s. 2; 2008-129, ss. 1, 2; 2009-460, s. 2.)

Editor's Note. — A colon following the word "former" in subdivision (d)(6) was deleted at the direction of the Revisor of Statutes.

Session Laws 2003-378, s. 7, made this act applicable to offenses committed on or after August 1, 2003. Prosecutions for offenses occurring before August 1, 2003 are not abated or affected by this act, and the statutes that would be applicable before this act remain applicable to those prosecutions.

Session Laws 2004, c. 178, s. 10, provides: "Sections 1 through 6 of this act and Section 8 of this act become effective December 1, 2004, and apply to offenses committed on or after that date. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. Section 7 of this act becomes effective January 1, 2005. The remainder of this act is effective when it becomes law, at which time the Commission for Health Services [now the Commission for Public Health] may adopt rules under Section 7 of this act."

Subdivisions (d)(16a) and (d)(15), as amended by Session Laws 2004-178, s. 2 and Session Laws 2004-186, s. 8.1, effective December 1, 2004, are applicable to offenses committed on or after that date.

Subdivision (d)(6), as amended by Session Laws 2005-101, s. 1, effective December 1, 2005, is applicable to offenses committed on or after that date.

Session Laws 2005-145, s. 5, effective June 30, 2005, which rewrote this section, provides, in part: "Prosecutions for offenses committed before June 30, 2005, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2008-129, ss. 1 and 2, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "G.S. 15A-1340.16(d)(12a) or (18a)" for "G.S. 15A-1340.16(d)(18a)" in subsection (b); and added subdivision (d)(12a).

Session Laws 2009-460, s. 2, effective December 1, 2009, and applicable to offenses committed on or after that date, substituted "animal, an assistance animal, or a search and rescue animal" for "animal or assistance animal" in subdivision (d)(6a).

Legal Periodicals. — For note "The Constitutional Right to a Jury Under Blakely v. Washington: Can North Carolina Defendants Waive Their State Right?," see 83 N.C. L. Rev. 1548 (2005).

CASE NOTES

Indictment Requirement. — Defendant's plea of guilty had no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment. State v. Wimbish, 147 N.C. App. 287, 555 S.E.2d 329, 2001 N.C. App. LEXIS 1142 (2001).

Applicability of Provision. — No error occurred in the imposition of an aggravated sentence on defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury, because while G.S. 15A-1340.16 did not apply based on when the crime occurred, a common-law procedural mechanism existed for submitted aggravating factors to the jury in the form of a special verdict; overwhelming evidence was presented that defendant shot a rival gang member in the rival gang member's territory, supporting the aggravating factor that defendant committed the crime to further or benefit the purposes of a criminal street gang. State v. Roberson, 182 N.C. App. 133, 641 S.E.2d 347, 2007 N.C. App. LEXIS 491 (2007).

No prejudicial error resulted from defendant's resentencing, in light of Blackwell, as a procedural mechanism existed by which to submit the aggravating factors to the jury, and there was overwhelming and uncontradicted evidence that defendant joined with more than one other person in the commission of the second-degree murder of the victim. State v. Harris, 185 N.C. App. 285, 648 S.E.2d 218, 2007 N.C. App. LEXIS 1708 (2007).

Because courts would interpret G.S. 15A-1340.16(d)(12a) as a sentencing enhancement statute, a defendant's probation violation may be used as an aggravating factor in a subsequent sentencing hearing. Therefore, collateral legal consequences of an adverse nature can reasonably be expected to result. State v. Black,

— N.C. App. —, 677 S.E.2d 199, 2009 N.C. App. LEXIS 693 (2009).

Findings. — As the Structured Sentencing Act provides specifically and without exception that a trial court must make written findings when deviating from the presumptive sentence and, unlike the Fair Sentencing Act, contains no exception for a sentence imposed pursuant to a plea arrangement, the trial court erred in imposing an aggravated sentence upon defendant without making written findings. State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (1999).

No findings of mitigating or aggravating factors were required where the trial court sentenced defendant within the presumptive guidelines for his offense. State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704, 1999 N.C. App. LEXIS 1309 (1999), cert. denied, 351 N.C. 475, 543 S.E.2d 496 (2000).

In defendant's prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and attempted murder, when the trial court sentenced defendant within the presumptive range, it was not required to make findings as to his offered mitigating factor under G.S. 15A-1340.16(e)(15) of accepting responsibility for his criminal conduct; the trial court could, in its discretion, sentence defendant within the presumptive range without making such findings. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C. 255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

Trial court did not err in sentencing defendant by imposing sentences within the presumptive range for each of his three convictions, and not making findings regarding aggravating and mitigating factors; the trial court was not required to make findings regarding aggravating and mitigating factors because such findings were not required where there was no departure from the presumptive range of sentences. State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311, 2005 N.C. App. LEXIS 144 (2005), cert. denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

Sentence in the aggravated range violated defendant's Sixth Amendment right to a jury trial. The aggravating factors found by the trial court pursuant to G. S. 15A-1340.16 were not admitted by defendant, were not found by a jury, and did not constitute prior convictions. State v. Lacey, 175 N.C. App. 370, 623 S.E.2d 351, 2006 N.C. App. LEXIS 10 (2006).

Defendant was entitled to resentencing where the trial judge made findings of aggravating factors and imposed an aggravated range sentence from a minimum term of 120 months to maximum term of 153 months of imprisonment for armed robbery without defendant either stipulating to the findings or a jury finding defendant guilty of the aggravating factors beyond a reasonable doubt. State v. Corey, 173 N.C. App. 444, 618 S.E.2d 784, 2005 N.C. App. LEXIS 2011 (2005), rev'd and remanded for resentencing, 361 N.C. 422, 646 S.E.2d 105 (2007), on remand, 2007 N.C. App. LEXIS 2058 (Oct. 2, 2007).

Trial court did not violate defendant's Sixth Amendment right to jury trial when it found that a statutory aggravating factor existed, but sentenced defendant within the presumptive range. State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Trial court did not err by declining to formally find or act on the defendant's proposed mitigating factors where it had entered a sentence within the presumptive range for a second-degree sexual offense. State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007).

Finding Not Found By Jury Violated Sixth Amendment. — Where the trial court, sentencing defendant for attempted voluntary manslaughter, enhanced the sentence, pursuant to G.S. 15A-1340.16, based on the aggravating factor found by the trial court that the victim suffered serious injury that was permanent and debilitating, this violated U.S. Const., Amend. VI because the fact was not found by a jury beyond the reasonable doubt. State v. Bullock, 171 N.C. App. 763, 615 S.E.2d 337, 2005 N.C. App. LEXIS 1353 (2005), on remand, 645 S.E.2d 402 2007 N.C. App. LEXIS 1178 (2007).

Trial court was not required to resentence defendant, as it did not err in imposing an enhanced term on him following his conviction for second-degree murder; G.S. 15A-1340.16(d) proscribed the use of the same fact to enhance a sentence, which the trial court did not do, but did not prohibit use of the same source, such as the Florida fugitive warrant that the trial court relied on. State v. Beck, 359 N.C. 611, 614 S.E.2d 274, 2005 N.C. LEXIS 644 (2005).

Burden of Proof. — Where the defendant contends that the trial court erred in failing to find a mitigating factor established by uncontradicted evidence, his position is analogous to that of a party seeking a directed verdict: he is asking the court to conclude that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law. State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997).

Concerning an aggravating factor for sentencing purposes, a trial court did not rely solely on a prosecutor's assertion that the factor existed, because the trial court verified the defendant's status by checking the clerk's records, and, therefore, the State proved by a preponderance of the evidence that the aggravating factor existed. State v. Spencer, 154 N.C.

App. 666, 572 S.E.2d 815, 2002 N.C. App. LEXIS 1521 (2002).

Where defendant was charged with, inter alia, assault with a deadly weapon on a government official, and fleeing to elude arrest with a motor vehicle, the trial court's finding as aggravators that the offense was committed to avoid arrest and defendant knowingly created a great risk of death to more than one person by means of a weapon was supported by defendant's stipulation that he fled police at speeds in excess of 100 miles per hour, during rush hour, and tried to ram an officer's vehicle with his. State v. Harrison, 164 N.C. App. 693, 596 S.E.2d 834, 2004 N.C. App. LEXIS 999 (2004).

Weight Distribution. — Because the trial court specifically noted its weight distribution by stating that each aggravating factor, standing on its own, was sufficient to outweigh all the mitigating factors, it eliminated the need for remand were it determined that the trial court erred in finding an aggravating factor. State v. Norman, 151 N.C. App. 100, 564 S.E.2d 630, 2002 N.C. App. LEXIS 689 (2002).

Proof of Element of Offense Not to Be Used for Aggravating Factor. — Trial court erred in finding an aggravating factor in defendant's prosecution for second degree sexual offense, G.S. 14-27.5; evidence necessary to prove an element of the offense could not be used to prove any factor in aggravation, G.S. 15A-1340.16(d), and to prove the element of force, the State used the same evidence used to prove that defendant took advantage of a position of trust as an aggravating factor. State v. Corbett, 154 N.C. App. 713, 573 S.E.2d 210, 2002 N.C. App. LEXIS 1525 (2002).

Trial court's finding of the aggravating factor of the use of a weapon normally hazardous to the lives of more than one person, under G.S. 15A-1340.16(d)(8), did not violate the prohibition in G.S. 15A-1340.16(d) against using evidence used to prove an element of an offense to prove an aggravating factor, because to prove the offenses of assault with a firearm, shooting into an occupied vehicle, and assault with intent to inflict serious bodily injury, it was not necessary for the State to prove that the defendant employed a weapon or device normally hazardous to the lives of more than one person. State v. Sellers, 155 N.C. App. 51, 574 S.E.2d 101, 2002 N.C. App. LEXIS 1631 (2002).

Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the plain language of G.S. 15A-1340.10. State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Use of Same Factors to Increase Prior Record Level and Aggravate Sentence Not Prohibited. — Although defendant contended that using the same factors to increase his prior record level and aggravate his sentence violated "his state and federal rights," defendant failed to point to any specific right, and instead, argued that such a procedure was improper; the General Assembly had not provided any statutory right prohibiting use of the same factors to increase a defendant's prior record level and aggravate his sentence. State v. Moore, 188 N.C. App. 416, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Strong Provocation as Mitigating Factor. — Evidence of "strong provocation" held insufficient where defendant retrieved a shotgun after a confrontation with victim and provoked the later confrontation which resulted in the victim's death. State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997).

Restitution as Mitigating Factor. — Defendant did not make substantial restitution to the victim so as to merit a mitigating instruction where the evidence indicated that defendant did not return property or money to victim until a civil lawsuit was filed and an investigator was employed. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

Mitigating Factors Not Found. — Where the presentence investigative report showed that defendant had held various jobs, mostly part-time, some for undisclosed amounts of time, and only one full-time for six months, the trial court in its discretion could have found that this employment history did not amount to substantial or manifest credible evidence in support of mitigating factors. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

The trial court did not err by failing to find either (e)(11) or (e)(15) mitigating factors. While the evidence showed that the defendant was aware that two people had been shot and that he had admitted to shooting one of them, a reasonable inference could be drawn that his statements did not amount to an admission of "culpability, responsibility or remorse, as well as guilt," especially where his testimony regarding the shooting of the victim who survived was that he "raised up [his] hand and the gun went off." State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000), cert. denied, 532 U.S. 964, 121 S. Ct. 1499, 149 L. Ed. 2d 384 (2001).

It was within the trial court's discretion to determine that defendant's youth and home life conditions did not significantly reduce defendant's culpability; The trial court was also within its discretion to determine that defendant did not have a good treatment prognosis. Defendant's argument that he acted under strong provocation was without merit. State v. Johnson, — N.C. App. —, 674 S.E.2d 727, 2009 N.C. App. LEXIS 374 (2009).

Mitigating Factors Did Not Have To Be Considered. — Trial court did not err in failing to find the existence of statutory mitigating factors because defendant was sentenced within the presumptive range. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Trial court was not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation under this section. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732, 1999 N.C. App. LEXIS 619 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 370 (1999).

Where the trial court, in its discretion did not depart from the presumptive range of sentences, it was not required to make findings of mitigating factors. State v. Brown, 146 N.C. App. 590, 553 S.E.2d 428, 2001 N.C. App. LEXIS 976 (2001).

Discretion of Trial Court. — Trial court had the discretion to choose to not consider aggravating or mitigating factors and to choose to sentence defendant convicted of shooting the victim in the back to consecutive sentences within the presumptive range for the two offenses for which the defendant was convicted; the Structured Sentencing Act did not deprive defendant of due process or equal protection and, since the sentences imposed were within the limits set by the legislature, the Eighth Amendment was not offended. State v. Streeter, 146 N.C. App. 594, 553 S.E.2d 240, 2001 N.C. App. LEXIS 989 (2001), cert. denied, 356 N.C. 312, 571 S.E.2d 211 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1319, 154 L. Ed. 2d 1071 (2003).

While defendant assumed a leadership position in committing the offenses of kidnapping and rape, there was insufficient evidence that defendant acted with more than one other person, pursuant to G.S. 15A-1340.16(d)(2), or that defendant was in a position of trust and confidence with the victim; thus, the trial court's imposition of a sentence in excess of the presumptive range was erroneous and an abuse of discretion. State v. Rogers, 157 N.C. App. 127, 577 S.E.2d 666 (2003).

Under the Structured Sentencing Act, specifically G.S. 15A-1340.16(a), the trial court must consider evidence of aggravating and mitigating factors and may impose a sentence in its discretion. State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103, 2003 N.C. App. LEXIS 1178 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003), cert. denied, — U.S. —, 124 S. Ct. 30, 156 L. Ed. 2d 692 (2003).

Trial judge properly determined that defendant had accepted responsibility for his actions and that he admitted responsibility by pleading guilty, which were both mitigating factors, and further found that there were no aggravating factors; however, the judge had discretion pursuant to G.S. 15A-1340.13(e) and G.S. 15A-1340.16(a), (b) to impose a sentence within the presumptive range. State v. Bivens, 155 N.C. App. 645, 573 S.E.2d 259, 2002 N.C. App. LEXIS 1611 (2002), cert. denied, 356 N.C. 680, 577 S.E.2d 895 (2003).

Where a defendant convicted on charges of second degree murder was sentenced within the presumptive range of sentences, the trial court did not abuse its discretion in failing to make findings in mitigation and was not required to consider evidence of aggravation or mitigation because it did not deviate from the presumptive range in sentencing the defendant. State v. Taylor, 155 N.C. App. 251, 574 S.E.2d 58, 2002 N.C. App. LEXIS 1633 (2002), cert. denied, 357 N.C. 65, 579 S.E.2d 572 (2003).

Trial court did not violate defendant's constitutional right to a jury trial when it submitted aggravating factors to the jury by means of a special verdict. To the contrary, the trial court was scrupulously protecting defendant's constitutional right to a jury trial, exactly as Blakely required, when it relied on the jury's findings to aggravate defendant's sentence. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007), review denied, appeal dismissed, 362 N.C. 477, 666 S.E.2d 765 (2008).

Participation in Drug Treatment Center Program as Mitigating Factor. — Where defendant presented uncontroverted evidence of the mitigating factor, G.S. 15A-1340.16(e)(16), that defendant successfully completed a drug treatment program while awaiting trial, the trial court's failure to consider this mitigating factor was erroneous. State v. Hilbert, 145 N.C. App. 440, 549 S.E.2d 882, 2001 N.C. App. LEXIS 658 (2001).

Evidence of Good Character. — Trial court did not err when it concluded that 24 letters which defendant submitted from family members, friends, and prisoners did not establish that defendant was a person of good character. State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d (2002).

Defendant's letters showing character evidence, although not contradicted by any other evidence, were not the type of evidence that demonstrated defendant's good character by a preponderance of the evidence; consequently, the trial court did not err in failing to find the mitigating factor of good character in deciding defendant's sentence on a conviction for robbery with a dangerous weapon. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Under G.S. 15A-1443(c), exclusion of the defendant's mother's testimony that she believed that he had remorse for the two murders that he committed and that he would adjust well to prison life was harmless error beyond a reasonable doubt because there were other similar opinions that were admitted and there was no foundation laid for the mother's opinions under G.S. 15A-1340.16(e)(12). State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Age or Physical Infirmity as Aggravating Factor. — The policy underlying the aggravating factor in (d)(11) is to deter wrongdoers from taking advantage of a victim because of his age or mental or physical infirmity. State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997).

The victim's age of 73, by itself, did not establish that he was more vulnerable to being mortally wounded by a twelve-gauge shot gun than a younger person would have been; evidence that defendant took advantage of victim's advanced years was required to find the aggravating factor in (d)(11). State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997).

A criminal may "take advantage," of the age of a victim in two different ways, causing the sentence eventually imposed to be enhanced. First, he may target the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. State v. Hilbert, 145 N.C. App. 440, 549 S.E.2d 882, 2001 N.C. App. LEXIS 658 (2001).

Trial court did not err in finding the old age aggravating factor in connection with an assault on an elderly widow; however, the trial court did err in finding the old age aggravating factor in connection with the crime of felonious larceny that was also committed on the widow because her age was totally unrelated to the crime of felonious larceny. State v. Skinner, 162 N.C. App. 434, 590 S.E.2d 876, 2004 N.C. App. LEXIS 177 (2004).

Serious Injury as Aggravating Factor. — Kidnapping is the unlawful, nonconsensual confinement, restraint, or removal from one place to another of a person for the purpose of committing specified acts, and under G.S. 14-39(b), if the victim is seriously injured, the offense is kidnapping in the first degree; G.S. 15A-1340.16(d)(19) lists serious injury inflicted upon the victim that is permanent and debilitating as an aggravating factor for consideration by the trial court in sentencing. State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103, 2003 N.C. App. LEXIS 1178 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003), cert. denied, — U.S. —, 124 S. Ct. 30, 156 L. Ed. 2d 692 (2003).

Position of Leadership as Aggravating Factor. — Evidence before a trial court at a sentencing hearing was sufficient to allow the trial court to find by a preponderance of the evidence that defendant occupied a position of leadership in the commission of the offenses where the State presented evidence that defendant was the driver of the vehicle that collided with the victim's vehicle, that defendant intended the collision, that defendant was the only person to speak with the victim after the collision, that, in an attempt to facilitate the robbery, defendant suggested the victim return to her vehicle to ensure it started, and that defendant was driving when she and her accomplice fled the scene; although defendant testified that it was the accomplice who stole the victim's pocketbook, the State's evidence tended to show that the accomplice's only participation in the actual robbery and assault was the taking of an envelope from defendant before defendant requested the victim's contact information. State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64, 2004 N.C. App. LEXIS 509 (2004), cert. denied, 359 N.C. 196, 608 S.E.2d 65 (2004).

Aggravating facts were properly submitted to a jury using a special verdict under G.S. 15A-1340.16 in that state supreme court limitations were followed to safeguard defendant's right to a jury trial under *Blakely*; there was sufficient evidence to support an instruction of leadership or dominance in commission of kidnapping and assault with a deadly weapon where defendant drove the car that the victim was forced into and told the codefendants to kill the victim. State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78, 2007 N.C. App. LEXIS 17 (2007), cert. denied, appeal dismissed, 361 N.C. 364, 644 S.E.2d 555 (2007).

Prior Adjudication of Juvenile Delinquency. — Defendant's contention that use of an adjudication of juvenile delinquency as an aggravating factor in sentencing an adult defendant violates the ex post facto provisions of our state and federal constitutions was unfounded. State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811, 1998 N.C. App. LEXIS 26 (1998), cert. denied, appeal dismissed, 348 N.C. 76, 505 S.E.2d 884 (1998), aff'd, 349 N.C. 219, 504 S.E.2d 785 (1998).

Trial court did not err in denying defendant's motion to dismiss the aggravating factor of previous adjudication of delinquency because the State presented evidence sufficient to support a jury verdict that defendant admitted to the offenses brought against him in juvenile court, and such an admission constituted acceptable grounds for the aggravating factor of being adjudicated delinquent; because defendant was no longer a juvenile and was being punished for a crime he committed as an adult, the court of appeals was not concerned with additional protections that could be afforded to juveniles. State v. Rivens, — N.C. App. —, 679 S.E.2d 145, 2009 N.C. App. LEXIS 1086 (July 7, 2009).

Hispanic Victims. — This section was correctly applied where co-defendant testified that he and defendant selected two Hispanic men as their victims because they thought Hispanics carry large sums of cash and are less likely to report crimes committed against them. State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

Race as Aggravating Factor. — The trial court properly applied this section in sentencing the defendant where the State introduced evidence that the victim was singled out because he was black and where the defendant's motivation, if any, for his attacks on the other victims was irrelevant in determining whether the attack on the black victim was racially motivated. State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

The defendant's felonious assault and attempted murder were especially heinous, atrocious or cruel where he assaulted five unsuspecting strangers in the dead of night, took pleasure in the assaults, bragged to his girlfriend that he "made front page," entertained his friends with stories about the assaults, especially ridiculing the black victim, and visited the scene of the first assault and commented upon how the area had "good memories." State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

The trial court erred in finding as an aggravating factor that defendant joined with more than one other person in committing the offense—felony child abuse—since defendant was not charged with committing a conspiracy because the state failed to meet its burden of proof. State v. Noffsinger, 137 N.C. App 418, 528 S.E.2d 605, 2000 N.C. App. LEXIS 420 (2000).

Where the only evidence presented was that one other person joined with defendant in committing the offense, the trial court erred in finding it an aggravating factor. State v. Lasiter, 361 N.C. 299, 643 S.E.2d 909, 2007 N.C. LEXIS 408 (2007).

Pretrial Release. — State did not meet its burden, under G.S. 15A-1340.16(a), to prove the aggravating sentencing factor that defendant committed a crime while on pretrial release, under G.S.15A-1340.16(d)(12), when its evidence only showed that defendant had previously been arrested for another crime and there was a lack of proof that he had been tried for that crime. State v. Sellers, 155 N.C. App. 51, 574 S.E.2d 101, 2002 N.C. App. LEXIS 1631 (2002).

Because defendant admitted, through counsel, that defendant committed an offense while on pretrial release on another charge for purposes of the aggravating factor under G.S. 15A-1340.16(d)(12) in sentencing defendant, no Blakely right to a jury trial under U.S. Const., Amend. VI was invoked, as such was within the exception to Blakely; the trial court had authority to impose an aggravated sentence on defendant's convictions based on that finding, as the North Carolina Blakely Act, G.S. 15A-1022.1, was inapplicable where defendant's offenses were committed prior to June 30, 2005. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Age as Aggravating Factor in Crime Where Age Is Already an Element. — Where mother/defendant was accused of shaking her three-week old infant to death, the trial court did not err in finding as an aggravating factor, under subdivision (d)(11) of this section, that the victim was of a very young age, even though the victim's age had already been used as an element of the crime under G.S. 14-318.4(a). State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Defendant's Age Not Relevant to Aggravation. — Trial court properly applied the aggravating factor under G.S. 15A-1340.16(d)(13) where the trial court could have concluded that defendant involved a 15-year-old in a robbery and murder; the fact that defendant was 16 years old at the time was not relevant to applicability of the factor. State v. Smarr, 146 N.C. App. 44, 551 S.E.2d 881, 2001 N.C. App. LEXIS 789 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 500 (2002).

Nonstatutory Aggravating Factors. — Trial court did not err in finding as a nonstatutory aggravating factor that defendant furnished alcohol to sisters and then victimized them, as a preponderance of evidence supported that finding. The State was not required to prove, pursuant to G.S. 15A-1340.16(d) regarding aggravating factors, that the sisters were under the age of 16, even though the State did have to prove that the sisters were under age 16 in order to convict under G.S. 14-202.1, regarding taking indecent liberties. State v. Bowers, 146 N.C. App. 270, 552 S.E.2d 238, 2001 N.C. App. LEXIS 866 (2001), cert. denied, 354 N.C. 576, 559 S.E.2d 185 (2001).

Where nothing supported a trial court's estimate of the respective ages, comparative strengths, and sizes of the victim and defendant, and defendant's prior crimes were not reasonably related to a robbery conviction, the trial court abused its discretion under G.S. 15A-1340.16(a) by finding the non-statutory aggravating factors. State v. Borders, 164 N.C. App. 120, 594 S.E.2d 813, 2004 N.C. App. LEXIS 740 (2004).

Breach of Trust — Aggravating Factor. — Evidence that the defendant took advantage of a position of trust or confidence to commit statutory rape of a 14-year-old girl was sufficient to permit the trial court to apply this factor as an aggravating factor at sentencing. State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Trial court did not err by finding that defendant had taken advantage of a position of trust by taking money from people who sought his help securing loans and using that finding as an aggravating factor when it imposed sentence, but because defendant's plea to a charge that he took money by false pretenses when he withdrew $22,200 from a swimming association's account was really a plea to embezzlement, the trial court should not have used the trust or confidence aggravating factor when it sentenced defendant for committing that crime. State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d (2002).

While the Court of Appeals of North Carolina has recognized a position of trust aggravating factor in familial relationships when the child in question is a minor, there is no precedent for such a finding where the child in question is an adult; therefore, in a case involving assault with a deadly weapon with intent to kill inflicting serious injury, the aggravating circumstance was improperly found, and, even if there was such a relationship, the facts showed that the crime was not committed by taking advantage of a relationship with the victim's mother. State v. Nicholson, 169 N.C. App. 390, 610 S.E.2d 433, 2005 N.C. App. LEXIS 601 (2005), appeal dismissed, cert. denied, 2006 N.C. App. LEXIS 2222 (Nov. 7, 2006), reported at 636 S.E.2d 341 (N.C. App. 2006).

Proper Aggravation. — The trial court properly found the aggravating factor that the murder was committed in the course of a robbery and was motivated by pecuniary gain where defendant pled guilty to and was sentenced for second degree murder, which does not require robbery as an element. State v. Baldwin, 139 N.C. App. 65, 532 S.E.2d 808, 2000 N.C. App. LEXIS 819 (2000).

The trial court properly aggravated defendant's sentence based on the subdivision (d)(8) factor that defendant knowingly created a great risk of death to more than one person and based on the non-statutory aggravating factor allowed by subdivision (d)(20) that defendant refused to participate in the proceedings and fled the courthouse. State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201, 2001 N.C. App. LEXIS 138 (2001).

Trial court properly found defendant "knowingly" used a weapon or device normally hazardous to the lives of more than one person, an aggravating sentencing factor under G.S. 15A-1340.16(d)(8), in spite of uncontroverted testimony that he did not know right from wrong at the time of the offense, because the jury rejected his insanity evidence. State v. Sellers, 155 N.C. App. 51, 574 S.E.2d 101, 2002 N.C. App. LEXIS 1631 (2002).

Same item of evidence was not used to prove both an element of the offense and an aggravating factor for purposes of sentencing defendant for first-degree kidnapping under G.S. 14-39(b), resulting in serious injury under G.S. 15A-1340.16(d)(19), where: (1) defendant pushed the victim off of the porch and shot him; (2) the victim fell to the ground but was unable to get up because he had been shot; (3) the victim was paralyzed as a result of the shooting; (4) the evidence that the victim had been shot was sufficient to prove the serious injury element of first-degree kidnapping; and (5) the evidence that the victim was paralyzed as a result of the shooting was the additional evidence that supported the finding of the aggravating factor. State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103, 2003 N.C. App. LEXIS 1178 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003), cert. denied, — U.S. —, 124 S. Ct. 30, 156 L. Ed. 2d 692 (2003).

Trial court did not violate G.S. 15A-1340.16(d) when it found as an aggravating sentencing factor that defendant intended to hinder the lawful exercise of a governmental function when he committed the crime of malicious conduct by a prisoner, G.S. 14-258.4. State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902, 2003 N.C. App. LEXIS 2049 (2003).

Where two or more offenses are joined for judgment, one offense may properly be aggravated by evidence needed to prove a separate joined offense; in a case where sexual offense by a person in a parental role was not the most serious crime in the consolidated judgment and thus was not the offense from which defendant's sentence was derived, the aggravator of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role, but rather properly applied to the most serious offense in each of the two consolidated judgments, the statutory sexual offense of a person aged 13, 14, or 15. State v. Tucker, 357 N.C. 633, 588 S.E.2d 853, 2003 N.C. LEXIS 1411 (2003).

In a case alleging that defendant had used a 13 year old boy to sell drugs, a jury's acquittal of charges of contributing to the delinquency of a minor, G.S. 14-316.1, and employing and using a minor to commit a controlled substance offense, G.S. 90-95.4, did not mean that the jury found there was insufficient evidence that the boy was a minor; by convicting defendant of conspiracy to sell a controlled substance, the jury found that defendant and the boy were conspirators, and the trial court's consideration as an aggravating sentencing factor that defendant involved a person under 16 years of age in the commission of a crime was proper. State v. Boyd, 162 N.C. App. 159, 595 S.E.2d 697 (2004).

Trial court did not err in sentencing defendant in the aggravated range because the court found that defendant joined with more than one other person in committing the offense and was not charge with committing a conspiracy. State v. Little, 163 N.C. App. 235, 593 S.E.2d 113, 2004 N.C. App. LEXIS 376 (2004).

Sentence of 66 to 89 months for an assault conviction was not beyond the prescribed statutory maximum, and thus did not violate the holding in Apprendi v. New Jersey, 530 U.S. 466, 147 L. E. 2d 435, 120 S. Ct. 2348 (2000). State v. McDonald, 163 N.C. App. 458, 593 S.E.2d 793, 2004 N.C. App. LEXIS 510 (2004), cert. denied, 358 N.C. 548, 599 S.E.2d 910 (2004).

Defendant has failed to show any abuse in the trial court's discretion to sentence defendant in the aggravating range under G.S. 15A-1340.16 after the jury found the aggravating factor that defendant took advantage of a position of trust or confidence to exist for each offense defendant committed towards his minor victim, the defendant's stepdaughter, beyond a reasonable doubt. Therefore, the sentence was proper notwithstanding the trial court also finding two mitigating factors to exist. State v. Anderson, 177 N.C. App. 54, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

G.S. 15A-1340.16(d) was not violated because the prosecution was required to prove facts for the aggravated sentences that were in addition to the elements of defendant's crimes of second-degree murder and assault with a deadly weapon inflicting serious injury. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

Because the trial court had determined that the aggravating factor under G.S. 15A-1340.16(d)(12), that defendant was on pretrial release at the time that defendant committed other offenses for which convictions were issued, outweighed the lone mitigating factor and supported imposition of an aggravated sentence, defendant was not entitled to a new sentencing hearing; defendant had admitted to the aggravator through counsel, which admission was sufficiently clear, definite, and certain for Blakely purposes. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Improper Aggravation. — In sentencing a criminal defendant, the trial court may not consider in aggravation of sentence that the defendant was exercising his right to plead not guilty or asserting his privilege against self-incrimination. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

The trial court's finding as an aggravating factor that defendant left without rendering aid and showed no mercy violated the proscription against aggravating a sentence with evidence "used to prove an essential element" of the crime, namely malice, an inherent element of second degree murder. State v. Baldwin, 139 N.C. App. 65, 532 S.E.2d 808, 2000 N.C. App. LEXIS 819 (2000).

The trial court erred, in sentencing the defendant for his assault conviction, by finding as an aggravating factor that the offense involved "damage causing great monetary loss" when the only evidence of monetary loss was loss caused by medical expenses. State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000), cert. denied, 532 U.S. 964, 121 S. Ct. 1499, 149 L. Ed. 2d 384 (2001).

Where the trial court entered three separate judgments of conviction, it erred in using an element of an offense that defendant was convicted of, specifically the factor of abusing a position of trust or confidence, to prove a sentencing factor in aggravation. State v. Tucker, 156 N.C. App. 53, 575 S.E.2d 770, 2003 N.C. App. LEXIS 33 (2003), cert. granted, 357 N.C. 65, 579 S.E.2d 573 (2003).

Defendant was entitled to a remand for resentencing after pleading guilty to sex offenses with a child because the State presented insufficient evidence to support the trial court's finding that the victim suffered psychological injuries. State v. Radford, 156 N.C. App. 161, 576 S.E.2d 134, 2003 N.C. App. LEXIS 69 (2003).

Trial court erred when it relied on a copy of a warrant issued by the State of Florida to find that defendant was on pretrial release and was also a fugitive from justice when he committed second-degree murder because the fact that Florida issued a warrant supported a finding of only one aggravating factor, and the appellate court vacated defendant's sentence for second-degree murder and remanded the case for resentencing. State v. Beck, 163 N.C. App. 469, 594 S.E.2d 94, 2004 N.C. App. LEXIS 405 (2004), appeal dismissed, 358 N.C. 546, 599 S.E.2d 558 (2004).

Appellate court vacated the trial court's judgment sentencing defendant for second-degree murder because it was unclear from the record whether the trial court used its finding that defendant participated in a robbery with one other person as a statutory or non-statutory aggravating factor to depart from the presumptive sentence, but it was clear that use of that finding as a statutory aggravating factor under G.S. 15A-1340.16(d)(2) would have been error. State v. Hurt, 163 N.C. App. 429, 594 S.E.2d 51, 2004 N.C. App. LEXIS 406 (2004), rev'd in part, and aff'd in part, 361 N.C. 325, 643 S.E.2d 915 (2007).

New sentencing hearing was required, following defendant's plea of guilty pursuant to a plea agreement to second-degree murder, because the trial court erred by finding as nonstatutory aggravating factors that defendant committed felony murder but was not charged with it and that defendant voluntarily entered the affray in which she shot the victim. State v. Byrd, 164 N.C. App. 522, 596 S.E.2d 860, 2004 N.C. App. LEXIS 972 (2004).

Trial court's unilateral finding that defendant's actions in a rape and robbery were especially heinous, atrocious, or cruel, and the court's use of that finding to enhance defendant's sentence, violated the principles of Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 2004 U.S. LEXIS 4573 (2004), and G.S. 15A-1340.16; on retrial, that factor could only be used to enhance defendant's sentence if either (1) it was found to exist beyond a reasonable doubt by the jury, (2) it was stipulated to by defendant, or (3) if defendant waived his right to a jury such that a judicial finding would be appropriate. State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

Trial court violated *Blakely* by imposing an aggravated sentence that exceeded the statutory maximum after making a unilateral finding that defendant was on pretrial release for another charge when he committed the instant offense. Since Blakely errors arising under North Carolina's Structured Sentencing Act were structural and, therefore, reversible per se, defendant's case had to be remanded to the trial court for resentencing. State v. Blackwell, 359 N.C. 814, 618 S.E.2d 213, 2005 N.C. LEXIS 846 (2005).

The trial court erred in sentencing defendant under G.S. 15A-1340.16(d)(2) because defendant's testimony constituted conflicting evidence and did not support a finding beyond a reasonable doubt that defendant joined with more than one other person in committing the offense, and it was impossible to know upon which evidence the jury based its verdict. State v. Walker, 188 N.C. App. 331, 654 S.E.2d 722, 2008 N.C. App. LEXIS 71 (2008).

Failure to Submit Aggravator to Jury Was Error. — Where a trial court failed to submit to a jury the factual issue of the sentencing aggravator that defendant took advantage of a position of trust and confidence to commit the crimes, the finding of that aggravating factor was error unless defendant admitted to it; since cases holding that an offender had the right to have a jury determine the existence of aggravating factors had not been decided at the time of defendant's sentencing hearing, he was unaware of this right, his stipulation to the factual basis for his plea was not a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences, and he did not knowingly and effectively stipulate to the aggravating factor, or waive his right to a jury trial on the issue of the aggravating factor. State v. Meynardie, 172 N.C. App. 127, 616 S.E.2d 21, 2005 N.C. App. LEXIS 1576 (2005).

Defendant was entitled to a new sentencing hearing because the judge, not the jury, found as an aggravating factor that defendant took advantage of a position of trust or confidence. State v. Massey, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005), rev'd in part on other grounds, 361 N.C. 406, 646 S.E.2d 362 (2007).

The sentence imposed for conviction of second-degree murder was error where the aggravated sentence imposed by the trial court pursuant to G.S. 15A-1340.16(d) was based on factors neither pled in an indictment, found by a jury beyond a reasonable doubt, nor admitted by defendant. State v. Harris, 175 N.C. App. 360, 623 S.E.2d 588, 2006 N.C. App. LEXIS 57, vacated, in part, on other grounds, 361 N.C. 154 (2006), petition denied as to additional issues, 361 N.C. 174, 641 S.E.2d 308 (2006).

Trial court's finding of an aggravating factor under G.S. 15A-1340.16(d)(12) at defendant's trial was harmless beyond a reasonable doubt because the evidence presented at defendant's trial, showing that he committed the underlying crime while on pretrial release, was both uncontroverted and overwhelming; moreover, the trial court's finding of the aggravating factor at defendant's trial was harmless beyond a reasonable doubt, and did not violate N.C. Const., Art. I, § 24. State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452, 2006 N.C. LEXIS 1301 (2006).

Because the arguments of defendant's counsel in mitigation did not constitute an admission of any aggravating factor, the trial court's sentencing procedure was erroneous under *Blakely*; since there was conflicting evidence as to defendant's role in the offense, as the fact that the jury could have found the heinous, atrocious, or cruel aggravator did not mean that the jury necessarily would have found it beyond a reasonable doubt, the error was not harmless beyond a reasonable doubt, and thus the matter had to be remanded for resentencing. State v. Hurt, 361 N.C. 325, 643 S.E.2d 915, 2007 N.C. LEXIS 407 (2007).

Right To Jury Trial Violated by Finding of Aggravating Factor. — Where, in sentencing defendant, the trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense, this judicial finding under G.S. 15A-1340.16 violated defendant's Sixth Amendment right to be tried by a jury, as the jury did not find the aggravating factor beyond a reasonable doubt, an error that was reversible per se. State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

Submission of Factor to Jury Held Proper. — Trial court did not err in submitting aggravating factor to the jury because the state presented ample evidence that defendant was operating his vehicle in a reckless manner by driving at a high rate of speed while legally intoxicated; any reasonable person should have known that an automobile operated by a legally intoxicated driver was reasonably likely to cause death to any and all persons who may find themselves in the automobile's path. State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (2008).

Submission of Aggravating Factor Issue to Jury Proper Even Though Abuse Occurred Before Statute Became Effective. — Although a child abuse offense occurred before G.S. 15A-1340.16(a1) was passed, the trial judge was authorized to submit the issue of aggravating factors to the jury. State v. Wilson, 181 N.C. App. 540, 640 S.E.2d 403, 2007 N.C. App. LEXIS 253 (2007).

Right to Jury Determination. — Trial court erred where, in sentencing defendant for two counts of assault with a deadly weapon inflicting serious injury, the trial court found as aggravating factors that defendant committed the offense while on pretrial release on another charge and that he joined with more than one other person in committing the offense, since these were not prior convictions, not admitted by defendant, and the facts for the aggravators were not presented to a jury and proved beyond a reasonable doubt; use of defendant's prior juvenile adjudication as an aggravator was also error since it was not a prior conviction, and not proven to a jury beyond a reasonable doubt. State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

Resentencing was necessary where the trial court sentenced defendant as a habitual felon at the top of the aggravated range, to a term of 167 to 210 months, but the aggravating factors under G.S. 15A-1340.16(d) were not found beyond a reasonable doubt by the jury and were not admitted by defendant. State v. Phillips, 172 N.C. App. 143, 615 S.E.2d 880, 2005 N.C. App. LEXIS 1426 (2005).

North Carolina Supreme Court has considered the application of Blakely to North Carolina's Structured Sentencing Act. G.S. 15A-1340 et seq., and held that U.S. Const., Amend. 6 required aggravating sentencing factors, like elements, to be found by a jury beyond a reasonable doubt; however, the trial court sentenced defendant, pursuant to G.S. 15A-1340.16, to the maximum aggravated range terms of imprisonment based on its finding of two aggravating factors without the jury's consideration, and therefore if the court had not already awarded defendant a new trial on separate grounds, he would have been entitled to a new sentencing hearing on this basis. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Defendant's aggravated sentence for second-degree murder was proper because the trial court submitted the aggravating factors to the jury by way of a special verdict. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

Handoff of Weapon Not Aggravating Factor. — The defendant's sentence on weapons charges could not be enhanced under subsection (d) by the aggravating factor that the defendant handed the weapon to a companion after discharging it. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

Great Monetary Loss as Aggravating Factor. — The trial court did not err in finding the aggravating factor of damage causing great monetary loss where the crime involved the use of computers to divert millions of dollars and where the amount of money involved in the offense was not an element but came into play only at the time of sentencing. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

Since the ratio of the amounts embezzled to the threshold amount of the offense charged was a factor to be considered in determining whether the imposition of an aggravated sentence was proper, defendant's embezzlement of $404,436 and $296,901 supported the imposition of an aggravated sentence, as they were sums of "great monetary value" when compared with threshold amount required for embezzlement of amounts over $100,000.00. State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007).

Evidence Sufficient to Support "Great Monetary Value" Factor. — A sufficient evidentiary basis existed to support the aggravating factor that the defendant's larceny involved the "taking of property of great monetary value" where the defendant pled guilty to all the facts listed in the indictment which listed the value of the property taken as $17,000 and where the prosecutor summarized the facts to the judge by saying that "the house had been ransacked." State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896, 2000 N.C. App. LEXIS 794 (2000).

The trial court properly found as an aggravating sentencing factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person where the defendant engaged a trooper in a high speed chase which resulted in the death of two passengers of a truck which the defendant struck. State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861, 2000 N.C. App. LEXIS 632 (2000).

The defendant "knowingly created a great risk of death to more than one person" where his shotgun went off in a hotel room that had dimensions of approximately 12 ½ by 13 ½ feet when he pointed it at the victim who was sitting on the bed four to six feet away from him and another individual was sitting on the same bed. State v. Baldwin, 139 N.C. App. 65, 532 S.E.2d 808, 2000 N.C. App. LEXIS 819 (2000).

Defendant's firing of 11 shots using Speer Gold Dot 155-grain jacketed hollow-point rounds, fired from a Ruger .40 caliber Smith and Wesson semi-automatic handgun was the knowing creation of a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, under G.S. 15A-1340.16(d)(8). State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17, 2002 N.C. App. LEXIS 17 (2002), cert. denied, 355 N.C. 495, 564 S.E.2d 47 (2002).

Position of Trust or Confidence Not Shown. — The court reversed and remanded, for resentencing only, sentencing judgments for two non-capital crimes, based upon insufficient evidence of the aggravating factor of G.S. 15A-1340.16(d)(15), as the evidence showed at most that defendant and victim enjoyed an amiable working relationship or friendship, but did not demonstrate a relationship conducive to reliance of one upon the other. State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

Refusal to Cooperate with Law Enforcement Officials. — The defendant's responsibility to cooperate with authorities does not attach when his silence is protected by the privilege against self-incrimination. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

Clerical Error Did Not Entitle Defendant to New Trial. — Contrary to the defendant's assertion, the record reflected that the trial court did not — and recognized that it could not — find the aggravating factor that defendant was armed with a deadly weapon in sentencing defendant for an armed robbery conviction, notwithstanding a clerical error on the sentencing form. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

Capital Sentence Upheld. — Equal protection clause was not violated when court applied felony murder rule and punished defendant more severely by sentencing him to death because more victims were harmed as authorized subdivision (d)(8) of this section and G.S. 15A-2000(e)(11). State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

Use of Special Verdict. — Imposition of an aggravated sentence for second-degree murder was not error even though the crime occurred prior to the effective date of the amended G.S. 15A-1340.16, as the trial court, in submitting the aggravators to the jury, complied with the limitations for a special verdict. State v. Heinricy, — N.C. App. —, 645 S.E.2d 147, 2007 N.C. App. LEXIS 1166 (2007).

***Blakely* Errors Were Harmless.** — *Blakely* errors committed by the trial court in sentencing defendant for involuntary manslaughter were harmless as defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to more than one person since: (1) defendant operated defendant's vehicle in a reckless manner by speeding, driving while intoxicated and with THC and morphine in defendant's blood, and weaving in and out of traffic; (2) a reasonable person would have known that a great risk of death had been created; (3) defendant's blood alcohol concentration was 0.10 two hours after the collision; (4) defendant acknowledged that the two involuntary manslaughter convictions showed that in the course of conduct as to each offense defendant killed another; and (5) since there were two involuntary manslaughter convictions, the evidence used to prove an element of one offense could be used to support an aggravating factor of a separate joined offense. State v. Speight, 186 N.C. App. 93, 650 S.E.2d 452, 2007 N.C. App. LEXIS 1983 (2007).

Although the trial judge's consideration of evidence of an aggravating factor not found by the jury or admitted by defendant violated the Sixth Amendment, the error was harmless beyond a reasonable doubt because, pursuant to G.S. 15A-1340.16(d)(8), a great risk of death was knowingly created to the lives of several people through defendant's actions of firing a semiautomatic pistol at police officers in the parking lot of a store where customers were present. State v. Sellars, 191 N.C. App. 703, 664 S.E.2d 45, 2008 N.C. App. LEXIS 1470 (2008), aff'd, modified, 363 N.C. 112 (2009).

Blakely Issue Not Reached. — Defendant's claim of a Blakely v. Washington, 542 U.S. 296 (2004), violation was not reached as defendant was indicted on March 13, 1995, which was before the certification date of the State v. Allen, 615 S.E.2d 256 (2005), opinion, his appeal was not pending direct review, and his case was final; defendant did not appeal the trial court's acceptance of the plea agreement under which he entered his Alford pleas, the finding of aggravating and mitigating factors by the trial court, nor his sentence to 55 years of imprisonment and it was not until November 7, 2003, that defendant filed a petition for a writ of certiorari and was allowed a limited review of only those issues within his appeal of right pursuant to G.S. 15A-1444(a1) and (a2). State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343, 2006 N.C. App. LEXIS 582 (2006).

Defendant's claim that *Apprendi* and *Blakely* eliminated the sentence-enhancement statute, and as a result rendered all recidivist statutes into substantive crimes with the effect that sentencing for either habitual misdemeanor assault or as a habitual violated the Double Jeopardy Clause's prohibition against multiple punishments for the same offense had to be rejected; *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements while defendant's argument was directed against the Fifth Amendment prohibition against double jeopardy, making *Blakely* and *Apprendi* inapposite. State v. Artis, 181 N.C. App. 601, 641 S.E.2d 314, 2007 N.C. App. LEXIS 261 (2007).

Applied in State v. Distance, 163 N.C. App. 711, 594 S.E.2d 221, 2004 N.C. App. LEXIS 576 (2004); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Cited in State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996); State v. Caldwell, 125 N.C. App. 161, 479 S.E.2d 282 (1996); State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997); State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997); Williams v. Currie, 103 F. Supp. 2d 858, 2000 U.S. Dist. LEXIS 9888 (M.D.N.C. 2000); State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001); State v. Kemp, 153 N.C. App. 231, 569 S.E.2d 717, 2002 N.C. App. LEXIS 1118 (2002); State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003); State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004); State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006); State v. McQueen, 181 N.C. App. 417, 639 S.E.2d 131, 2007 N.C. App. LEXIS 154 (2007); State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008).

Decisions Under Prior Law

I. General Consideration.
II. Aggravating Factors.
  A. In General.
  B. Inducing, Leading or Dominating.
  C. Preventing Arrest or Effecting Escape.
  D. Hire or Pay.
  E. Victim Performing or Having Exercised Official Duties.
  F. Heinous, Atrocious or Cruel.
  G. Risk of Death to More Than One Person.
  H. Deadly Weapon.
  I. Young, Old, or Infirm Victim.
  J. Commission of Crime While on Pretrial Release.
  K. Person under 16 Involved in Commission of Crime.
  L. Great Monetary Value or Loss.
  M. Position of Trust.
  N. Nonstatutory Factors.
  O. Elements of Offense.
  P. Prior Convictions.
    1. In General.
    2. Evidence of Prior Conviction.
    3. Indigency at Time of Conviction.
  Q. Joinable Offenses.
III. Mitigating Factors.
  A. In General.
  B. Duress, Coercion, Threat or Compulsion.
  C. Passive or Minor Role.
  D. Mental or Physical Condition.
  E. Immaturity or Limited Mental Capacity.
  F. Participation or Consent of Victim.
  G. Aid in Apprehension or Prosecution of Another.
  H. Strong Provocation or Extenuating Relationship.
  I. Lack of Foreseeability or Exercise of Caution.
  J. Voluntary Acknowledgment of Wrongdoing.
  K. Good Character or Reputation.
  L. Minor Defendant.
  M. Honorable Discharge.

N. Nonstatutory Factors.
IV. Findings of Court.
V. Additional Sentencing Factors.

I. GENERAL CONSIDERATION.

Editor's Note. *— Many of the cases cited below were decided under former G.S. 15A-1340.4 and 15A-1340.7.*

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, it is not clear the extent to which the act limited the sentencing discretion of the trial judge. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act was an attempt to strike a balance between the inflexibility of a presumptive sentence which insured that punishment was commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

The Fair Sentencing Act established rules which determined what evidence a sentencing judge could consider in aggravating a crime covered by the act; first, a conviction could not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined or by acts which formed the gravamen of these convictions; second, evidence used to prove an element of a crime could not also be used to prove a factor in aggravation of that same crime; third, the same item of evidence could not be used to prove more than one factor in aggravation; fourth, acts which could have been, but were not, the basis for other joinable criminal convictions could be used to aggravate the conviction for which defendant was being sentenced; finally, evidence used in proving an element of one crime could also be used to support an aggravating factor of a separate, though joined, crime for which defendant was being sentenced. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

One of the primary purposes of sentencing is to impose a punishment commensurate with the injury the offense has caused, taking into consideration factors which may diminish or enhance the offender's culpability. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Article Established Guidelines. — Former Article 81A did not eliminate the existing discretionary system; it only established certain guidelines for trial judges, which if correctly observed, still left an open door for disparity of sentences. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Ordinarily, a resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

"The Offense" Referred to Offense Defendant Convicted of. — As it was used in former G.S. 15A-1340.4(a)(1), the phrase "the offense" clearly referred to the offense for which the defendant was convicted or to which defendant tendered a plea of guilty. State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988).

Duty of Judge to Examine Evidence. — A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors, even absent a request by counsel. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Legislature Determines Factors to Be Considered. — The power to determine those statutory mitigating and aggravating factors which must be considered by the sentencing judge lies solely within the discretion of the legislature. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Judge Must Consider Aggravating and Mitigating Factors. — Unless a sentence has been agreed to during plea bargaining, a sentencing judge is required to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense. Such circumstances might include facts concerning both a dismissed charge as well as the admitted offense. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Under former G.S. 15A-1340.4(a) judges had to consider all aggravating and mitigating factors before imposing a prison term other than the presumptive term. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985); State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied,.

If the trial court imposed a sentence greater than the presumptive term for any conviction, it had to consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighed the other. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Findings of Factors of Aggravation and Mitigation Required. — Where the conviction for the sale of cocaine, a Class H felony, has a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

When Statutory Factor Must Be Found. — Sentencing court is required to find a statutory factor only when the evidence supporting that factor is uncontradicted, substantial, and manifestly credible. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Finding of Factor Required Where Evidence Uncontradicted, Substantial and Credible. — When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, it is error for the trial court not to find that factor. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Former § 15A-1340.4 did not require that only aggravating or mitigating factors listed therein be considered. The court could use any factors which were supported by a preponderance of the evidence and were reasonably related to the purposes of sentencing. State v. Setzer, 61 N.C. App. 500, 301 S.E.2d 107 (1983), cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

In addition to specified factors which could be considered, the sentencing judge could consider any aggravating and mitigating factors that he found were proved by the preponderance of the evidence, and that were reasonably related to the purposes of sentencing. It was error, however, to consider factors such that the severity of the sentence imposed related to the defendant's plea of not guilty. State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982).

Former G.S. 15A-1340.4 did not limit a trial judge to the aggravating and mitigating factors enumerated therein. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. State v. Beamer, 339 N.C. 477, 451 S.E.2d 190 (1994).

All circumstances which are transactionally related to the admitted offense must be considered during sentencing. State v. Wood, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

The trial court had to consider all circumstances that were both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they were not essential to the establishment of elements of the offense. This was so regardless of whether such factors were specifically listed under former G.S. 15A-1340.4(a)(1), and regardless of whether the State specifically requested a finding in this regard. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If They Are Reasonably Related to the Purposes of Sentencing. — The court could use an aggravating factor not set forth in former G.S. 15A-1340.4(a)(1) if it reasonably related to the purposes of sentencing. State v. Nichols, 66 N.C. App. 318, 311 S.E.2d 38, cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Former G.S. 15A-1340.4 did not purport to grant trial judge the discretion to create new aggravating factors. Rather, the statute listed several aggravating factors which the trial judge was required to consider and also authorized him to consider any other aggravating factors that he found were proved by a preponderance of the evidence, and that were reasonably related to the purposes of sentencing. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984), overruled on other grounds, 321 N.C. 570, 364 S.E.2d 373 (1988).

But the trial judge may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing. State v. Baucom, 66 N.C. App. 298, 311 S.E.2d 73 (1984).

Burden of Proving Aggravating and Mitigating Factors. — The state has the burden of proving that aggravating factors exist, whereas the defendant has the burden of proving that mitigating factors are present. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Factors Must Be Supported by Preponderance of Evidence. — The trial judge may consider aggravating and mitigating factors supported by evidence not used to prove an essential element as long as those factors are reasonably related to the purposes of sentencing. Such factors must be supported by a preponderance of the evidence. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Findings in aggravation and mitigation must be proved by a preponderance of the evidence.

State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Separate Factors in Aggravation Cannot Be Found on the Same Evidence. — The trial court improperly found two factors in aggravation based upon the same evidence. Therefore, defendant was entitled to a new sentencing hearing on his convictions for burglary and kidnapping. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Absent Rebuttal, Factual Allegations in Indictment Deemed Admitted by Guilty Plea. — Where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance, and fails to challenge or present any evidence to rebut these factual allegations, they are deemed admitted and may be utilized by the trial court to establish the existence of the aggravating factor. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Defendant Who Pleads Guilty May Present Evidence. — Even where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment or other criminal process which could be used to establish the existence of an aggravating circumstance. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Behavior Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Behavior Prior to Resentencing. — As G.S. 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and his resentencing hearing in order to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Judge Held Not Required to Find Aggravating and Mitigating Factors. — Where defendant was charged, convicted and sentenced for four separate violations of G.S. 14-100, the trial judge was not required to find aggravating and mitigating factors in sentencing defendant, even though charges against defendant were consolidated for trial and for hearing on judgments, as they were not consolidated for judgment and thus did not exceed maximum ten-year term for the offense. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

II. AGGRAVATING FACTORS.

A. In General.

Every aggravating factor must be reasonably related to the purposes of sentencing. State v. Gaynor, 61 N.C. App. 128, 300 S.E.2d 260 (1983).

Former §§ 15A-1340.3 and 15A-1340.4 did not require that factors which increased the defendant's culpability be a part of the actions which constituted the crime in order to be aggravating factors. State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991).

Although the same item of evidence may not be used to prove more than one aggravating factor, where detective was killed because he was disrupting the drug trade and because he was going to be involved in the prosecutions of some of the group members, the trial judge's finding of two aggravating factors in former G.S. 15A-1340.4(a)(1)(d) and (a)(1)(e) was not error. State v. Evans, 113 N.C. App. 644, 439 S.E.2d 775 (1994).

Former § 15A-1340.4, by its terms, prohibited the use of the same item of evidence to prove more than one factor in aggravation. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

It was error for the trial court to consider the same evidence of defendant's mental problems to support more than one aggravating factor. State v. Jones, 66 N.C. App. 274, 311 S.E.2d 351 (1984).

In felonious assault case, defendant's contention that the evidence necessary to prove he acted with intent to kill was also necessary to prove premeditation and deliberation was without merit; premeditation means that the defendant formed the intent to kill during some period of time before actually committing the crime; deliberation means that the defendant was in a cool state of blood when he formed the intent to kill; thus, proof of each factor required presenting additional evidence beyond mere intent to kill, and the statutory prohibition against use of evidence necessary to prove an element of the crime to prove a factor in aggravation did not apply. State v. Smith, 92 N.C. App. 500, 374 S.E.2d 617 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Where trial court found as non-statutory aggravating factor the assault on victim was premeditated and deliberated, trial court did not use evidence of an element of the offense to aggravate the same offense for sentencing since proof of premeditation and deliberation required presentation of additional evidence beyond evidence necessary to prove defendant's intent to kill. State v. Reed, 93 N.C. App. 119, 377 S.E.2d 84, cert. denied, 324 N.C. 580, 381 S.E.2d 779 (1989).

But Same Factor May Aggravate More Than One Conviction. — The same factor may be used to aggravate more than one conviction. State v. McCullers, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to increase the offender's culpability. State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

In determining the existence of aggravating factors, the trial court may rely on evidence presented at the sentencing hearing, or, when a defendant pleads guilty, on the circumstances surrounding the offense, including factual allegations contained in the indictment or other criminal process, despite the fact that the State fails to present evidence at sentencing. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

The existence of aggravating factors must be proved by a preponderance of the evidence. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 618, 336 S.E.2d 78 (1986); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986); State v. Cooke, 87 N.C. App. 613, 361 S.E.2d 764 (1987).

Statement of Prosecuting Attorney as Support for Aggravating Factors. — Statement of the prosecuting attorney which, considered with the statement of defendant's attorney, showed that there was a stipulation that the prosecuting attorney could state what the evidence would show, was sufficient to support aggravating factors. State v. Mullican, 329 N.C. 683, 406 S.E.2d 854 (1991).

Burden of Proof. — The state bears the burden of persuasion on aggravating factors. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

The state bears the burden of proof to establish the existence of aggravating factors if it seeks a term of imprisonment greater than the presumptive sentence. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986).

The sentencing judge may consider any aggravating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purpose of sentencing, even though not enumerated on the statutory list. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Presence of Defendant Required. — Trial court erred in adding an aggravating factor outside of defendant's presence, after the sentencing hearing was completed. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Defendant's plea of guilty does not prevent trial judge from reviewing all circumstances surrounding the offense in finding aggravating factors. State v. Lloyd, 89 N.C. App. 630, 366 S.E.2d 912, cert. denied, 322 N.C. 483, 370 S.E.2d 231 (1988).

Prior Conviction and Commission of Offense While Sentence Suspended Are Distinct Factors. — Defendant's prior conviction for an offense punishable by more than 60 days and the fact that, at the very time he committed the offense for which he was being tried, he was under a suspended sentence for the prior felony conviction are two clearly distinct aggravating factors. State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984).

B. Inducing, Leading or Dominating.

The focus of former § 15A-1340.4(a)(1)a was on the role of defendant in inducing others to participate in the commission of an offense or in leading or dominating other participants during the commission of an offense. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

And Not on the Role of the Participants. — The focus of former G.S. 15A-1340.4(a)(1)a was not on the role of the participants in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership. State v. Lattimore, 310 N.C. 295, 311 S.E.2d 876 (1984).

The conduct referred to in former § 15A-1340.4(a)(1)a was of two types: first, inducing others, and second, leading or dominating others. The words used were not generally synonymous. Since former G.S. 15A-1340.4(a)(1)a was stated in the disjunctive, proof of either type of conduct, by the preponderance of the evidence, was sufficient to support the finding of an aggravating factor. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

When Inducing Others and Leading Others Could Constitute Two Aggravating Factors. — Inducing others to commit an offense and leading others during the commission of an offense constituted conduct which increased a defendant's culpability. Since proof of either type of conduct, by the preponderance of the evidence, was sufficient to support the finding of an aggravating factor, proof of both types of conduct should have sufficed to support the finding of two aggravating factors so as to reflect the defendant's greater culpability. However, since the same evidence could not be used to prove more than one aggravating factor, two aggravating factors could be found only if there was separate evidence supporting each. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

The evidence showed that defendant induced others to participate, and that he lead or dominated others. Since there was separate evidence to support the factors of inducing others to commit a crime and his position of leadership, there was no duplication error. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

If evidence is presented showing that a defendant induced another or others to participate in the commission of an offense, and separate evidence is presented showing that the defendant also led or dominated another or others during the commission of the offense, the court may find two separate aggravating factors. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

The fact that a defendant induced a victim to take part in the offense or exercises leadership or dominance over a victim of a crime was not within the meaning of former G.S. 15A-1340.4(a)(1)a. State v. Mosley, 93 N.C. App. 239, 377 S.E.2d 554 (1989).

Inducing Perjury. — Trial court's finding as an aggravating factor that defendant attempted to induce State's witness to perjure herself upheld. State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990).

The aggravating factors set forth in former § 15A-1340.4(a)(1)a could not be proven by conjecture. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

Inducing Conspiracy. — A preponderance of the evidence showed that defendants brought about or caused others' involvement in conspiracy and drug sale and thus supported this finding as a factor in aggravation. Defendants' contention that evidence necessary to prove the aggravating factor of inducing another to participate in the commission of the offense was also necessary to prove an essential element of the conspiracy offense was without merit, as an inducement to enter an agreement necessarily precedes the agreement itself, and only the agreement itself is an element of the offense of conspiracy. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985), holding, however, that a finding of the factor of leadership or dominance was in error.

Finding Upheld. — Aggravating factor found by the trial court, that defendant occupied a position of leadership or dominance over the other participants in the commission of the offense and that defendant induced others to commit the crime, was supported by the evidence. State v. Miller, 315 N.C. 773, 340 S.E.2d 290 (1986).

Evidence held sufficient to show that defendant occupied a position of leadership which resulted in his companions' involvement in the crimes. State v. Hager, 320 N.C. 77, 357 S.E.2d 615 (1987).

The evidence supported a finding of aggravation when it showed that defendant, a 26-year-old adult, by his actions and his words influenced co-defendant, a 16-year-old minor, to a course of conduct. Defendant after threatening to shoot the victim and getting a gun, told co-defendant to shoot the victim. The crime did not occur until after the encouragement from defendant. This was sufficient to prove by a preponderance of the evidence that defendant induced co-defendant to participate in the offense. State v. Lloyd, 89 N.C. App. 630, 366 S.E.2d 912, cert. denied, 322 N.C. 483, 370 S.E.2d 232 (1988).

Evidence was sufficient to support finding as an aggravating factor that defendant induced others to participate in the trafficking of cocaine. State v. Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993).

C. Preventing Arrest or Effecting Escape.

Scope of Former § 15A-1340.4(a)(1)b. — The language in former G.S. 15A-1340.4(a)(1)b, like that in G.S. 15A-2000(e)(4), was intended to include situations in which defendant's motivation in committing the second offense was to avoid subsequent detection and apprehension for the underlying crime; it was not to be limited solely to situations where defendant committed the second offense in an effort to avoid an immediate arrest or to escape from custody. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

Assault Committed for Purpose of Avoiding Detection and Apprehension. — Where one of defendant's purposes behind the sexual assault of his grandmother was the desire to avoid detection and apprehension for his prior assault upon her, which resulted in her death, defendant's actions were properly submitted to the jury as an aggravating factor in his sentencing hearing. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

D. Hire or Pay.

Involvement of Money or Valuable Items Not Sufficient. — The language "The defendant was hired or paid to commit the offense" in former G.S. 15A-1340.4(a)(1)c, clearly evinced the legislature's intent to avoid the enhancement of a defendant's sentence simply because money or other valuable items were involved in the crime charged. State v. Thompson, 62 N.C. App. 585, 303 S.E.2d 85, limited cert. allowed, 309 N.C. 464, 311 S.E.2d 289 (1983).

Evidence Had to Show That Defendant Was Paid or Hired. — Under the Fair Sentencing Act there had to be evidence that the defendant was paid or hired to commit the offense before the aggravating factor of pecuniary gain could be found. State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985), rev'd on other grounds, 323 N.C. 306, 372 S.E.2d 704 (1988).

Pecuniary Gain Inherent in Offense Should Not Be Considered. — If the pecuniary gain at issue in a case is inherent in the offense, then that "pecuniary gain" should not be considered an aggravating factor. However, pecuniary incentive is not always inherent in a crime. Thus, the determination of whether pecuniary gain, as an aggravating factor, is also an element of the underlying offense is a factual one. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309, cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983), decided prior to the 1983 amendment to former § 15A-1340.4(a)(1)c.

Pecuniary Gain — Armed Robbery. — Pecuniary gain is not an essential element of the crime of armed robbery. State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983), decided prior to the 1983 amendment to former § 15A-1340.4(a)(1)c.

Same — Felonious Uttering. — It is error for a trial court to consider pecuniary gain as a factor in aggravation of a sentence for uttering a fraudulent instrument, unless defendant is hired or paid for the offense, since pecuniary gain is inherent in the offense of felonious uttering. State v. Thompson, 62 N.C. App. 585, 303 S.E.2d 85, limited cert. allowed, 309 N.C. 464, 311 S.E.2d 289 (1983).

E. Victim Performing or Having Exercised Official Duties.

Hindering the Lawful Exercise of a Governmental Function or Law Enforcement. — The trial court erred in finding as a factor in aggravation of sentencing that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws. State v. Whitley, 111 N.C. App. 916, 433 S.E.2d 826 (1993).

Hindrance of Law Enforcement Officer. — In prosecution in which defendant was convicted of assault on officer with a deadly weapon with intent to kill inflicting serious injury and assault on a different law enforcement officer with a firearm, it was not error for the court to find as statutory aggravating factors under former G.S. 15A-1340.4 that: (1) the offense was committed to hinder the lawful exercise of a governmental function or enforcement of the laws, and (2) the offense was committed against a law enforcement officer in the performance of his official duties. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

Victim Who Was Witness Against Defendant. — Evidence that defendant's shooting of his wife occurred in close proximity to defendant's conviction in a trial in which his wife had been the sole witness against him; that in the setting of that trial he made veiled references to "doing something" to his wife; and that while he had threatened and harassed her on numerous prior occasions, he made a life-threatening assault upon her only in the immediate wake of that trial, permitted the court to find as an aggravating factor, by a preponderance of the evidence, that the offense was committed against a witness against defendant while engaged in the performance of her official duties or because of the exercise of her official duties. State v. Laney, 74 N.C. App. 579, 328 S.E.2d 586 (1985).

F. Heinous, Atrocious or Cruel.

Focus Is on Brutality, Pain, Suffering or Dehumanizing Aspects. — In determining whether an offense is especially heinous, atrocious or cruel, the focus should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense. State v. Blalock, 77 N.C. App. 201, 334 S.E.2d 441 (1985); State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987); State v. Torres, 322 N.C. 440, 368 S.E.2d 609 (1988); State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Facts Should Be Compared with Those Attributable to Like Offenses. — Whether an offense is especially heinous, atrocious or cruel depends upon a comparison of the facts of the case with those normally attributable to other like offenses. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Factor May Be Found Where Serious Injury Is Element. — If the evidence establishes that the infliction of serious injury was done in an especially heinous, atrocious or cruel manner, former G.S. 15A-1340.4(a)(1) did not prohibit the finding of the aggravating factor merely because infliction of a serious injury was an element of the offense. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Multiple Acts of Same Offense. — Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious or cruel. State v. Blalock, 77 N.C. App. 201, 334 S.E.2d 441 (1985).

Multiple Injuries. — Relevant to the question of sentencing and properly considered under former G.S. 15A-1340.4(a)(1) was the impact of the crime on the victim. Where the physical or emotional injury was in excess of that normally present in the offense, multiple injuries would be an important consideration either as an additional factor in aggravation or as proof that the offense was especially heinous, atrocious or cruel. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983); State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985); State v. Cofield, 77 N.C. App. 699, 336 S.E.2d 439 (1985), rev'd on other grounds, 320 N.C. 297, 357 S.E.2d 622 (1987).

Whether death resulted from multiple acts of violence and was immediate are factors properly considered in determining whether a murder is especially heinous, atrocious or cruel. State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985).

Time Between Acts of Violence and Death. — A factor bearing on physical and psychological suffering is the length of time between a defendant's acts of violence and the victim's death. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

Parent-Child Relationship. — The especially heinous, atrocious or cruel factor cannot be based on a parent-child relationship when, as for example in incest, the relationship is an element of the offense. State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Relationship Held Not to Support Factor. — Trial court erred in finding that defendant's conduct was heinous in that victim was the mother of defendant's nephew. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Consideration of Conduct in Joinable Offense as Aggravating Factor. — Where in sentencing defendant for first-degree burglary the trial judge found as a statutory aggravating factor that the offense was especially atrocious or cruel, and in so doing the trial court improperly considered evidence of defendant's course of conduct in the commission of a joinable offense, to wit, first degree murder, the case would be remanded for resentencing on defendant's first-degree burglary conviction. State v. Flowers, 84 N.C. App. 696, 354 S.E.2d 240 (1987), cert. denied, 319 N.C. 675, 356 S.E.2d 782 (1987).

Evidence of Handcuffing in Murder Case. — In case in which defendant was convicted of several offenses, including kidnapping and second-degree murder, the fact that the victim's hands were handcuffed behind her back was not necessary to prove any element of the second-degree murder. Therefore, even if defendant's contention that the handcuffing was necessary to prove an element of the first-degree kidnapping was correct, there would still be no error in court's using the handcuffing in aggravation of the murder conviction. State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987).

Reference to "Overall Situation" Did Not Amount to Improper Consideration. — Trial court did not err in finding as an aggravating factor in both cases of assault with a deadly weapon with intent to inflict serious injury that offense was especially heinous, atrocious or cruel; trial court's reference to "overall situation" did not necessarily indicate the judge was improperly considering a "course of conduct" that included commission of a joined offense. State v. Reed, 93 N.C. App. 119, 377 S.E.2d 84, cert. denied, 324 N.C. 580, 381 S.E.2d 779 (1989).

Armed Robbery. — While any armed robbery is frightening to the victim and repugnant to lawful society, the aggravating factor set forth in former G.S. 15A-1340.4(a)(1)(f) expressly applied only to especially heinous, atrocious, or cruel offenses. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Sufficient Evidence to Support Factor. — Evidence that defendant fired two shots from close range into victim's groin, leaving four wounds or holes in his scrotum and then walked over to victim, who was lying on the living room floor, stood over him for a few seconds, and fired a third and fatal bullet into his head, supported the trial court's finding that the offense was especially heinous, atrocious, or cruel. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 462, 356 S.E.2d 9 (1987).

Where defendant's felonious assault on victim was excessively brutal and dehumanizing, and his comments suggested that he enjoyed committing the offense, the trial court properly found the aggravating factor that the offense was especially heinous, atrocious or cruel. State v. Hager, 320 N.C. 77, 357 S.E.2d 615 (1987).

Evidence that defendant shot victim six times, that he cruelly taunted victim and indicated his intent to continue shooting until he was dead, that five of the wounds, although painful, would not have been immediately fatal, and that victim could have remained conscious for some time even after receiving the sixth gunshot wound clearly supported a finding that victim suffered a degree of physical and mental pain not normally present in every murder, so as to support the trial court's finding that the murder was especially heinous. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

Defendants held victim helpless in the presence of the beating being administered to victim's husband by co-defendant. The kind of suffering, both physical and psychological, that victim endured at the hands of defendant concomitantly with burglary is not ordinarily present when a burglary is committed. Thus, record evidence supports the court's finding of heinous, atrocious or cruel behavior during commission of the burglary. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Where the evidence showed that a homicide involved a violent struggle in which the victim's scalp was torn away from her skull; her torso, head and face were severely bruised from the blows she received; she lost a tremendous amount of blood; her body and the floor around her body were covered with blood, and blood was splattered on the walls of the room; her lungs and trachea were full of blood, and she was beaten and stabbed so many times it is not entirely clear whether a blow or the knife wound was the actual cause of death, multiple injuries such as those found here may demonstrate that a crime was committed in an especially heinous, atrocious or cruel manner. State v. Smart, 99 N.C. App. 730, 394 S.E.2d 475 (1990), cert. denied, 328 N.C. 576, 403 S.E.2d 520 (1991).

Evidence Held Sufficient — Armed Robbery of Mother by Son. — The armed robbery of a mother by her son involves those emotions which the parent-child relationship evokes and thus produces psychological suffering and victim dehumanization beyond that normally present in armed robbery offenses. Thus the finding that such an armed robbery offense was especially heinous, atrocious or cruel was proper. State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Evidence Held Sufficient — Assault with Deadly Weapon. — Since only a single blow was necessary to prove an element of the offense of assault with a deadly weapon, and the evidence established the infliction of multiple blows with a hatchet, the court could properly find as to the assault offense that the offense was especially heinous, atrocious or cruel. State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

The trial court's finding that the offense was heinous, atrocious or cruel was adequately supported by evidence that an initial shot resulted in a wound to victim's heart which was sufficient to support a conviction of assault with a deadly weapon with intent to kill inflicting serious injury and that second, third, and fourth shots resulted in a severed jugular vein and permanent nerve injury to victim's arm. Moreover, the record disclosed ample evidence of physical pain and psychological suffering sufficient to support the finding that the offense was heinous, atrocious or cruel, where the victim pled with the defendant to stop firing, and after all four shots were fired, the victim was on the ground, drifting in and out of consciousness, and felt pain and trauma, yet was unable to get help because she could not move. State v. Vaught, 318 N.C. 480, 349 S.E.2d 583 (1986).

Evidence Held Sufficient — Second Degree Murder. — Evidence held to show both psychological and physical suffering beyond that normally present in the offense of second degree murder, so as to justify finding that the offense was especially heinous, atrocious or cruel. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

Judge did not err in finding as a statutory aggravating factor that second degree murder offense was especially heinous, atrocious or cruel where the victim was kidnapped, raped twice, beaten, taunted, and did not lose consciousness or die immediately. State v. Mason, 125 N.C. App. 216, 480 S.E.2d 708 (1997), cert. denied, 346 N.C. 286, 487 S.E.2d 563 (1997).

Evidence Not Sufficient — Second-Degree Murder. — The trial court erred in finding as a factor in aggravation that offense of second-degree murder was especially cruel, where the evidence in the case was that the unsuspecting victim was shot one time in the back. This shooting was no crueler than any other fatal shooting; indeed, since the victim did not know he was going to be shot it might have been less cruel than the usual face-to-face shooting. State v. Nelson, 76 N.C. App. 371, 333 S.E.2d 499, modified on other grounds and aff'd, State v. Nelson, 316 N.C. 350, 341 S.E.2d 561 (1986).

Where the peculiar facts of a case gave no evidence that the murder was excessively brutal or dehumanizing when compared to other second-degree murders, the single fact that the defendant inflicted multiple wounds did not make the second-degree murder especially heinous, atrocious, or cruel under former G.S. 15A-1340.4(a)(1)f. State v. Torres, 322 N.C. 440, 368 S.E.2d 609 (1988).

Where defendant struck the victim on the head only two or possibly three times with a stick after the victim had fallen and where testimony of the witness nearest the victim indicated that the victim was rendered unconscious immediately, the attack was not excessively more brutal than any other second-degree murder; therefore, the trial court erred when it found that the murder was especially heinous, atrocious or cruel. State v. Stanley, 110 N.C. App. 87, 429 S.E.2d 349 (1993).

Evidence Held Not Sufficient — Armed Robbery. — Where the State presented no evidence to show that defendant's actions in the robbery were more excessively brutal than those of other armed robbers or that the victim endured more psychological or physical pain or dehumanizing aspects than other armed robbery victims, aggravation of sentence was improper. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Evidence Held Sufficient — Burglary. — The evidence was sufficient to support aggravating factor that burglary of victims' home was especially heinous, atrocious or cruel where the acts in question constituted neither another crime nor the gravamen of another crime for which defendant was convicted and they were not used as evidence to prove any other aggravating circumstance. With regard to the burglary itself, the state was required to prove that defendant entered the dwelling; but the egregious manner in which the entry occurred and defendant's being armed with a firearm were superfluous to the entry itself. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Evidence Not Sufficient — Assault with Deadly Weapon. — It was error for the trial court to find as a factor in aggravation that assault with a deadly weapon resulting in serious injury was especially heinous, atrocious or cruel, where the victim received 50 stitches, was hospitalized for two weeks, lost the sight in one eye and had some amnesia, as it could not be said that the conduct of defendant was any more brutal than that inherent in any assault with a deadly weapon resulting in serious bodily injury. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant's acts of repeatedly striking his wife in the presence of their daughter, telling her to kiss him goodbye, and refusing to get help after she was injured did not represent brutality beyond that found in other assaults with a deadly weapon with the intent to kill inflicting serious injury, and were insufficient to sustain a finding of the aggravating factor. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

G. Risk of Death to More Than One Person.

To impose this aggravating factor, the sentencing judge must focus on two considerations: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

What Weapons Are Contemplated by This Factor. — The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns or bombs would fit that description. These weapons are normally hazardous to the lives of more than one person. A rifle, while it may sometimes be dangerous to the lives of more than one person, is not so normally. State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984); State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Weapon Must Be Indiscriminate. — To qualify as a weapon or device which in its normal use is hazardous to the lives of more than one person, the instrumentality must be one which is indiscriminate in its hazardous power. State v. McBridge, 118 N.C. App. 316, 454 S.E.2d 840 (1995).

A machine gun is one weapon contemplated by the aggravating factor that defendant employed a weapon normally hazardous to the lives of more than one person. State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332 (1987), cert. denied, 320 N.C. 516, 358 S.E.2d 529 (1987).

A shotgun is a weapon which would normally be hazardous to more than one person if it is fired into a group of two or more persons in close proximity to one another. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Rifle. — It was error to find as an aggravating factor that the defendant employed a weapon normally hazardous to the lives of more than one person, where defendant employed a .30-.30 lever action rifle. State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984).

Evidence that defendant fired a semi-automatic rifle several times into a crowd of several persons supported a finding of the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. State v. Carver, 319 N.C. 665, 356 S.E.2d 349 (1987).

A .38 caliber handgun is not normally dangerous to the lives of more than one person, and thus the trial court erred in finding this aggravating factor. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Semiautomatic Nine-Millimeter. — The aggravating factor under subdivision (d)(8) was properly found where defendant fired more than one shot from a nine-millimeter, semiautomatic pistol. State v. Bruton, 344 N.C. 381, 474 S.E.2d 336 (1996).

Automobile. — Where defendant operated his automobile while legally intoxicated, his blood alcohol concentration being .183 grams of alcohol per 100 milliliters of blood, and drove his automobile recklessly, crossing over into the oncoming lane of traffic and striking an automobile containing three passengers, killing or seriously injuring them, the trial court did not err in finding that defendant's automobile, under the circumstances surrounding its use, constituted a device which in its normal use was hazardous to the lives of more than one person, and that defendant knowingly created great risk of death thereby. State v. McBridge, 118 N.C. App. 316, 454 S.E.2d 840 (1995).

Factor Applied in Case of Assault with Deadly Weapon. — The court did not err in using the factor that defendant employed a weapon normally hazardous to the lives of more than one person to aggravate sentences for assault with a deadly weapon with intent to kill inflicting serious injury. State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332, cert. denied, 320 N.C. 516, 358 S.E.2d 529 (1987).

Second-Degree Murder. — Where the record showed that three persons were sitting close to each other on the same couch when defendant fired shotgun from a distance of less than 12 feet away, the record contained sufficient evidence to support the sentencing judge's finding of this aggravating factor on second-degree murder conviction. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

H. Deadly Weapon.

Defendant Need Only Be Armed with Deadly Weapon. — As former G.S. 15A-1340.4(a)(1)i made clear, this aggravating factor could be found if a defendant either used a deadly weapon or was merely armed with one at the time of the crime. State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988).

Co-Defendant's Use of Gun. — By being present at the scene of the crime, with the intent to see it take place, and by performing the overt act of assisting in its commission by driving the getaway car, defendant became a principal in the crime, and his co-defendant's use of the gun in perpetrating the crime was therefore imputed to defendant; there is no indication that the legislature in its enactment of this section, sought to change this well-established rule with respect to the statutory aggravating factor of using a deadly weapon by adding scienter as an element to be found by the court; therefore, the question of defendant's awareness of the gun was not dispositive. State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

Factor Precluded Where Inference of Malice Arises from Use of Deadly Weapon. — When the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing. This "bright-line" rule avoids hair-splitting factual disputes necessitated by having to second guess jury decisions as to the existence of malice. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

Where malice can be inferred from a murder perpetrated by the use of a deadly weapon, irrespective of whether defendant is convicted of or pleads to the charge, use of the deadly weapon will be deemed evidence necessary to prove the element of malice. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

A per se rule exists in this State that when the facts justify an inference of malice arising from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. Even where defendant pleads guilty, use of the deadly weapon is deemed to be evidence necessary to prove the element of malice. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

When the facts justify an inference of malice arising only from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. This rule is applicable to both convictions or pleas in first or second-degree murder cases where malice is an essential element. State v. Lattimore, 310 N.C. 295, 311 S.E.2d 876 (1984).

And Where Use of Deadly Weapon Is Essential Element of Offense. — The trial court erred in relying upon the aggravating factor of defendant's use of a deadly weapon in sentencing defendant for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property, as an essential element of both offenses involves the use of a deadly weapon. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Existence of Deadly Weapon Used to Support More Than One Factor. — In a prosecution for two murders, use of the existence of a deadly weapon in finding both the aggravating circumstance that the defendant was armed with a deadly weapon and the aggravating circumstance that each murder was committed during a course of conduct in which defendant engaged in an act of violence against another person was proper, since although the deadly weapon was common to both factors, evidence tending to prove each factor was necessarily different. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Use of Weapon to Commit Separate, Joinable Offense. — A trial court may use the possession of a deadly weapon to aggravate the sentence on a burglary conviction, notwithstanding the use of the weapon to commit a separate, though joinable, offense. State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988).

Where assault with a deadly weapon was a joined offense of which defendant was contemporaneously convicted, to aggravate armed robbery offense based on evidence of the assault would be improper. State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Unlawful Killing Generally. — The General Assembly did not intend that the use of a deadly weapon at the time of a crime be used to enhance sentences in cases where the offense itself is an unlawful killing accomplished by shooting the victim with a deadly weapon. State v. Green, 62 N.C. App. 1, 301 S.E.2d 920, modified on other grounds and aff'd, 309 N.C. 623, 308 S.E.2d 326 (1983).

Murder. — Court erred in finding as a statutory aggravating factor that defendant, who pleaded guilty to second degree murder, used a deadly weapon at the time of the crime. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Manslaughter. — Standing alone, use of a deadly weapon to shoot a victim and thereby accomplish an unlawful killing may not be considered as a factor in aggravation in manslaughter cases. But if the deadly weapon was used in a manner which rendered the offense especially heinous, atrocious or cruel, that may properly be considered as a factor in aggravation. State v. Green, 62 N.C. App. 1, 301 S.E.2d 920, modified on other grounds and aff'd, 309 N.C. 623, 308 S.E.2d 326 (1983).

Where it appeared that the court erred in finding, in sentencing the defendant for voluntary manslaughter, as an aggravating factor, that the defendant killed her husband with a deadly weapon, the case was remanded for resentencing. State v. Heidmous, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Where, for the jury to convict the defendant of involuntary manslaughter under the instruction given by the trial court, it necessarily had to find that the defendant was armed with and discharged a firearm, the possession and discharge of the firearm in effect became an element of the offense, and the same evidence could not be considered as a factor aggravating the manslaughter for sentencing. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

Assault with Deadly Weapon with Intent to Kill. — The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of assault under G.S. 14-32. State v. Braswell, 67 N.C. App. 609, 313 S.E.2d 216 (1984), aff'd, 78 N.C. App. 498, 337 S.E.2d 637 (1985).

Rape. — Where the evidence was uncontradicted that defendant used a knife, described by the victim as a "steak knife," to threaten the victim and to facilitate the act of raping her, the trial court, in determining factors in aggravation, and taking into consideration the everyday use of the term "steak knife" and the utilization of the weapon by defendant, had adequate evidence upon which to base its factual determination that a deadly weapon was used in the commission of the crime. State v. Cooke, 87 N.C. App. 613, 361 S.E.2d 764 (1987).

Armed Robbery. — Possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in a robbery with firearm case. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309, cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

One essential element necessary to prove the offense of armed robbery is that of the possession, use or threatened use of a firearm or other dangerous weapon. Thus, the use of this factor is proscribed under this section. State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983).

Burglary. — In a prosecution for first degree burglary, where the defendant broke into and entered a motel room by pointing a gun at the victim's head and driving him into the room, wherein he committed armed robbery, the trial court erred in sentencing him by considering as a factor in aggravation the use of a deadly weapon. If the evidence of the deadly weapon was removed, the State would have failed to prove three elements of the burglary: breaking, entering and intent to commit a felony. State v. Edwards, 75 N.C. App. 588, 331 S.E.2d 183 (1985).

Larceny. — It was not improper for the court to find the use of a deadly weapon at the time of the crime as a factor in aggravation of larceny offense, even though evidence of its use was necessary to prove an essential element of the joinable offense of second-degree murder. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Common-Law Robbery. — Use of a deadly weapon has never been an element of proof required to establish common-law robbery in North Carolina; consequently, the State's evidence proving defendant's use of the gun as an aggravating factor was not barred by former G.S. 15A-1340.4(a). State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

I. Young, Old, or Infirm Victim.

The underlying policy of former § 15A-1340.4(a)(1)j was to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity. State v. Eason, 67 N.C. App. 460, 313 S.E.2d 221, aff'd, 312 N.C. 320, 321 S.E.2d 881 (1984).

State had the burden of showing (1) that the victim was in fact vulnerable because of conditions at the time of the offense, and (2) that she was targeted because of these conditions or that the defendant took advantage of them while committing the offense. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

When Age or Infirmity of Victim May Be Used as Aggravating Factor. — The age of the victim may not be used as an aggravating factor unless it appears that the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm was worse because of the age or condition of the victim. State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

Although former G.S. 15A-1340.4(a)(1)j provided that extreme youth, old age or physical infirmity could be found to be an aggravating factor, this factor should not have been found unless it appeared that defendant took advantage of the victim's relative helplessness to commit the crime or that age or infirmity increased the resultant harm. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

If the evidence showed that victim was targeted because of a physical infirmity or that defendant took advantage of such infirmity, the aggravating factor of physical infirmity was properly found. State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988).

Defendant's Culpability Must Be Enhanced by Victim's Age or Condition. — Age of the victim was not reasonably related to the purposes of sentencing, as required by former G.S. 15A-1340.4(a), unless culpability was enhanced by defendant's having taken advantage of the victim's relative defenselessness occasioned by age. State v. Eason, 67 N.C. App. 460, 313 S.E.2d 221, aff'd, 312 N.C. 320, 321 S.E.2d 881 (1984).

A victim's age or condition is reasonably related to the purposes of sentencing only when it enhances the defendant's culpability. State v. Williams, 74 N.C. App. 574, 328 S.E.2d 775 (1985).

Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985).

Vulnerability. — The vulnerability of the victim due to age and mental or physical infirmity was the concern addressed by the aggravating factor established by subdivision (a)(1)j of former G.S. 15A-1340.4 (see now (d)(11) of this section). State v. Long, 316 N.C. 60, 340 S.E.2d 392 (1986).

The gravamen of the aggravating factor that the victim is physically infirm is vulnerability. State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988).

Age or Infirmity Must Make Victim More Vulnerable. — A victim's age does not make a defendant more blameworthy unless the victim's age causes him to be more vulnerable than he otherwise would be to the crime committed against him, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act. State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985).

As Where Defendant's Decision to Commit Crime Is Based on Victim's Age. — Where a defendant decides to perpetrate a crime against an individual, based in part on the likelihood that the crime will be successfully completed because of the intended victim's advanced age, the victim's age has made him more vulnerable than otherwise would be the case, and the trial court may properly find this aggravating factor. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

But Victim Need Not Be Targeted Because of Age or Infirmity. — For purposes of the aggravating factor of the victim's infirmity, it is not necessary that the victim be targeted because of her infirmity, but only that this condition be taken advantage of by the defendant. State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986).

When considering the age of a child kidnapping victim as an aggravating factor, it is not necessary to show that the abduction was caused by the child's vulnerability. It is not the cause of the taking which supports the aggravating factor. Whatever the motive, if the victim is more vulnerable because of age, this aggravates the crime. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Victim Need Not Be Present During Commission of Crime. — The policy underlying this aggravating factor is to deter criminals from taking advantage of a victim's age or mental or physical infirmity and the presence of victim during the commission of the crime is irrelevant. State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988).

Victim's old age was improperly found as an aggravating factor for the crime of first-degree burglary since there was no evidence tending to show victim's home was targeted for burglary because of her old age, as there was no evidence at all that defendant knew the age of the occupants of the house before he broke into it, and since there was no evidence in the record that victim, because of her old age, was more vulnerable to having her home burglarized than anyone else, or that she had a more difficult time recovering from the effects of the crime. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

If some disability impedes a victim from fleeing, fending off attack, recovering from its effect, or otherwise avoid being victimized, such disability is a physical infirmity. State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988).

How Defendant May Take Advantage of Age or Infirmity of Victim. — For purposes of the aggravating factor of age of the victim, there are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Secondly, the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986).

Age of Victim of First-Degree Rape Not to Be Considered. — Due to the General Assembly giving children under 13 greater protection from first-degree rape than victims over 13, the rape of a victim under 13 by a defendant at least 12 and at least four years older than the victim made the defendant more blameworthy, because rape victims under 13 are in fact more vulnerable to the crime of rape than they would otherwise be if older than 12. This did not, however, allow the age of the victim to be considered in sentencing for first-degree rape, because (1) age was an element of first-degree rape under G.S. 14-27.2(a)(1) and as such could not be considered an aggravating factor upon sentencing for that crime under former G.S. 15A-1340.4(a)(1)p, and (2) first-degree rape was a Class B felony which carried a mandatory life sentence without consideration of aggravating and mitigating factors, under former G.S. 14-1.1(a)(2). State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

Age of Victim of Second-Degree Rape May Be Considered. — Because age of the victim is not a necessary element of second-degree rape, and a determination by a preponderance of the evidence in the sentencing phase that the defendant raped a child 11 years old is reasonably related to the purpose of sentencing, the age of a victim under 13 may be considered as a nonstatutory aggravating factor in sentencing for second-degree rape. State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

Age of Child in Case Involving Indecent Sexual Liberties May Be Considered. — Finding that eight-year old victim was "very young" was not clearly erroneous in the context of case which dealt with the vulnerability of a child to indecent sexual liberties. The element of age in the offense spans 16 years. Proof that the victim was "very young" was not necessary to prove the offense, and consequently the aggravating factor and the offense did not merge. United States v. Price, 812 F.2d 174 (4th Cir. 1987).

Child Victim with Low I.Q. — Trial judge's finding as an aggravating factor that 12-year-old victim of sexual assault was especially vulnerable in that she had an I.Q. in the mildly handicapped range (45-60) and that her development age was six years and two months upheld. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

Victim's Intoxication Considered an Infirmity. — The trial court was correct in finding as an aggravating factor that the victim was physically infirm in that he was acutely intoxicated. State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992).

Blood Alcohol Content of Victim. — Evidence that victim has a blood alcohol content of .29 percent may be used to prove that the victim has a physical disability. State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988).

Sleeping Victim. — Trial court properly aggravated defendant's sentence for rape where victim was asleep and was therefore impeded from fleeing or fending off the attack. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Presence of Child During Rape of Mother. — Trial court properly found as an aggravating factor the fact that victim's two young children were present in the house at the time of rape. Particularly compelling was the fact that victim's 15-month-old baby was in the room with defendant and victim during the attack. Because the victim feared for the safety of her baby, she clearly was inhibited in her ability to resist attack and protect herself. Under these circumstances, she was rendered more vulnerable to an attack. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Menstrual Cycle. — Court erred by aggravating defendant's sentence on grounds that rape victim was having her period, where there was no evidence in the record that the fact that the victim was menstruating at the time of attack rendered her "physically infirm" or more vulnerable and less able to protect herself from her attacker, and no evidence that the defendant targeted or took advantage of her because she was having her period. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Absence of Rape Victim's Husband. — Trial court properly aggravated defendant's sentence based upon a finding that defendant knew that victim's husband was away on military duty and that he proceeded to target her because of this knowledge. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Arson. — Under former G.S. 15A-1340.3 and 15A-1340.4, the victim's age was a statutory aggravating factor which the court could consider in an arson case regardless of whether the arson resulted in a death. The court therefore did not aggravate the sentence for arson based on defendant's conviction on the joined murder charge. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Even if defendant's child had not been harmed by burning of apartment, if it resulted in sufficient charring to constitute arson, defendant would be guilty of first-degree arson and the child's vulnerability because of its young age could still have been used to aggravate defendant's arson conviction. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Finding Upheld. — Where the evidence showed that defendant choked 81 year old victim to unconsciousness before raping her and stealing two heaters, it was appropriate for the judge to conclude that the victim's age had made her more vulnerable than most women to the defendant's forcible and felonious invasion of her home and was therefore related to the purposes of sentencing. State v. Williams, 74 N.C. App. 574, 328 S.E.2d 775 (1985).

Although the State relied on evidence showing that second-degree murder victim suffered from "battered child syndrome" in order to obtain a conviction (i.e., the age of the victim and the caretaker role of the defendant), the court did not err in sentencing by finding as aggravating circumstances that the victim was very young and that the defendant took advantage of a position of trust or confidence, as these factors were not elements of the offense. State v. Hitchcock, 75 N.C. App. 65, 330 S.E.2d 237, cert. denied, 314 N.C. 334, 333 S.E.2d 493 (1985).

Where, at the time of the offense, victim was wearing a leg cast and, as a result, after being shot, she had difficulty getting up, only managing to get back to her bedroom to call for assistance two hours later, there was little doubt that the victim's physical infirmity impeded her ability to recover from the effects of the attack and to call for assistance, and thus, the trial court did not err in finding the victim's physical infirmity as an aggravating factor in offense of assault with a deadly weapon with intent to kill. State v. Vaught, 318 N.C. 480, 349 S.E.2d 583 (1986).

Where 70-year-old victim's physical infirmity was not the sole evidence supporting the two aggravating factors of victim's old age and physical infirmity, as there was discrete evidence that victim lived alone in an apartment building for the elderly, and that defendant knew victim and was able to assess her vulnerability, finding of these factors did not violate former G.S. 15A-1340.4(a). State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Where evidence showed that 74-year-old victim's advanced age caused her to be more vulnerable to defendant's restraint and removal of her from her home than most women of a younger age as evidenced by her failed escape attempt, consideration of victim's age as an aggravating factor in second-degree kidnapping conviction was appropriate. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

The trial court properly found from the evidence that victim's age was an aggravating factor. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

Finding Held Error. — The trial court erred in finding as an aggravating factor, in sentencing defendant for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury that the victim was very young when the victim was 17 years old at the time of the crimes. State v. Cogdell, 74 N.C. App. 647, 329 S.E.2d 675 (1985).

Where the defendant simply entered and stole from an unoccupied house, the victim's age had nothing to do with it and the trial court erred in finding the victim's age as an aggravating factor. State v. Fair, 77 N.C. App. 641, 335 S.E.2d 783 (1985), cert. denied, 316 N.C. 381, 342 S.E.2d 900 (1986).

Aggravation of defendant's sentence for taking indecent liberties with a minor on the ground that the 13 year old victim was very young was error, as she was not, for purposes of this offense, "very young." State v. Sumpter, 318 N.C. 102, 347 S.E.2d 396 (1986).

It was error for the trial judge to aggravate sentence for felonious assault with the factor that the 11 and 14 year old victims were very young, as the victims were not at the beginning of the age spectrum and the State failed to show that they were rendered more vulnerable to defendant's assault than the average person would have been by reason of their age. State v. Long, 316 N.C. 60, 340 S.E.2d 392 (1986).

J. Commission of Crime While on Pretrial Release.

Constitutionality of Considering Defendant's Status as Pretrial Releasee. — Whether or not one on pretrial release on another felony charge is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The legislature may constitutionally require that it be considered. State v. Webb, 309 N.C. 549, 308 S.E.2d 252 (1983).

Scope of Enhancement Under Former § 15A-1340.4(a)(1)k. — Under G.S. 15A-1340.4(a)(1)k, a sentence could be increased if defendant had committed an offense while on release for a pending felony charge. However, while pending charges could in such narrow instances be admissible to prove a sentencing factor, the sentencing court could never enhance defendant's presumptive sentence merely because defendant had charges for other crimes pending against him. State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988).

It is not error for the court to consider as an aggravating factor that the defendant had committed the offenses with which he was charged while on pretrial release on another felony charge. Such consideration does not violate his constitutional rights. State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23 (1985), aff'd, 318 N.C. 188, 340 S.E.2d 105 (1986).

Lack of Speed for Trial of Earlier Felony Charge Was Irrelevant to Factor. — Trial court did not err by finding, in aggravation of burglary sentence, that defendant committed burglary while on pretrial release from another felony charge even though earlier felony charge was left dormant by prosecutor for one and one-half years; speed or lack thereof with which first case is tried is irrelevant to factor's validity, although weight to be given such factor is for judge's discretion. State v. Parks, 324 N.C. 94, 376 S.E.2d 4 (1989).

Commission of Offense While on Release for Misdemeanor. — Fact that defendant committed an offense while on release for a misdemeanor, rather than a felony, does not preclude the court from finding it as an aggravating factor. It simply means that the court is not required to find it as an aggravating factor. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Finding as an aggravating factor that defendant committed an offense while on release for a misdemeanor, rather than a felony, would not be contrary to the intent of the legislature as expressed by former G.S. 15A-1340.4(o), which required that the sentencing court consider as an aggravating factor the fact that defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement, when such factor was proven by the evidence. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

K. Person under 16 Involved in Commission of Crime.

Application of Factor. — The legislative intent behind this statutory aggravating factor concerned situations where children were encouraged and actually used in the commission of a crime. The fact that the victim of a particular crime fell below the age of 16 was not included within the meaning of former G.S. 15A-1340.4. State v. Waters, 87 N.C. App. 502, 361 S.E.2d 416 (1987).

The fact that the victim of a particular crime falls below the age of 16 was not included within the meanings of former G.S. 15A-1340.4(a)(1)*l*. State v. Mosley, 93 N.C. App. 239, 377 S.E.2d 554 (1989).

The aggravating factor that defendant involved a person under the age of 16 in a crime was not properly found based on the evidence that a child under 16 was present with the victim and defendant when the victim performed oral sex on defendant. State v. Mosley, 93 N.C. App. 239, 377 S.E.2d 554 (1989).

Evidence held sufficient to support a finding as a factor in aggravation when sentencing defendant on the noncapital felonies of conspiracy to commit murder and conspiracy to commit arson that defendant involved a person under the age of 16 in the commission of the crime. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

L. Great Monetary Value or Loss.

Monetary Loss Must Be Loss from Property Damage. — This aggravating factor under former G.S. 15A-1340.4(a)(1)m applied only to damage to property causing great monetary loss, and not to great monetary loss incurred because of a personal injury. State v. Sowell, 318 N.C. 640, 350 S.E.2d 363 (1986).

Consideration of the financial burden imposed upon the victim by his or her injury was not statutorily mandated by the aggravating factor contained in former G.S. 15A-1340.4(a)(1)m. State v. Bryant, 318 N.C. 632, 350 S.E.2d 358 (1986).

Property Taken or Attempted to Be Taken Was Contemplated. — The aggravating factor of the taking of property of great monetary value spoke of the value of the property taken or attempted to be taken, and not the value of the property which was ultimately retained or possessed by a particular defendant. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

The gist of former § 15A-1340.4(a)(1)m was the value of the property and not whether there was a taking or attempted taking of property. The aspect of the designated aggravating factor which permitted enhancing the punishment was the great monetary value of the personal property in possession of the defendant. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985), upholding judge's finding as an aggravating factor in sentencing defendant for possession of stolen goods and being a habitual felon that the offense involved an attempted taking of property of great monetary value.

Taking of Money or Property in Armed Robbery. — Since the offense of robbery with firearms does not require proof that money was actually taken, the taking of a large sum of money is properly considered as an aggravating factor. State v. Thompson, 64 N.C. App. 485, 307 S.E.2d 838 (1983), cert. denied, 313 N.C. 513, 329 S.E.2d 399 (1985).

Since the crime of armed robbery does not require proof that property was actually taken, the mere attempt to take property by use of a firearm or other deadly weapon being sufficient, this aggravating factor may be properly found in armed robbery cases. Thus, where the evidence tended to show that defendant, acting alone or in concert, took $3,200.00 from victim during armed robbery, the court could properly find as an aggravating factor the taking of "property of great monetary value." State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Great Monetary Value of Subject of Larceny. — Trial court did not err in finding as a factor in aggravation that offense of felonious larceny involved the taking of property of great monetary value, where evidence tended to show that the value of the taxi cab taken was approximately $3,000.00. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

M. Position of Trust.

Factor Not to Be Considered Where It Is an Element of the Charged Offense. — A relationship of trust and confidence was needed to prove the custodial element of custodial sexual offense. The evidence that proved the aggravating factor that the defendant took advantage of a position of trust or confidence to commit the offense thus was necessary to prove the custodial element of the offense, and the finding of the aggravating factor was proscribed by former G.S. 15A-1340.4(a). State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987).

Factor Dependent Neither upon Victim's Age Nor Consciousness of Victim's Trust. — A finding of the aggravating factor that the defendant took advantage of a position of trust or confidence depends no more on the youth of the victim than it does on the notion that confidence or trust in the defendant must repose consciously in the victim. Such a finding depends instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

The aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense does not require evidence of a conscious mental process on the part of an infant victim and may properly be grounded in the child's dependence upon the defendant. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Husband-Wife Relationship. — Husband-wife relationship permits a finding of this factor. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

Relationship of Mother to Infant. — A relationship of trust or confidence existed between defendant and her newborn infant, whom she killed, because defendant was the child's mother and because she was singularly responsible for its welfare. The abuse of her parental role related to defendant's character and conduct and was reasonably related to the purposes of sentencing. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Nature of Trust Between Defendant and Family Members. — The aggravating sentencing factor under former G.S. 15A-1340.4(a)(1)n did not require the defendant to abuse a position of greater "trust and confidence" than that inherent among family members whenever defendant was convicted of taking indecent liberties with such family members. State v. Caldwell, 85 N.C. App. 713, 355 S.E.2d 813 (1987).

Parent-Child Relationship Not Factor When Manslaughter Based on Misdemeanor Child Abuse or Criminally Negligent Act. — The aggravating factor that the defendant took advantage of a position of trust or confidence can not be used to increase a sentence beyond the presumptive for involuntary manslaughter when the manslaughter conviction could have been based on the predicate crime of misdemeanor child abuse, which has as an element that the defendant was a parent of the victim, or by a finding that defendant committed a criminally negligent act, and the jury was instructed as to both possibilities. State v. Darby, 102 N.C. App. 297, 401 S.E.2d 791 (1991).

Duty of Drivers to Passengers. — Finding in aggravation that defendant violated a position of trust is not supported merely by the long history of special duties owed by drivers to passengers in their cars. State v. Carroll, 85 N.C. App. 696, 355 S.E.2d 844 (1987), cert. denied, 320 N.C. 514, 358 S.E.2d 523 (1987).

Where defendant was convicted of taking indecent liberties with his stepson and stepson's overnight guest, court properly found as an aggravating factor that he abused a position of trust and confidence to commit the offense. State v. Caldwell, 85 N.C. App. 713, 355 S.E.2d 813 (1987).

Customer of Cocaine Dealer. — The defendant was not put in the type of position of trust or confidence envisioned by legislature in establishing the aggravating factor set forth in this section, even though defendant had been to victim's home on numerous occasions and was one of his regular cocaine customers. State v. Erlewine, 328 N.C. 626, 403 S.E.2d 280 (1991).

Conviction Under § 14-27.7. — Trial court erred in sentencing defendant, convicted of two violations of G.S. 14-27.7, by finding as an aggravating factor that the defendant "took advantage of a position of trust or confidence to commit the offense," as evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the evidence necessary to convict defendant tended to show that he took advantage of his custodial position in committing the offenses involved. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138, aff'd, 319 N.C. 458, 354 S.E.2d 486 (1987).

Insufficient Evidence to Support Finding of Factor. — Where defendant and victim had met only a day and a half before victim was found fatally wounded and the evidence showed only that the two men talked and that victim decided to ride down to Darlington with defendant in defendant's car, there was no evidence to support the trial court's finding as a factor in aggravation that defendant took advantage of a position of trust or confidence. State v. Carroll, 85 N.C. App. 696, 355 S.E.2d 844, cert. denied, 320 N.C. 514, 358 S.E.2d 523 (1987).

In a rape case, the evidence was insufficient to show as an aggravating factor that there existed a relationship of trust and confidence between victim and defendant, who were acquainted. State v. Midyette, 87 N.C. App. 199, 360 S.E.2d 507 (1987), aff'd, 322 N.C. 108, 366 S.E.2d 440 (1988).

Where the only relationship between victim and defendant was that defendant and victim had worked at the same place of employment and that defendant had driven a van that victim had been in at least five times, the evidence showed only that the victim was acquainted with defendant and the relationship between the victim and defendant did not rise to a relationship of trust that caused the victim to rely upon defendant. State v. Hammond, 118 N.C. App. 257, 454 S.E.2d 709 (1995).

N. Nonstatutory Factors.

The State has the burden of proving the existence of a nonstatutory aggravating factor by a preponderance of the evidence. The State must also show that it is reasonably related to the purposes of sentencing. State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757, cert. denied, 330 N.C. 444, 412 S.E.2d 79 (1991).

Reasonably Related to Purpose of Sentencing. — Pursuant to former G.S. 15A-1340.4, a sentencing judge could consider any nonstatutory aggravating factor which was reasonably related to the purposes of sentencing and was proven by the preponderance of the evidence. State v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991).

Exercising the right against self-incrimination cannot be an aggravating factor in the defendant's sentence. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Failure to Perform a Mitigating Act Was Not an Aggravating Factor. — It was improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would have supported the finding of a factor in mitigation. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Omission of an Act. — The trial judge, in proper circumstances, should not be precluded from finding the omission of an act to be an aggravating factor when in other circumstances the performance of that act might be a nonstatutory mitigating factor. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Serious injury may be an aggravating factor. State v. Nichols, 66 N.C. App. 318, 311 S.E.2d 38, cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Premeditation and Deliberation in Aggravation of Violent Offense. — It is well established that premeditation and deliberation may properly be found as a factor in aggravation of a violent offense. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Premeditation and Deliberation in Voluntary Manslaughter Case. — Premeditation and deliberation are appropriate nonstatutory aggravating factors where the defendant pleads guilty to voluntary manslaughter. State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

Finding of Premeditation and Deliberation in Felonious Assault Case. — Where the evidence showed that there was considerable ill will between the parties in the weeks preceding felonious assault, which ill will culminated in violence on at least two occasions prior to felonious assault; that one week before felonious assault, defendant showed his wife butterfly knife, which was type of knife used in assault, and told her drug dealers were after him and were going to get her to get at him; and that, hours before assault, defendant approached wife at concert and told her she was dead, or was going to die, or words of similar import, the State met its burden of proving premeditation by a preponderance of the evidence. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Pregnancy of Victim. — On conviction of assault with a deadly weapon inflicting serious injury, it was not error for the trial judge to find the victim's advanced stage of pregnancy as a nonstatutory aggravating factor and, based thereon, to sentence the defendant to a term of years greater than the presumptive term provided for the offense. State v. Artis, 316 N.C. 507, 342 S.E.2d 847 (1986).

Intoxication of Victim. — Intoxication of the defendant has been recognized as a mitigating factor by the courts. It would be both unreasonable and unfair to allow defendant's intoxication to be considered a mitigating factor, but not to allow the victim's intoxication to be an aggravating factor. Clearly the legislature did not intend this result. State v. Potts, 65

N.C. App. 101, 308 S.E.2d 754 (1983), cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Child in Hospital at Time of Abduction. — That a child victim of kidnapping was more vulnerable because he was in a hospital at the time of his abduction was a proper non-statutory aggravating factor. It was particularly egregious that defendant disguised herself as a nurse and used this disguise to abduct the baby. The mother of the child had a right to rely on a person dressed as a nurse. This made the victim more vulnerable than he ordinarily would have been and makes it a worse crime than if it had occurred under other circumstances. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Pattern of Conduct Causing Serious Danger to Society. — Where upon sentencing defendant for larceny and breaking or entering the trial court found as the only aggravating factor that the defendant engaged in a pattern of conduct causing serious danger to society, and the only basis for the trial court's finding of this aggravating factor was evidence of joinable offenses for which defendant was also being sentenced, defendant's convictions of larceny and breaking or entering would be remanded for resentencing. State v. Flowers, 84 N.C. App. 696, 354 S.E.2d 240, cert. denied, 319 N.C. 675, 356 S.E.2d 782 (1987).

Evidence showing that defendant and his companions first went to the victim's home and when victim refused to open the door, the three men left and went to a nightclub, that while at the nightclub, they consumed quantities of liquor and got into a fight with several other people, that during the course of the evening they armed themselves with a sawed-off shotgun, and that armed and intoxicated, they returned a second time to the victim's home, all unrelated to the other crimes for which defendant was convicted, was enough to support the trial court's finding in aggravation that defendant engaged in a pattern of conduct causing serious danger to society. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Defendants consumed quantities of liquor and got into a fight with several other people; armed themselves with a sawed-off shotgun; and armed and intoxicated, went to victim's home. This evidence, all unrelated to the other crimes for which defendant was convicted, is enough to support the trial court's finding of aggravation that defendant engaged in a pattern of conduct causing serious danger to society. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Inquiry Made to Victim to Determine When She Would be Alone. — The trial court did not commit error in finding as a nonstatutory aggravating factor that defendant used information gained as a result of an inquiry to victim to determine whether she would be alone and used keys surreptitiously copied while they were entrusted to his wife to enter her home. State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988).

Evidence Necessary to Show Elements of Charged Crime. — In sentencing defendant for being an accessory before the fact to second-degree murder, the court erred in finding as a non-statutory aggravating factor that defendant dispensed cocaine to the principals in substantial quantity while inducing them to kill and murder the two victims, promised to forgive debts to him, and furnished a knife and a pistol to the principals to use in the crime, and that the principals who were solicited and procured by the defendant committed murder in the act of robbery and without any legal provocation, as this evidence was necessary to show that defendant participated in the planning or contemplation of the crime in such a way as to counsel, procure, or command the principals to commit it. State v. Kimbrell, 84 N.C. App. 59, 351 S.E.2d 801, rev'd on other grounds, 320 N.C. 762, 360 S.E.2d 691 (1987).

Consideration of Element of Greater Charge Dropped in Exchange for Plea Bargain. — Judge's finding as an aggravating factor that there was vaginal penetration by defendant was not error where defendant pled guilty to attempted first degree sexual offense and attempted indecent liberties with a child, as it was not a violation of defendant's constitutional due process rights to consider as an aggravating factor an element of a greater charge dropped in exchange for a plea bargain for a lesser included offense where the dismissed charge was not used in aggravation. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

Medical Expenses of Victim. — In sentencing defendant for assault with a deadly weapon inflicting serious injury, consideration of the medical expenses incurred by the victim was not prohibited by the provision of former G.S. 15A-1340.4(a)(1) that "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation," as although evidence of large medical and hospital expenses was both properly and frequently used to establish the element of serious injury, such expenses were not inherent in every instance of a serious injury, nor were such expenses a necessary method for proving the element of serious injury, and in the case at issue the State did not rely on such expenses to establish the element of serious injury, but instead presented evidence of the permanent disabilities suffered by the victim as a result of the assault to prove serious injury. State v. Sowell, 318 N.C. 640, 350 S.E.2d 363 (1986).

While medical expenses, which represent a financial burden on the victim, could be considered as a non-statutory factor in aggravation under former G.S. 15A-1340.4, they could not be so used unless they were excessive and go beyond that normally incurred from an assault of this type. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Where evidence concerning the victim's medical bills and his lack of insurance was placed before the court solely by the oral representation of the prosecuting attorney, no bills or records or other evidence was submitted, and the victim did not testify nor did the defendant stipulate to the amounts or existence of the medical bills, the State presented insufficient evidence to support the non-statutory aggravating factor that the injury caused great monetary damage to the victim. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Financial Burden Imposed upon Victim. — There were circumstances under which the financial burden imposed upon the victim by his injury could be used as a non-statutory aggravating factor under former G.S. 15A-1340.4(a)(1)m. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Failure to Aid Victim. — The trial court erred, in sentencing defendant on his plea to voluntary manslaughter, in finding as an aggravating factor defendant's failure to aid his victim, whom he left dying in a field. State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Where defendant failed to render aid to the helpless 17-month-old child who was in defendant's custody and care for three days, during which time the child was suffering from painful second-degree burns, such conduct increased the injury to the child and clearly increased defendant's culpability. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Failure to Provide Medical Assistance. — Failure to provide child abuse victim with medical treatment at a reasonable time after his injury could be considered as a factor in aggravation. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Failure to Aid in Law Enforcement. — Fact that the defendant did not at any time render assistance to the arresting officer or the district attorney and did not offer aid in the apprehension of other felons could not be considered as aggravating factors. Because it was difficult to ascertain what help the defendant could have provided without implicating himself, consideration of these two aggravating factors was a potential infringement on his right to plead not guilty. State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Trial court improperly found as a nonstatutory aggravating factor that the defendant gave no substantial assistance to law enforcement. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Denial of Guilt. — Trial judge improperly considered defendant's denial of all guilt in regard to the charges as an aggravating factor in sentencing. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Imposition by the trial court of maximum sentence on defendant because defendant denied guilt was error entitling defendant to a new sentencing hearing. State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

Pattern or Course of Violent Conduct. — Where, in addition to evidence relating to the violent acts committed by defendant at the date of the crimes in question, there was evidence that prior to that date defendant had hit several members of his family during attacks of rage, shot a gun while angry at one of his neighbors, hit his boss at another company where he once worked, and was involved in two fist fights, there was sufficient evidence that defendant had engaged in a pattern or course of violent conduct to support the judge's finding of that factor in aggravation, separate and apart from evidence of psychiatrist which supported the additional aggravating factor relating to defendant being a dangerous and mentally abnormal person. Thus the trial court's findings in aggravation were not based on the same item of evidence in violation of former G.S. 15A-1340.4. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Setting Course of Criminal Conduct in Motion. — In sentencing defendant on conviction of soliciting another man to commit common law robbery, it was not improper for the trial judge to find as a nonstatutory factor in aggravation that the defendant set a course of criminal conduct in motion by his own actions which ultimately resulted in the robbery with a dangerous weapon and death of the victim and the second degree burglary of his dwelling, the felonious breaking or entering of his storage shed, the felonious larceny of his truck and the taking of a large amount of cash money from his person, even though the offenses for which this factor purported to hold defendant responsible were dismissed or resulted in acquittals. State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986).

Premeditation and Deliberation in Second Degree Murder Case. — As premeditation and deliberation were not elements of murder in the second degree, if a defendant charged with murder in the first degree pled guilty to murder in the second degree, the sentencing judge could conclude that for purposes of sentencing premeditation and deliberation had been established by a preponderance of the evidence and therefore could be used as an aggravating factor. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

A court could properly find premeditation and deliberation to be an aggravating factor when sentencing a defendant who pled guilty to murder in the second degree. State v. Carter, 318 N.C. 487, 349 S.E.2d 580 (1986).

A trial judge could find as an aggravating factor that the killing was done with premeditation and deliberation when a defendant charged with first degree murder pled guilty to second degree murder. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

Where a defendant tried for murder in the first degree was found guilty of murder in the second degree, the trial court could not find by a preponderance of the evidence that the killing was after premeditation and deliberation and use this finding as an aggravating factor. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

Forty-year sentence imposed on defendant who pled guilty to second-degree murder, based in part on the finding as a nonstatutory factor in aggravation that the killing had been planned for two months and was premeditated, would be upheld. State v. Jackson, 91 N.C. App. 124, 370 S.E.2d 687 (1988).

Where a defendant was convicted on an indictment charging only second degree murder, a determination by a preponderance of the evidence that defendant premeditated and deliberated the killing was reasonably related to the purposes of sentencing. Therefore, a sentencing judge was not barred from using premeditation and deliberation as an aggravating factor in such a case. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

Malice in Manslaughter Case. — Since "malice" was not an element of voluntary manslaughter, the finding of malice as an aggravating factor did not violate the principle that evidence necessary to prove an element of the offense could not be used to support a factor in aggravation. State v. Heidmous, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Carrying of Loaded Pistol. — Where defendant was convicted of involuntary manslaughter based on evidence that he had shot and killed victim outside nightclub, defendant's possession and use of a pistol could not be used as a factor in aggravation of the crime of voluntary manslaughter. However, the trial court could properly have found as a nonstatutory aggravating factor that defendant returned to the nightclub carrying a loaded pistol after his encounter with the owner. State v. McKinney, 88 N.C. App. 659, 364 S.E.2d 743 (1988).

Danger to Self and Others. — A defendant's dangerousness to others may be legitimately considered as an aggravating factor. State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983).

The trial judge may properly find as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems, even though evidence of his social and emotional problems was also considered in mitigation. State v. Jones, 66 N.C. App. 274, 311 S.E.2d 351 (1984).

Absent evidence that a defendant poses a greater threat to the public than any other defendant convicted of assault with a deadly weapon with intent to kill inflicting serious injury, it was error to find this factor in aggravation. It must be assumed that in setting the presumptive sentence the General Assembly was aware that a person convicted of assault with a deadly weapon with intent to kill inflicting serious injury was a person who was dangerous to others. State v. Vaught, 80 N.C. App. 486, 342 S.E.2d 536, aff'd in part and rev'd in part on other grounds, 318 N.C. 480, 349 S.E.2d 583 (1986).

Finding of Premeditation and Deliberation in Felonious Assault Case. — Where evidence presented tended to show defendant acquired personal information about his victim, adopted an alias, contacted him to schedule a meeting about his girlfriend in order to observe what the victim looked like, and several weeks later on the night of the offense, awaited the victim's return home, spoke his name when the latter passed by, and then fired four shots at him as he tried to escape, the circumstances of this felonious assault supported the trial court's finding of premeditation and deliberation, and tended to show a higher degree of culpability than other assault cases; therefore, the use of nonstatutory factors to aggravate defendant's sentence was proper. State v. Smith, 92 N.C. App. 500, 374 S.E.2d 617 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Finding of Dangerousness Upheld. — The trial court's finding as a factor in aggravation that defendant was a dangerous and mentally abnormal person would be upheld where the evidence showed that defendant suffered from post-traumatic stress disorder at the time of the incident for which he was convicted, and the expert testimony also revealed strong indications that defendant had psychotic potential when he was under emotional stress. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Finding of Dangerousness Not Upheld. — Evidence that the defendant harbored deep resentment against her former lover, who testified against her, was not sufficient to support a finding that the defendant posed a danger to others. State v. Vaught, 318 N.C. 480, 349 S.E.2d 583 (1986).

Drug Activities. — Where the evidence of defendant's bad character related in part to his activities in the illegal drug trade, it bore a reasonable relationship to the purposes of sentencing for offenses under G.S. 90-95 by demonstrating his increased culpability and was a proper aggravating factor. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Intent to Sell Controlled Substance. — Intent to sell was not an element of manufacturing, transporting or possessing 28 grams or more of heroin, the reason a person possesses, manufactures or transports the heroin being irrelevant; therefore, the trial judge properly found as an aggravating factor that defendant had the specific intent to sell the heroin that he possessed. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Conspiracy. — Aggravating factor that defendant, although not charged with the crime of conspiracy, entered into a conspiracy to aid and abet another person in the commission of a felony held not supported by a preponderance of the evidence. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Taking Firearm. — In sentencing defendant on conviction for second-degree burglary, the trial judge did not err in finding as a nonstatutory aggravating factor that at the time the defendant committed the burglary he also committed larceny of a firearm, which offense was not charged in the case but which the defendant admitted performing. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Gun Battle. — Where no evidence was presented which tended to show that defendant, convicted of obtaining and attempting to obtain a controlled substance by fraud and forgery, knew that her accomplice was armed, the nonstatutory aggravating factor that accomplice and deputy engaged in a gun battle in which accomplice was killed and the deputy was wounded, as found by the trial judge, was improper and a new sentencing hearing would be required. State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Discharge of Firearm into Occupied Property. — In sentencing for discharging a firearm into occupied property, that defendant shot at least two times into the house could properly be used as a basis for aggravation. The crime of discharging a weapon into an occupied building was accomplished when the defendant shot once into the structure, and any further acts of shooting were above and beyond that necessary to prove the offense for which defendant is convicted. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

In sentencing for discharging a firearm into an occupied building, finding that the shooting endangered a two year old child could be considered as an additional nonstatutory aggravating factor. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

A defendant's bad character and reputation could be a proper nonstatutory aggravating factor. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Defendant's acknowledged participation under oath in other felonies could properly be considered as pertaining to his character and as a nonstatutory aggravating factor for purposes of sentencing, where defendant had placed his character directly in issue. State v. Moore, 317 N.C. 275, 345 S.E.2d 217 (1986).

Probationary Status of Defendant. — It was not error for the trial court to base a factor in aggravation upon evidence that defendant was on probation, as long as the finding of such a factor in aggravation was reasonably related to sentencing. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Desertion from U.S. Army. — Where defendant in child abuse prosecution admitted that he was AWOL from the U.S. Army and the evidence showed that this fact dictated his family's secretive life style and was directly related to defendant's child care responsibilities and opportunity for abuse of the child, defendant's desertion increased his culpability, and the trial court did not err in finding this factor in aggravation. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Lack of Remorse. — For the State to prove lack of remorse as an aggravating circumstance, it was not enough to show merely that there was no remorse at the very time the crime was being committed. If, sometime after the commission of the crime, when defendant had an opportunity to reflect on his criminal deed, remorse did not come, and there was evidence of this fact, then lack of remorse could properly be found by the sentencing judge as an aggravating circumstance. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985), cert. denied, 324 N.C. 250, 377 S.E.2d 760 (1989).

Since evidence which showed that defendant exhibited remorse for the crime could support finding the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to the arrest or at an early stage of the criminal process, assuming arguendo that the record contained evidence showing that defendant exhibited no remorse prior to arrest or at an early stage of the criminal process, this lack of remorse could not be the basis for an additional written finding of a factor in aggravation. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

The only evidence recorded in support of the court's finding that defendant was unremorseful was that during the sentencing proceeding defendant laughed while the prosecutor was reading statements elicited by the police, and the evidence was contradicted by defendant's testimony as to how the sexual encounter started and by his statement that he laughed because the statements read were mostly lies; while this evidence warranted the reprimand that the court administered, the evidence did not support the court's conclusion that the defendant was without remorse. State v. Parker, 92 N.C. App. 102, 373 S.E.2d 558 (1988), cert. denied, 324 N.C. 250, 377 S.E.2d 760 (1989).

While an expression of remorse might have mitigated defendant's sentence, the lack of such an expression, which took the form of exercising his right against self-incrimination, could not be an aggravating factor in defendant's sentence. State v. Williams, 98 N.C. App. 68, 389 S.E.2d 830 (1990).

When a defendant has pled not guilty and maintains his plea, finding as non-statutory aggravating factor that he had not exhibited any remorse and imposing a sentence beyond the presumptive term was error warranting a new sentencing hearing. State v. Williams, 98 N.C. App. 68, 389 S.E.2d 830 (1990).

A defendant may not be penalized for electing to plead not guilty. State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984).

Pecuniary Gain as Nonstatutory Aggravating Factor. — Former G.S. 15A-1340.4 did not prohibit the use of pecuniary gain as a nonstatutory aggravating factor. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

In cases where defendant was not hired or paid to commit the offense, there was nothing to prevent the use of pecuniary gain as a nonstatutory aggravating factor, provided pecuniary gain was not an element essential to the establishment of the crime which was sought to be aggravated. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Where defendant pleaded guilty to possession of stolen property, and she received this property as the result of a crime in which she participated and in which the victim received serious injuries, this increased her culpability. State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991).

Fact that murder was committed for pecuniary gain could be used as a nonstatutory aggravating factor in the absence of any evidence that defendant was hired or paid to commit the offense. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

A person who conspired and solicits the taking of a person's life, so that he could live off the insurance proceeds from that person's death and live in that person's home was more culpable by reason of those motives, and a sentence greater than the presumptive was warranted for purposes of deterrence as well as protection of the unsuspecting public. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Contradicted Testimony Was Not Sufficient to Find Failure to Testify Truthfully. — In order to carry out presumptive sentencing as mandated by the General Assembly, a judge could not find as an aggravating factor that the defendant did not testify truthfully, when the only evidence of his untruthfulness was his contradicted testimony at a voir dire hearing or during the trial. State v. Setzer, 61 N.C. App. 500, 301 S.E.2d 107, cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

Deterrence. — Court erred in finding as factors in aggravation that sentence given was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fell within the exclusive realm of the legislature and were presumably considered in determining presumptive sentences. While both factors served as legitimate purposes for imposing an active sentence, neither could form the basis for increasing or decreasing a presumptive term because neither related to the character or conduct of the offender. State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983).

Since deterrence, a basic purpose of all sentencing, was necessarily considered by the legislature in establishing presumptive sentences for the various crimes, it could not also be the basis for trial judges exceeding the presumptive terms. State v. Partridge, 66 N.C. App. 427, 311 S.E.2d 53, cert. denied, 310 N.C. 629, 315 S.E.2d 695 (1984).

Peace of Mind and Body. — Although the trial court did not formally find as a nonstatutory aggravating factor that victim, like any other citizen, was entitled to peace of mind and body in her home, the court's comments indicated that it nevertheless improperly considered it in determining defendant's sentence. State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262, cert. denied, 333 N.C. 170, 424 S.E.2d 914 (1992).

Retaliation by Codefendant. — Finding as an aggravated factor against defendant that his codefendant was motivated to retaliate against victim for seeking child support held error. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Insufficient Presumptive Sentence. — It was error for the trial judge to find, as an additional aggravating factor, that the presumptive sentence of 15 years did not do justice to the seriousness of the crime. State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

O. Elements of Offense.

"The Offense" Defined. — "The offense," as used in former G.S. 15A-1340.4(a), referred to the criminal charge of which the defendant was convicted or to which he pled guilty or no contest. Had the legislature intended that the crime charged was "the offense," language such as "the crime charged was committed" would have been used throughout the subsection. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Circumstances that are inherent in the crime of which defendant was convicted could not be used as aggravating factors in order to increase the punishment beyond what the legislature set for the offense involved. State v. Coffey, 65 N.C. App. 751, 310 S.E.2d 123 (1984).

It was error for an aggravating factor to be based on circumstances which were part of the very essence of a crime, because it could be presumed that the legislature was guided by this fact when it established presumptive sentences. State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Because the jury found the defendant not guilty of first degree rape but guilty only of second degree rape, the jury clearly rejected the theory that the defendant employed a deadly weapon in commission of the crime. Where defendant was in effect found innocent by the jury of an element of a crime with which he was charged, in this case the use of a deadly weapon, the court could not then find such as a factor in aggravation. State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991).

The trial court erred in finding as an aggravating factor that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person" because evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. State v. Antoine, 117 N.C. App. 549, 451 S.E.2d 368 (1995), cert. denied, 340 N.C. 115, 456 S.E.2d 320 (1995).

Duplication of Proof Did Not Prohibit Finding of Factor. — It did not matter that certain evidence essential to establish the giving of aid or advice by defendant convicted of being an accessory before the fact also tended to show he persuaded the principal to commit the offense in question. Such duplication in proof did not prohibit the trial judge from using the evidence to find a factor in aggravation. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Many of the factors listed under former § 15A-1340.4(a)(1) contemplated a duplication in proof without violating the proscription that evidence necessary to prove an element of the offense could not be used to prove any factor in aggravation. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Consideration of Fact Constituting Element of Offense That Was Dropped as Part of Plea Bargain. — It was not a violation of defendant's constitutional due process rights to consider as aggravating a fact which was an element of a charge dropped in exchange for a plea bargain, where the dismissed charge was not used in aggravation. The trial judge could use any aggravating or mitigating factors which were proved by a preponderance of the evidence. State v. Jones, 59 N.C. App. 472, 297 S.E.2d 132 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 651 (1983).

The mere fact that a guilty plea had been accepted pursuant to a plea bargain did not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Where the crime that defendant was convicted of was based on the relationship of parent and child, that relationship could not be used again to exceed the presumptive sentence. State v. Young, 67 N.C. App. 139, 312 S.E.2d 665 (1984).

Where evidence of vaginal penetration was not necessary to prove the offense defendant pled guilty to and was sentenced for, namely, taking indecent liberties with a child, the finding that his conduct indicated that he was guilty of the greater offense charged was not forbidden by former G.S. 15A-1340.4(a)(1). State v. Parker, 92 N.C. App. 102, 373 S.E.2d 558 (1988), cert. denied, 324 N.C. 250, 377 S.E.2d 760 (1989).

Factors Held Not Elements of § 90-95. — While former G.S. 15A-1340.4(a)(1) prohibits using evidence necessary to prove an element of the offense to prove a factor in aggravation, that the offense was committed for hire or pecuniary gain and involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or that the offense involved an unusually large quantity of contraband, were aggravating factors which were not elements of G.S. 90-95(a)(1). State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

P. Prior Convictions.

1. In General.

Purposes of Sentencing. — To say that an offense which was punishable by more than 60 days confinement could not be used as an aggravating factor because it was not related to the purposes of sentencing for the crime charged would be substituting the judgment of the Supreme Court for the judgment of the legislature. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

"Prior Conviction" Defined. — Former G.S. 15A-1304.4 contained no language to support the argument that the legislature intended to define "prior conviction" as a conviction obtained before a later offense was committed; a fair reading of the statute defined "prior conviction" as one that was obtained before the defendant was sentenced for another offense. State v. McCullers, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

More Than Sixty Days' Confinement. — The legislature determined that conviction of any criminal offense punishable by more than 60 days' confinement was an aggravating factor. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Convictions in Which Prayer for Judgment Was Continued. — In finding prior convictions as an aggravating factor, it was improper for the court to consider convictions in cases in which prayer for judgment was continued. State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

An offense was a "prior conviction" under the Fair Sentencing Act only if the judgment had been entered and the time for appeal had expired, or the conviction had been upheld on appeal. When an accused was convicted with prayer for judgment continued, no judgment was entered, and no appeal was possible (until judgment is entered). Such a conviction could not support a finding of an aggravating circumstance under former G.S. 15A-1340.4(a)(1)o. State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Convictions in which prayer for judgment was continued and no fines or other conditions imposed did not constitute "prior convictions" under the Fair Sentencing Act. State v. Southern, 314 N.C. 110, 331 S.E.2d 688 (1985).

Prior Conviction Which Was on Appeal. — The trial court erred by finding as the sole aggravating factor that defendant had been convicted of robbery with a dangerous weapon in another case, where that case was on appeal to the Court of Appeals at the time of the sentencing hearing. State v. Dorsett, 81 N.C. App. 515, 344 S.E.2d 342 (1986).

Former § 15A-1340.4(a)(1)o did not include any time limit within which convictions had to have occurred. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985); State v. Moxley, 78 N.C. App. 551, 338 S.E.2d 122 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Nor does it make any distinction among crimes of violence, property crimes and traffic offenses. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Sentencing judge was not required to give less weight to the aggravating factor of convictions for criminal offenses punishable by more than 60 days confinement when the prior crimes were property crimes. The statute did not distinguish between crimes of violence and property crimes. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Serving of Sentence Was Subsumed within Prior Conviction Factor. — The fact that the legislature specifically authorized the use of prior convictions as an aggravating factor was an indication that a sentence, whether suspended or served actively, was subsumed within that legislated factor. Thus, it was improper to consider both a prior conviction and the serving of a prison sentence as aggravating factors. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983), remanded for resentencing, 73 N.C. App. 306, 326 S.E.2d 94 (1985).

Weighing Severity of Prior Offense in Imposing Sentence. — The General Assembly determined that a conviction of a criminal offense punishable by more than sixty days' confinement would be an aggravating factor. If the court were to hold that such a factor should be of small weight in imposing a sentence if the crime for which the defendant was convicted was a minor offense, it would be substituting its judgment for the judgment of the legislature, which the court could not do. State v. Parker, 319 N.C. 444, 355 S.E.2d 489 (1987).

Defendant on Parole at Time of Offense as Separate Aggravating Factor. — It was not error for a trial court to find as an aggravating factor that a defendant had prior criminal convictions, and then to find as a separate aggravating factor that the defendant was on parole at the time of the offense. State v. McRae, 85 N.C. App. 270, 354 S.E.2d 30, cert. denied, 319 N.C. 676, 356 S.E.2d 783 (1987).

Use of Fact Needed to Prove Contemporaneous Conviction. — The exclusion found in former G.S. 15A-1340.4(a)(1)o applied only to the use of prior convictions that could have been joined with the conviction for which defendant was being sentenced. It did not apply to the use of a fact needed to prove an element of a contemporaneous conviction. State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987).

A conviction of driving while impaired under G.S. 20-138.1, irrespective of the level of punishment imposed, constituted a prior conviction of an offense punishable by more than 60 days' imprisonment for purposes of sentencing under the Fair Sentencing Act. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

Finding of Prior Conviction as Factor Upheld. — In a prosecution for rape, evidence of defendant's prior conviction of assault with intent to commit rape, while some evidence of intent, was not necessary to prove the intent element. Accordingly, it was not error for the trial court to use evidence of defendant's prior conviction as a factor in aggravation at sentencing. State v. Moser, 74 N.C. App. 216, 328 S.E.2d 315 (1985).

The sentencing judge did not err in treating defendant's plea of nolo contendere to a charge of failure to provide child support as a prior conviction for a crime punishable by imprisonment for more than 60 days and an additional aggravating factor under former G.S. 15A-1340.4(a)(1)o. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

Trial court did not err in utilizing defendant's prior drug offenses as aggravating factors for his then current convictions for indecent liberties. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

Prior conviction of a level four driving while impaired offense which carried a possible sentence of up to 120 days in prison met the standard set out in former section to find such conviction an aggravating factor in sentencing for a second-degree murder conviction. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

The trial court did not err in denying second-degree murder defendant's motion to suppress evidence of three prior convictions, later relied upon by the court as aggravating factors to support sentencing defendant to a term greater than the presumptive. State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (1993).

Separate Factors Not Shown. — Fact that defendant had prior convictions for criminal offenses punishable by more than 60 days imprisonment and that he had a prior record involving the use of violence covering a span in excess of 10 years were too similar, the latter being based upon the former, to be considered as separate factors for purposes of sentencing. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

2. Evidence of Prior Conviction.

The means of proof set out in former § 15A-1340.4(e) were permissive, not mandatory or exclusive. State v. Graham, 61 N.C. App. 271, 300 S.E.2d 716, modified on other grounds and aff'd, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983); State v. Carter, 318 N.C. 487, 349 S.E.2d 580 (1986); State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988); State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

Other Methods of Proof Were Not Precluded. — The language of former G.S. 15A-1340.4(e) was permissive rather than mandatory. It provided that prior convictions "could" be proved by stipulation or by original or certified copy of the court record, not that they had to be. The statute thus did not preclude other methods of proof. State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982); State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983); State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987); State v. Morgan, 82 N.C. App. 674, 347 S.E.2d 487 (1986); State v. Stone, 104 N.C. App. 448, 409 S.E.2d 719 (1991).

The State did not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it could be used to impeach the defendant or to aggravate his sentence. State v. Smith, 96 N.C. App. 235, 385 S.E.2d 349 (1989), cert. denied, 326 N.C. 267, 389 S.E.2d 119 (1990); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

A prior conviction could be proven by defendant's admission. State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

Party Admission Held Sufficient to Support Findings of Aggravating Factor. — Party admission, contained in defendant's motion in limine, of his previous conviction in California, was sufficient evidence to support the trial court's finding of aggravating factor. State v. Duffy, 109 N.C. App. 595, 428 S.E.2d 695 (1993).

Evidence of Prior Convictions Used as Proof as Element of Crime. — As a basis for imposing a life sentence for the offense of second-degree murder (in a drunk driving fatality case), the trial court found one aggravating factor, prior convictions for criminal offenses punishable by more that 60 days confinement, and no mitigating factors. The State had relied on the prior convictions in its case as proof of malice, and evidence offered at trial to prove malice, an element of second degree murder, could not be the basis for aggravating that crime. Because defendant's prior convictions were offered by the State as proof of malice, the trial court's consideration of such convictions as a factor in aggravation was error. State v. McBride, 109 N.C. App. 64, 425 S.E.2d 731 (1993).

Defendant's own statements under oath constituted an acceptable alternate method of proof of a prior conviction. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983); State v. Graves, 83 N.C. App. 126, 349 S.E.2d 320 (1986).

As Could Defense Counsel's Statement. — A defense counsel's response to the prosecutor's assertion of a prior conviction could in certain cases constitute a stipulation or an admission that the defendant indeed had the convictions represented by the State. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Defense Counsel's Remarks Held Admission of Prior Convictions as Represented by State. — Considering the state's remarks about defendant's record of convictions and defense counsel's immediate response that he would like to emphasize to the court that defendant's record indicated no convictions for almost 10 years, the court held that the defense counsel was referring to the record of convictions the state had just referenced. Defense counsel's response was tantamount to an admission or a stipulated fact that the defendant had the convictions so represented by the state. Therefore, the credibility of the evidence of defendant's prior convictions was manifest as a matter of law by defense counsel's admission of the truth of the basic facts. State v. Brewer, 89 N.C. App. 431, 366 S.E.2d 580, cert. denied, 322 N.C. 482, 370 S.E.2d 229 (1988).

A prior conviction could be proved by a law enforcement officer's testimony as to his personal knowledge of the conviction. State v. Carter, 318 N.C. 487, 349 S.E.2d 580 (1986); State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987).

The prosecutor's unsworn statements as to defendant's criminal record were not competent evidence to support a finding of an aggravating factor that defendant had prior convictions. State v. Frazier, 80 N.C. App. 547, 342 S.E.2d 534 (1986).

A prosecutor's mere unsupported statement was not sufficient proof of defendant's prior convictions under former G.S. 15A-1340.4(a)(1)o. State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988).

Trial court erred in finding existence of prior conviction based solely on prosecutor's unsworn statement where although prosecutor read from official records he neither offered those records into evidence nor sought defendant's stipulation as to what those records would show. State v. Williams, 92 N.C. App. 752, 376 S.E.2d 21, cert. denied, 324 N.C. 251, 377 S.E.2d 762 (1989).

Where a trial judge based his finding of an aggravating factor of prior convictions solely on a prosecutor's unsworn statements, these statements, standing alone, were insufficient to prove defendant's prior convictions under former section. The defendant's failure to object at trial did not bar her from appealing this issue. State v. Gordon, 104 N.C. App. 455, 410 S.E.2d 4, cert. denied, 330 N.C. 444, 412 S.E.2d 78 (1991).

Proof of a prior conviction by a certified copy was expressly permitted by statute and constituted prima facie evidence of the facts set out therein. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Certified copies of court records were a proper method for proving prior convictions. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

Defendant had burden of proving that records of prior convictions were not in fact his. State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Evidence of a kidnapping defendant's prior crimes was properly used to establish the status of a habitual felon as well as to establish the aggravating factor of prior felony convictions to increase the presumptive sentence of the underlying felony. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Prior Conviction Proven. — The contents of the certified court record of defendant's Virginia conviction for sodomy, along with defendant's admission on cross-examination that "the Judge imposed a judgment... as a result of that guilty plea," constituted sufficient evidence to refute defendant's argument that no judgment was entered on the Virginia felony conviction. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

3. Indigency at Time of Conviction.

Indigent Defendant Must Have Been Represented by Counsel or Waived Same. — A prior conviction which occurred while the defendant was indigent could not be used unless defendant was represented by counsel or waived counsel in the earlier proceeding. State v. Farmer, 60 N.C. App. 779, 299 S.E.2d 842 (1983).

Burden on Defendant to Show Indigency and Lack of Counsel. — The initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction was on the defendant. If the defendant elected to challenge the admissibility of evidence of his prior convictions, he had to do so by a method which informed the court of the specific reason for his objection; i.e. that he was indigent and unrepresented by counsel at the time of the prior conviction or convictions. A mere objection to the evidence alone would not be sufficient. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Use of Prior Conviction Not Error Where Defendant Failed to Contest Validity. — It is not error for the trial court to consider a prior conviction as an aggravating circumstance absent evidence that defendant was not indigent or was represented by counsel at the prior conviction, where defendant does not make an issue of the validity of the prior conviction in the trial court. State v. Massey, 309 N.C. 625, 308 S.E.2d 332 (1983).

Q. Joinable Offenses.

Using Evidence Establishing Element of Offense to Prove Aggravating Factor. — The Fair Sentencing Act prohibited using evidence that established an element of the offense to prove an aggravating factor. United States v. Price, 812 F.2d 174 (4th Cir. 1987).

Evidence of Element of Joined Offense. — The prohibition in former G.S. 15A-1340.4, against using the same evidence to prove both an element of the offense and a factor in aggravation did not also extend to using evidence necessary to prove an element of a joined or joinable offense for which defendant was convicted. State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987).

Court could not use the commission of a joinable offense as an aggravating factor. However, the court could use evidence necessary to prove an element of a joinable offense as an aggravating factor. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Joinable Offense Not Charged Could Not Be Used. — The use of evidence of an element of a joinable offense with which defendant had not been charged to show additional criminal acts committed during the crime for which defendant was being sentenced as factors in aggravation was even less valid than the use of evidence of the commission of a joinable offense for which a defendant had been convicted. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

It was error to use as an aggravating factor evidence of an element of a joinable offense with which defendant had not been charged. In order for the trial court to impose a prison sentence on defendant for committing such an act, the State had to charge the defendant and prove beyond a reasonable doubt that he committed the offense. State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Dismissed Joinable Offense Could Be Aggravating Factor. — A trial court could properly consider evidence in support of an aggravating factor even though the same evidence might also prove an element of an offense joinable with the offense for which defendant was being sentenced, if the joinable offense had been dismissed. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

When Evidence of Murder Could be Aggravating Factor for Armed Robbery. — It was clear that evidence presented to support a conviction of first-degree murder by premeditation and deliberation could also support an aggravating factor in an armed robbery conviction. However, a premeditated and deliberate murder that occurred during an armed robbery could not be used as an aggravating factor in the armed robbery sentencing here if the murder was a joined offense. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Offense Held Joinable. — Finding of the trial court that after committing the offense of second-degree rape and thereafter stating to the victim that she was going to tell on him and have him hung, defendant choked the victim until she was unconscious, involved an offense separate but joinable with the rape charge, which could not be used as an aggravating factor. State v. Cofield, 76 N.C. App. 699, 336 S.E.2d 439 (1985), rev'd on other grounds, 320 N.C. 297, 357 S.E.2d 622 (1987).

Robbery and malicious throwing of acid were joinable offenses under G.S. 15A-926(a), which permits joinder of offenses based on the same act or transaction or on a series of acts or transactions connected together, and use of the fact that the acid was thrown after the robbery to aggravate sentence for the malicious throwing of acid was prohibited by former G.S. 15A-1340.4(a)(1)o. State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

The trial court did not err by aggravating defendant's sentence on the first-degree burglary conviction with the fact that defendant was armed with a deadly weapon at the time he committed the initial crime of burglary. State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993).

Trial court's decision to aggravate defendant's sentence on first-degree burglary conviction on the basis of an element of a joined felonious assault offense was completely consistent with former G.S. 15A-1340.4(a)(1). State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988).

A Joinable Offense for Which Defendant Not Convicted May Be Used. — Former section 15A-1340.4(a)(1)o, as interpreted in *State v. Lattimore, 310 N.C. 295, 311 S.E.2d 876 (1984),* only prohibited a sentencing judge from aggravating a sentence on the basis that defendant committed an act when that act constituted a joinable offense for which he had also been convicted. *Lattimore* did not prohibit a trial court from using as an aggravating circumstance evidence that defendant committed an act for which he was not convicted. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991). Declining to follow State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985), and further distinguishing State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

When a defendant pleads guilty to being an accessory after the fact of a crime, should the trial court find by a preponderance of the evidence that the defendant aided and abetted in the commission of that crime, it may use this factor in aggravation of defendant's sentence on the accessory charge. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

III. MITIGATING FACTORS.

A. In General.

The defendant has the burden of proving mitigating factors by a preponderance of the evidence. State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 888 (1984); State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986); State v. Faison, 90 N.C. App. 237, 368 S.E.2d 28 (1988); State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

Defendant has the burden of persuading by a preponderance of the evidence that mitigating factors exist. That evidence must be uncontradicted, substantial and manifestly credible. State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

Defendant's Position Analogous to One Seeking Directed Verdict. — When defendant argues that his evidence is such as to compel the finding of a mitigating factor, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law. State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983), aff'd, 314 N.C. 644, 336 S.E.2d 385 (1985); State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 888 (1984); State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

The sentencing judge is required to find in mitigation any factor proved by uncontradicted, manifestly credible evidence. State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

The judge has a duty to find a statutory mitigating factor when the evidence in support of the factor is uncontradicted, substantial, and manifestly credible. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988); State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

Failure to Find Mitigating Factor Supported by Evidence Is Error. — Where the State's own unequivocal evidence clearly establishes the existence of a factor in mitigation which the legislature has included among those which must be considered, it is error for the trial judge to fail to find that factor. State v. Graham, 61 N.C. App. 271, 300 S.E.2d 716, modified on other grounds and aff'd, 309 N.C. 587, 308 S.E.2d 311 (1983).

Failure to find a mitigating factor when the evidence in support of such is substantial constitutes reversible error. However, in order for the appellate court to make the determination of whether evidence of this nature was introduced at trial and at the sentencing hearing, the record on appeal must reveal what the evidence is in a direct and concise manner. State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

Where the evidence in support of a mitigating factor is uncontradicted and manifestly credible, it is error for the trial court to fail to find such mitigating factor. State v. Bullard, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

A trial judge's failure to find a statutory mitigating factor is error only where evidence supporting the factor is uncontradicted, substantial, and manifestly credible. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

But Evidence Must Show Conclusively That This Factor Exists. — To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., that no other reasonable inferences can be drawn from the evidence. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988); State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

Only if the evidence offered at the sentencing hearing so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn is the court compelled to find that a mitigating factor exists. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

And Court May Determine What Weight a Mitigatory Factor Will Be Given. — The trial court was required to find a statutory mitigating factor under the Fair Sentencing Act only if the evidence supporting that factor was uncontradicted and there was no reason to doubt its credibility; even then, the trial court was free to determine what weight it would give such a mitigating factor in sentencing under former G.S. 15A-1340.4(a). State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L. Ed. 2d 659 (1993), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L. Ed. 2d 659 (1993).

The sentencing court is accorded wide latitude in determining the existence of mitigating factors, for it observes the demeanor of the witnesses and hears the testimony. State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

Court's Failure Will Not Be Overturned Absent Substantial Evidence. — The failure of the court to find a factor in mitigation urged by defendant will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Unsupported Mitigating Factors May Be Rejected. — A trial court must find a factor in mitigation if it is supported by uncontroverted, substantial and inherently credible evidence; on the other hand, should the defendant fail to produce such evidence, the trial judge may reject the proposed factors. State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

When Judge Must Find Factor Not Submitted by Defendant. — The duty of the trial judge to find a mitigating factor that had not been submitted by defendant arose only when the evidence offered at the sentencing hearing supported the existence of a mitigating factor specifically listed in former G.S. 15A-

1340.4(a)(2) and when the defendant met the burden of proof established in State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983). The trial judge was not required to consider whether the evidence supported the existence of nonstatutory mitigating factors in the absence of a specific request by defense counsel. State v. Gardner, 312 N.C. 70, 320 S.E.2d 688 (1984).

The trial judge only had a duty to find a statutory mitigating factor that was not submitted by defendant when the evidence offered at the sentencing hearing in support of the factor in mitigation was both uncontradicted and manifestly credible. State v. Torres, 77 N.C. App. 345, 335 S.E.2d 34 (1985).

The duty of the trial judge to find a statutory mitigating factor that has not been submitted by defendant arises only when defendant meets the burden of proof established in State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983), i.e., the evidence in support of the statutory factor must be substantial, uncontradicted and manifestly credible. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

The trial court is required to find a statutory mitigating factor if proved by a preponderance of the evidence, even in the absence of a specific request. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Consideration of Nonstatutory Factors Is Permitted But Not Required. — Regarding nonstatutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentencing, such as conduct while awaiting sentencing, the trial judge may consider them, but such consideration is not required. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

And Is Entrusted to Judge's Discretion. — Although failure to find a statutory mitigating factor supported by uncontradicted, substantial and manifestly credible evidence was reversible error, a trial judge's consideration of a nonstatutory factor which was (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, was a matter entrusted to the sound discretion of the sentencing judge under former G.S. 15A-1340.4(a). State v. Spears, 314 N.C. 319, 333 S.E.2d 242 (1985); State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985); State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986); State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

The same evidence may not be used to find more than one mitigating factor; each mitigating factor can be found only if there is separate evidence to support it. State v. Crandall, 83 N.C. App. 37, 348 S.E.2d 826 (1986), cert. denied, 319 N.C. 106, 353 S.E.2d 115 (1987).

Separate Findings Must Be Made for Each Offense. — Court did not err in failing to find as a mitigating factor in sentencing defendant for felonious larceny and armed robbery that defendant was suffering from a physical condition which reduced his culpability, even though the court found this factor in mitigation of his second-degree murder offense, as when one sentencing hearing addresses multiple offenses, the trial judge must treat each offense separately and make separate findings as to the aggravating and mitigating factors for each. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Factors Found by Jury in Capital Case Need Not Be Found by Judge in Non-Capital Case. — Fact that the trial court did not find as mitigating factors in noncapital felony cases all of the mitigating factors specifically found by the jury in the sentencing phase of capital case did not constitute error. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

The trial judge, in the sentencing phase of crimes coming within this section, was not bound by the jury's finding in the sentencing phase of a capital charge that the defendant had a reputation for good character in the community in which he lived and led a law abiding life for a substantial period of time prior to his present convictions, especially in the light of the fact that these mitigating factors were not supported by uncontradicted evidence. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Circumstances set forth in former § 15A-1340.4(a)(2)d and (a)(2)e were different. The former dealt with a mental disease or illness, such as chronic brain syndrome. The latter concerned a defendant's "immaturity" or "limited mental capacity." State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Effect of Alibi on Mitigating Factors. — The sentencing judge cannot, as a matter of law, refuse to consider mitigating factors after a jury has determined that defendant committed the crime, even though defendant has presented an alibi defense at the guilt determination stage of the trial. State v. Brooks, 68 N.C. App. 298, 314 S.E.2d 565 (1984).

Counsel's Statements Not Evidence of Nonstatutory Mitigating Factors. — Absent a stipulation by the prosecution, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of nonstatutory mitigating factors. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Reasonable Belief Conduct Was Legal. — Trial court's failure to find mitigating factor was not reversible error where only evidence to support finding that defendant reasonably believed that his conduct was legal was defendant's own testimony to effect that he thought he could settle matter in manner of a civil action; although there was no evidence directly contradicting testimony, evidence showed that defendant never raised issue of settlement in present of authorities but only discussed it with victim over telephone and when requesting payment, defendant made clear to victim that matter could not be settled after defendant signed arrest warrants; thus indicating that he knew that a criminal prosecution could not be settled. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

B. Duress, Coercion, Threat or Compulsion.

Exertion of External Pressure on Defendant. — The statutory mitigating factor of compulsion, which was listed together with duress, coercion, and threat, was intended to apply to situations in which some type of external pressure was directly exerted upon the defendant in an attempt to force commission of the offense. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Duress Not Found. — Evidence of statutory factor of duress held not so substantial and manifestly credible as to require the sentencing judge to find this statutory mitigating factor. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Trial court was correct in refusing to find mitigating factors based on duress or provocation; victim never directly threatened defendant, and although there was some evidence that victim was attempting to arrange an assault, victim himself contradicted this, and there was no manifestly credible evidence that defendant was the target. State v. Lovell, 93 N.C. App. 726, 379 S.E.2d 101 (1989).

Verdict of Lesser Included Offense Did Not Obviate Duty to Consider Mitigating Factors. — As to mitigating factors of duress, threat and mental condition, the trial court erred when it relied on the jury's verdict of the lesser included offense of assault with a deadly weapon inflicting serious injury to determine that these statutory mitigating factors had been satisfied. The finding by the jury of a lesser included offense did not relieve a trial court from adequately determining the existence of mitigating factors. State v. Faison, 90 N.C. App. 237, 368 S.E.2d 28 (1988).

C. Passive or Minor Role.

Proof May Support Two Factors. — Proof of either passive participation or performance of a minor role, by the preponderance of the evidence, is sufficient to support the finding of a mitigating factor; thus, proof of both types of conduct may suffice to support the finding of two mitigating factors, so as to reflect the defendant's lesser culpability. State v. Crandall, 83 N.C. App. 37, 348 S.E.2d 826 (1986), cert. denied, 319 N.C. 106, 353 S.E.2d 115 (1987), holding, however, that the court was not required to find two separate mitigating factors absent separate evidence supporting each.

Attempt to Dissuade Co-Defendant Not Controlling. — Although the attempt to dissuade a co-defendant and the failure to do so constitutes evidence to be considered in determining whether the defendant was a passive participant in the crime, this is not the controlling factor. State v. Parker, 319 N.C. 444, 355 S.E.2d 489 (1987).

Evidence did not so clearly establish that defendant was a passive participant in murder that no reasonable inferences to the contrary could be drawn, and trial judge therefore did not err in failing to find this mitigating circumstance. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

Where defendant did not object to the actions of codefendants in sexually assaulting 12-year-old, did not attempt to persuade them to stop, and, in fact, attempted to have sex with the victim at one codefendant's encouragement, trial judge's refusal to find that the defendant was a passive participant was not error. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

D. Mental or Physical Condition.

A "mental condition" is defined as a mental disease or illness. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Psychological Disorders. — The term "mental condition" as used in former G.S. 15A-1340.4(a)(2)d included not only mental diseases and illnesses, such as schizophrenia, but also psychological disorders, such as abused spouse syndrome, which were not necessarily categorized as diseases or illnesses. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Evidence of Condition, Without More, Is Not Sufficient. — A mental or physical condition may be capable of reducing a defendant's culpability for an offense. However, evidence that the condition exists, without more, did not mandate consideration as a mitigating factor pursuant to former G.S. 15A-1340.4(a)(2)d. State v. Grier, 70 N.C. App. 40, 318 S.E.2d 889 (1984), cert. denied, 318 N.C. 698, 350 S.E.2d 860 (1986).

Since there was no evidence that defendant suffered from a mental disease or illness, former G.S. 15A-1340.4(a)(2)d was simply inapplicable to defendant who had an IQ of 79, was functioning at a below average level in terms of intelligence, and was below average in his ability to see causes and consequences of behavior. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250,

cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

While a mental or physical condition, such as alcoholism, may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. Defendant has the burden of proof with respect to any alleged mitigating factors. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Where there was no medical evidence regarding the state of defendant's mental and physical health other than testimony as to defendant's condition during the trial, and assuming arguendo there was sufficient evidence to show that defendant was suffering from a particular physical or mental condition, there was no evidence that the condition was such as to reduce his culpability in assaulting his brother, the judge did not abuse his discretion in failing to find a mitigating factor. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Condition Must Precede Criminal Act. — Defendant's contention that as a result of having been shot he suffered from a mental or physical condition that reduced his culpability was without merit, where he was wounded after he initiated a shootout. Mental and physical conditions recognized as possible mitigating factors have been those which existed prior to a defendant's criminal act. Since his own culpable conduct led to his being shot, he could not properly claim diminished responsibility on that account. State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Intoxication was not enumerated as a separate mitigating factor under the provisions of former G.S. 15A-1340.4(a)(2). However, intoxication of a defendant could be appropriately considered in mitigation under the statutory mitigating factor contained in former G.S. 15A-1340.4(a)(2)d; regarding defendant's mental or physical condition. State v. Barranco, 73 N.C. App. 502, 326 S.E.2d 903, cert. denied, 314 N.C. 118, 332 S.E.2d 484 (1985).

Alcohol intoxication, or drunkenness, exists when there is a material impairment of mental or physical faculties, or both, induced by excessive consumption of alcohol. Thus, intoxication may constitute a mental condition or a physical condition. The mitigating effect, if any, of intoxication upon an offender's culpability will depend upon the circumstances of each case. State v. Barranco, 73 N.C. App. 502, 326 S.E.2d 903, cert. denied, 314 N.C. 118, 332 S.E.2d 484 (1985).

Alcoholism or drug addiction, while not itself a statutorily enumerated mitigating factor, could properly be found to mitigate an offense under the rubric of the statutory factor contained in former G.S. 15A-1340.4(a)(2)d. State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

Proffered evidence of diminished capacity due to intoxication did not compel a finding of the statutory mitigating factor that defendant was suffering from a physical condition which was insufficient to constitute a defense, but which significantly reduced his culpability, because it failed to demonstrate that defendant's alcohol consumption reduced his mental or physical capacity, and thus his culpability to commit the offense. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990), cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Physical Condition Held Not Mitigating. — The trial judge did not abuse his discretion in failing to find that defendant's physical condition, evidenced by poor health and physical deterioration due to physical abuse, seizures, and inadequate recovery from childbirth, significantly reduced her culpability for the offense. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Mental Condition Held to Be Mitigating. — Evidence of internal, psychological forces which led defendant to take the life of her child was properly considered by the judge when he found in mitigation that defendant was suffering from a mental condition, and the judge appropriately labeled defendant's action as one performed under the influence of mental suffering, rather than one performed under compulsion. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Factor Not Found. — Where evidence tended to show that co-defendants had explained their plan for robbing the victim, that defendant understood this plan and agreed to participate although he realized he could go back to prison, that defendant attempted to disguise his identity during the crime by wearing a mask and using a false name, and that defendant attempted to conceal the crime by disposing of baseball bat and wallet and by burying stolen pistol, trial judge could properly conclude that defendant's alcoholism and prolonged drug abuse did not affect his presence of mind, his ability to appreciate the nature of his own actions, or his understanding that his conduct was wrong. State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

Where a defendant failed to establish by a preponderance of the evidence that his alcohol and drug consumption constituted a material impairment to his mental or physical faculties, the trial judge did not err in failing to find the statutory mitigating factor that the defendant was suffering from a mental or physical condition which significantly reduced his culpability for the offense. State v. Jewell, 104 N.C. App.

350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Ignorance of the legal implications of an act, nothing else appearing, is not tantamount to a mental condition sufficient to reduce one's culpability. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

E. Immaturity or Limited Mental Capacity.

The mitigating factor in former § 15A-1340.4(a)(2)e involved two inquiries: one as to immaturity (or mental capacity) and one as to the effect of such immaturity upon culpability. Clearly, age alone was insufficient to support this factor. State v. Moore, 317 N.C. 275, 345 S.E.2d 217 (1986); State v. Holden, 321 N.C. 687, 365 S.E.2d 626 (1988).

The trial court's determination under former G.S. 15A-1340.4(a)(2)e involved a two part inquiry: (1) Whether the defendant sufferred from a limited mental capacity (or from "immaturity"), and (2) if so, its effect on his culpability for the offense. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987); State v. Lloyd, 89 N.C. App. 630, 366 S.E.2d 912, cert. denied, 322 N.C. 483, 370 S.E.2d 231, cert. denied, 322 N.C. 483, 370 S.E.2d 232 (1988); State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (1994).

To find a defendant's limited mental capacity as a mitigating factor, the statute required that it significantly reduce his culpability for the offense. State v. Colvin, 90 N.C. App. 50, 367 S.E.2d 340, cert. denied, 322 N.C. 608, 370 S.E.2d 249 (1988).

"Limited mental capacity," as used in former G.S. 15A-1340.4(a)(2)e, was used in the sense of limited intelligence or low I.Q. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250 (1987); State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

Defendant Bears Burden of Showing Reduced Culpability. — Evidence of limited mental capacity, by itself, does not require the trial court to find mitigating circumstances. Defendant bears the burden of showing beyond a reasonable doubt that his lack of capacity significantly reduced defendant's culpability for the offense charged. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

It is within the trial judge's discretion to assess the conditions and circumstances of the case in determining whether defendant's immaturity or limited mental capacity significantly reduced culpability. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Lack of Evidence of Inability to Understand Consequences of Behavior. — Where although reports submitted by defendant established his borderline intelligence, there was no evidence that defendant was unable to understand the consequences of his behavior, so as to significantly reduce his culpability for the offense, there was no error in the trial court's failure to find defendant's limited mental capacity as a mitigating factor. State v. Colvin, 90 N.C. App. 50, 367 S.E.2d 340, cert. denied, 322 N.C. 608, 370 S.E.2d 249 (1988).

Intoxication did not support a finding of the mitigating factor found in former G.S. 15A-1340.4(a)(2)e. State v. Barranco, 73 N.C. App. 502, 326 S.E.2d 903, cert. denied, 314 N.C. 118, 332 S.E.2d 484 (1985).

Age Alone Insufficient to Show Immaturity. — Defendant being 16, at the time of second-degree rape of 11-year-old victim, by itself, failed to show that his immaturity significantly reduced his culpability. State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

Factor Not Found Despite Some Evidence. — While report which stated that defendant's IQ was 79, that he was functioning at a below average level in terms of intelligence, and that he was below average in his ability to see causes and consequences of behaviors was some evidence of a limited mental capacity, which would reduce defendant's culpability for the offense, it did not require the trial court to find it as a mitigating factor. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Evidence Held Insufficient. — Where the only evidence presented as to defendant's intelligence or I.Q. was that defendant had earned an associate degree in mechanical engineering from the University of Kentucky, this evidence was insufficient to support defendant's contention of limited mental capacity. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

A trial court was not required to find mitigating circumstances, under this section, when the evidence only showed that defendant had a limited mental capacity, since the evidence must also show that this limited capacity significantly reduced defendant's culpability. State v. Smith, 321 N.C. 290, 362 S.E.2d 159 (1987).

Although defendant on trial for burglary, rape and common-law robbery offered evidence that he was intoxicated on the night in question and that he had only fourth or fifth grade reading and writing skills, he failed to show conclusively that either disability somehow reduced his culpability for the offenses charged; thus, the trial court was not required to find voluntary intoxication or limited mental capacity as a factor in mitigation. State v. Redfern, 98 N.C. App. 129, 389 S.E.2d 846 (1990).

F. Participation or Consent of Victim.

Burden of Proof Under former § 15A-1340.4(a)(2)g. — Although under former G.S. 15A-1340.4(a)(2)g a defendant was entitled to a factor in mitigation when the victim was more than 16 years of age and defendant's conduct was "consented to," the burden of establishing both of the conditions stated was on the defendant. State v. Elliott, 77 N.C. App. 647, 335 S.E.2d 774 (1985).

Paid police informant who volunteered to purchase cocaine in furtherance of a police investigation was not a "victim" within the meaning of former G.S. 15A-1340.4(a)(2)g. State v. David, 80 N.C. App. 327, 342 S.E.2d 50, cert. denied, 317 N.C. 709, 347 S.E.2d 445 (1986).

Factor Not Found. — Where the evidence did not so clearly establish the fact in issue that no reasonable inference to the contrary could be drawn, the trial court did not err in failing to find as a mitigating factor that the victims were more that 16 years old and willing participants in defendant's conduct. State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (1995).

G. Aid in Apprehension or Prosecution of Another.

Willingness to Testify Against Codefendant. — Evidence that a defendant testified truthfully against a codefendant was one statutory factor which a trial judge had to consider in passing sentence under this former Article 81A. However, evidence that a defendant was merely willing to testify against a codefendant did not meet the statutory requirement. Nevertheless, a trial judge could properly consider nonstatutory mitigating factors in setting a sentence, so long as those factors were logically related to the purposes of sentencing. The crucial difference was that a trial judge had to consider the presence or absence of the statutory mitigating and aggravating factors; whereas a trial judge could, but was not required to consider nonstatutory mitigating factors. State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Cooperative Conduct. — If he found that defendant's conduct was cooperative, though not sufficient to fit within former G.S. 15A-1340.4(a)(2)h, the judge could consider it as a factor in mitigation of his sentence. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

Aid to Police after Repeated Refusals to Admit Wrongdoing. — Where police obtained a search warrant which led to the discovery of victim's body on the basis of defendant's statement, but they extracted this statement from defendant only after substantial time and effort and repeated refusals on the part of defendant to admit wrongdoing in connection with the offense, the sentencing judge could have found that whatever consideration defendant earned by helping police locate the body was offset by his earlier persistent denials of wrongdoing; thus, judge's failure to find defendant's statement to be an early acknowledgement of wrongdoing was not an abuse of discretion. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

Defendant Held Entitled to Factor. — Where there was uncontradicted, manifestly credible testimony to the effect that defendant aided in the apprehension of another felon or testified truthfully for the State in another felony prosecution in a neighboring prosecutorial district, defendant was entitled to have that fact in mitigation found and considered by the court before sentence was imposed. State v. Cartwright, 81 N.C. App. 144, 343 S.E.2d 557 (1986).

Error in Not Finding Factor. — The trial court erred by not finding as a mitigating factor that defendant aided in the apprehension of another felon where there was uncontradicted testimony by an SBI agent that defendant's statements led to the apprehension of other felons. State v. Flowers, 84 N.C. App. 696, 354 S.E.2d 240, cert. denied, 319 N.C. 675, 356 S.E.2d 782 (1987).

H. Strong Provocation or Extenuating Relationship.

"Strong provocation," as used in former § 15A-1340.4(a)(2)i, was not synonymous with "legal provocation" necessary to establish a defense and reduce a second-degree murder to manslaughter. Ample support for this conclusion was found in that portion of former G.S. 15A-1340.4(a)(2)i which stated that the existence of an extenuating relationship between the defendant and the victim was a mitigating factor. State v. Wood, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

Threat or Challenge Must Be Shown. — Provocation within the meaning of former G.S. 15A-1340.4(a)(2)i required a showing of a threat or challenge by the victim to the defendant. State v. Braswell, 78 N.C. App. 498, 337 S.E.2d 637 (1985); State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985); State v. Faison, 90 N.C. App. 237, 368 S.E.2d 28 (1988).

Circumstances That Shift Part of Fault Intended. — In enacting former G.S. 15A-1340.4(a)(2)i, the legislature apparently had in mind circumstances that morally shifted part of the fault for a crime from the criminal to the victim. State v. Martin, 68 N.C. App. 272, 314 S.E.2d 805 (1984).

The legislature provided the statutory mitigating factor of strong provocation to reduce a defendant's culpability when circumstances exist that morally shift part of the fault for a crime from the criminal to the victim. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

"Strong provocation" as a mitigating factor is a conclusion which a court may or may not reach from uncontradicted evidence. State v. Cameron, 71 N.C. App. 776, 323 S.E.2d 396 (1984), cert. denied, 313 N.C. 510, 329 S.E.2d 395, aff'd, 314 N.C. 516, 335 S.E.2d 9 (1985).

When Finding of Strong Provocation Is Compelled. — When evidence is offered to support a claim of a mitigating factor of strong provocation, the trial judge first must determine what facts are established by the preponderance of the evidence, and then determine whether those facts support a conclusion of strong provocation. Only if the evidence offered at the sentencing hearing so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn is the court compelled to find that the mitigating factor exists. State v. Clark, 314 N.C. 638, 336 S.E.2d 83 (1985); State v. Faison, 90 N.C. App. 237, 368 S.E.2d 28 (1988).

Legislature did not intend to provide shorter prison terms for defendants motivated by jealousy or rage. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Conflict with Aggravating Factor Not Established. — Mitigating factor that relationship between defendant and her husband, victim of conspiracy to commit murder was an extenuating circumstance did not conflict with aggravating factor that defendant took advantage of position of trust or confidence vis-à-vis her husband, as the mitigating factor was based on evidence that victim told defendant that he was a homosexual and had had an affair with the principal in the conspiracy. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

Relationship Between Husband and Wife. — A relationship between husband and wife, including marital difficulties in the past, is not sufficient, standing alone, to support a finding of the mitigating factor that the relationship between defendant and victim was extenuating. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Strong Provocation Not Shown. — Under evidence that victim had stabbed defendant two days previously, had threatened his life, and had refused to talk to him about the stabbing incident eight hours before the time of the actual shooting, the trial court did not err in failing to find the statutory mitigating factor of strong provocation. State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

Where evidence showed that defendant approached the victim at work and a discussion ensued during which no weapons were displayed, that after the discussion, defendant left the building, went to his car, obtained a rifle and returned to the building, and that upon seeing the victim, defendant fired a total of eight shots and eventually shot the victim numerous times, the evidence did not compel the conclusion that strong provocation had been proved by the preponderance of the evidence. State v. Faison, 90 N.C. App. 237, 368 S.E.2d 28 (1988).

Where defendant confronted victim the day after defendant received information that victim had molested defendant's daughter, the lapse of time between the provocation and defendant's actions tended to contradict defendant's contention that he acted under strong provocation. State v. Foster, 101 N.C. App. 153, 398 S.E.2d 664 (1990).

Given the lapse of time between the previous encounter between defendant and victim and the time of the shooting and given the absence of any weapon on victim's person at the time of the shooting, uncontradicted evidence of strong provocation did not exist. State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376, cert. denied, 334 N.C. 438, 433 S.E.2d 184 (1993).

Extenuating Relationship Not Shown. — In a prosecution for murder, although the evidence that defendant and victim had been arguing over an extended period of time was not contradicted, this evidence did not compel a finding that their relationship was "otherwise extenuating," because such evidence did not necessarily lessen the seriousness of the crime committed. State v. Bullard, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

Trial court was not required to find that an extenuating relationship between defendant and victim existed such that defendant's conviction for murder of victim was mitigated. Although woman told defendant the victim had been "torturing" and otherwise mistreating her, since there was evidence of a scheme between woman and defendant to burn the trailer, the trial court did find defendant's relationship with woman mitigated his alleged arson of her trailer; however, any relationship between defendant and the woman did not necessarily compel the trial court to find a similar extenuating relationship existed between defendant and the murder victim. State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

Despite evidence that murder defendant's relationship with his victim (also his wife) was mutually stormy and difficult, the court could not conclusively determine that the mitigating factor of extenuating relationship existed. State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363, cert. denied, 334 N.C. 437, 433 S.E.2d 183 (1993).

I. Lack of Foreseeability or Exercise of Caution.

Defendant's Attempts to Restrain Himself Not Contemplated. — That defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or that defendant exercised caution to avoid such consequences, is a mitigating factor that is present when a defendant takes action to avoid harmful results of his criminal action, such as ensuring that accomplices are not armed with weapons. It does not refer to attempts by a criminal defendant to restrain himself from committing the criminal act itself. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Purpose of Factor. — The statutory factor in former G.S. 15A-1340.4(a)(2)j was not designed to benefit an offender who merely chose to commit lesser crimes when greater ones are within his grasp. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

When Factor Available. — The mitigating factor in former G.S. 15A-1340.4(a)(2)j was available only when a defendant exercised caution to prevent or could not reasonably foresee harm that actually occurred. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

The simple fact that defendant could have broken into occupied cars instead of unoccupied cars was insufficient to invoke the mitigating factor in former G.S. 15A-1340.4(a)(2)j. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

J. Voluntary Acknowledgment of Wrongdoing.

Two Opportunities for Mitigation. — Former G.S. 15A-1340.4(a)(2)*l* made it clear that a criminal defendant had two opportunities to mitigate the sentence that he might be given on a guilty plea or verdict. State v. Graham, 61 N.C. App. 271, 300 S.E.2d 716, modified on other grounds and aff'd, 309 N.C. 587, 308 S.E.2d 311 (1983).

Purpose of Factor. — One purpose of the mitigating factor of voluntarily acknowledging wrongdoing prior to arrest or at an early stage is to allow a sentencing judge to give some credit to a defendant who by early confession spares law enforcement officers expense and trouble which might otherwise be required to resolve the crime. Another purpose is to allow a sentencing judge to recognize that the earlier one admits responsibility, the better one's chance of rehabilitation. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

Time of Confession. — In order to be absolutely entitled to a finding of a mitigating factor regarding defendant's voluntary acknowledgment of wrongdoing, defendant must make his confession prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first; and since defendant made his statement after his arrest, he was not absolutely entitled to a finding of this mitigating factor, and it was for the trial judge to determine, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor. State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991).

Defendant Must Admit Culpability, Responsibility or Remorse. — To prove the mitigating factor of acknowledging wrongdoing at an early stage, defendant must have admitted culpability, responsibility or remorse, as well as guilt. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Meaning of "Criminal Process." — The legislature contemplated that "the criminal process," as used in former G.S. 15A-1340.4(a)(2)*l* , involved formal legal proceedings and not merely investigation of crimes by law enforcement officers. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

When "Criminal Process" Begins. — The "criminal process" begins upon either the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or upon arrest, whichever comes first. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Hayes, 314 N.C. 760, 334 S.E.2d 741 (1985); State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Time of Making Confession. — If defendant's confession was made prior to the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or prior to arrest, whichever came first, he was entitled to a finding of the mitigating circumstance set forth in former G.S. 15A-1340.4(a)(2)*l* . State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Hayes, 314 N.C. 760, 334 S.E.2d 741 (1985); State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

A defendant is entitled to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first. Otherwise, it is for the trial judge to determine, in his discretion, whether a statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating circumstance. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985), aff'd, 318 N.C. 395, 348 S.E.2d 798 (1986).

Confession after arrest is not automatically disqualified as a voluntary acknowledgment of wrongdoing at an early stage of the criminal process. Rather, it is for the trial judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process to qualify as a mitigating factor. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

Burden of Proving Confession Sufficiently Early. — Where the evidence established that defendant, after being stopped by police, confessed to committing other crimes, giving police a fictitious name, although later he gave police his real name, but no evidence was presented establishing when in the criminal process the confession was made, defendant failed to meet his burden of proof and was not entitled to the finding of the factor in former G.S. 15A-1340.4(a)(2)*l* by right. Instead, the decision was subject to the sentencing judge's discretion. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

When defendant in a murder conviction moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove this mitigating circumstance. State v. Smith, 321 N.C. 290, 362 S.E.2d 159 (1987).

Acknowledgment Not at Early Stage. — Where warrants for defendant's arrest were issued on November 16, 1984, defendant was arrested 11 days later on November 27, 1984, and he did not admit his guilt until the day after his arrest, defendant was not entitled to a finding that he acknowledged his guilt at an early stage of the criminal process. State v. Long, 316 N.C. 60, 340 S.E.2d 392 (1986).

Requirement Goes to Weight of Factor. — Requirement that restitution must be prompted by repentance for the deed, and not solely by fear of punishment does not go to the existence of the mitigating factor, but to its weight. State v. McDonald, 94 N.C. App. 371, 380 S.E.2d 406 (1989).

Discretion of Judge. — If defendant's confession was made after indictment, arrest, or issuance of the warrant, or if defendant fails to establish by a preponderance of the evidence when the confession was made, it is for the sentencing judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

Discretion as to Weight Given Acknowledgment of Wrongdoing. — Although a trial judge may be required to find in mitigation that a defendant voluntarily acknowledged wrongdoing in connection with the offense, the weight to be given to that factor remains within his sound discretion. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Consideration of Motive. — An unrepudiated acknowledgment of guilt, admissible against defendant, made before arrest or at an early stage in the criminal process, must be considered during sentencing, even if defendant's motives for the acknowledgment are suspect, overruling State v. Sweigart, 71 N.C. App. 383, 322 S.E.2d 188 (1984), to the extent that it is inconsistent with this holding. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Motive in Acknowledging Guilt Goes to Weight Given It. — The defendant's motive in acknowledging his guilt at an early stage does not go to the existence of the mitigating factor of acknowledgment of wrongdoing, but goes to the weight the trial judge must give that factor. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Whether confession reflects remorse is a matter for the fact finder to determine. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

Retraction of Inculpatory Statement. — The mitigating factor set out in former G.S. 15A-1340.4(a)(2)*l* reflected the assumption that a person who admits guilt and acknowledges a responsibility for his actions shows a possibility of rehabilitation which should be rewarded; however, when a defendant later retracts an inculpatory statement, this assumption of the potential for rehabilitation disappears, and it is as though no inculpatory statement was ever made. Thus, if a defendant repudiates his inculpatory statement, he is not entitled to a finding of this mitigating circumstance. State v. Hayes, 314 N.C. 760, 334 S.E.2d 741 (1985).

Repudiation of Statement. — Where defendant moved to suppress an incriminating statement he made to the police department, he repudiated the statement and was not entitled to use it as a mitigating factor under subdivision (e)(15). State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (1997), appeal dismissed, cert. denied, 346 N.C. 284, 487 S.E.2d 559 (1997).

Allegation of Self-Defense. — Admission by defendant after arrest that he killed the victim did not constitute an admission of wrongdoing, where defendant denied culpability by contending that the shooting was justified by self-defense. State v. Clark, 314 N.C. 638, 336 S.E.2d 83 (1985).

The trial court did not err in failing to find as a mitigating factor that, prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing, in connection with the offense, to a law enforcement officer, where, although defendant confessed the details of the shooting to a law enforcement officer, at trial he sought, unsuccessfully, to rely on self-defense, as a defendant who seeks to rely on self-defense is not entitled to this mitigating factor. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Pleas of guilty should not be considered as mitigating factors during sentencing. State v. Tyler, 66 N.C. App. 285, 311 S.E.2d 354 (1984).

Factor to Be Found Though Not Requested by Defendant. — If substantial, uncontradicted, and credible evidence is presented that defendant's confession was made prior to the issuance of a warrant, or upon the return of an indictment, or prior to arrest, whichever comes first, the sentencing judge must find this factor in mitigation or commit reversible error, even if defendant has not requested this factor to be found. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

Factor Present If Acknowledgment Admissible. — If an acknowledgment is admissible against defendant, it is voluntary within the meaning of the mitigating circumstance of voluntary acknowledgment of wrongdoing. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Defendant Held Entitled to Factor. — The trial judge, in sentencing a convicted murderer, erred in failing to find as a mitigating factor the fact that defendant voluntarily acknowledged wrongdoing prior to arrest, where the State's own uncontradicted evidence was that defendant told the police immediately upon their arrival at the scene that he shot his wife and then shot himself. State v. Martin, 68 N.C. App. 272, 314 S.E.2d 805 (1984).

Where all the evidence showed, without contradiction, that defendant made her inculpatory statement before her arrest, which statement was sufficient to clearly establish her guilt of a murder, defendant was entitled to have her acknowledgement of wrongdoing found as a mitigating circumstance. State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Defendant Not Entitled to Factor. — The court was not required to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process, based upon evidence that, following his arrest, he told officers of the location of knife and admitted striking victim, where the evidence failed to affirmatively show that defendant acknowledged wrongdoing, and where, while he acknowledged striking victim, defendant denied that he cut and killed him, attributing the fatal blow to someone else. State v. Bullard, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

Where the defendant did not admit to his participation in the crimes until after he was arrested and confronted with codefendant's statement to police implicating him, the trial judge could reasonably have reached the conclusion that this mitigating factor should not be found. State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987).

Trial court did not abuse its discretion in not finding the factor described in former G.S. 15A-1340.4(a)(2)*l* where defendant only admitted wrongdoing after his arrest. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

When Defendant Moves to Suppress His Confession. — When a defendant moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove the mitigating circumstances of voluntarily acknowledging wrongdoing. State v. Ruffin, 90 N.C. App. 152, 370 S.E.2d 275 (1988).

Substantial or Full Restitution Not Found. — Trial court did not err when it failed to find as a statutory mitigating factor that the defendant made substantial or full restitution to the victim where the defendant initially abandoned the property, but later led police to its location so the police could return it to the victim and where the property was not returned in the condition in which it was stolen. State v. McDonald, 94 N.C. App. 371, 380 S.E.2d 406 (1989).

K. Good Character or Reputation.

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Winnex, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Winnex, 66 N.C. App. 280, 311 S.E.2d 594 (1984); State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985); State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Good manners and a law-abiding life do not necessarily constitute a good character. State v. Winnex, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Evidence of Character and Reputation to Be Liberally Received. — Under former G.S. 15A-1340.4(a)(2)m, a defendant's character and his reputation in the community where he lives were direct issues in the case for purposes of sentencing. Evidence of both, therefore, could be liberally received, not only because they were directly in issue, but also because the court accords more liberality in the admissibility of evidence when it is being considered by a trial judge for purposes of sentencing than when by a jury for some other purpose. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983).

Evidence of good character or reputation must be at least substantial. State v. Winnex, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Proof of good character requires inherently credible evidence. Even where favorable character evidence is uncontradicted, the trial judge may determine that the witnesses are unreliable and hold that defendant has failed to meet his burden of proof. State v. Winnex, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

For discussion of permissible indicia of unreliability of character witnesses, see State v. Winnex, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Methods of Proving Good Character. — When the defendant in his sentencing hearing produces evidence of his good character in order to take advantage of that particular mitigating circumstance, character becomes "a direct issue in the case," and thus is not limited to the traditional methods of proof, but may be proved by specific acts, as well as by reputation and by the opinions of others. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

Good moral character is seldom subject to proof by reference to one or two incidents. State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983).

Testimony of witness that defendant was well behaved around her did not establish the fact of his good character or reputation in his community so clearly as to compel a finding of this mitigating circumstance. State v. Brown, 314 N.C. 588, 336 S.E.2d 388 (1985).

No Recent Conviction. — The trial judge justifiably concluded that four years without a conviction did not amount to leading a law-abiding life for a substantial period of time. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Defendant Not Entitled to Factor. — Evidence of defendant's good reputation was not "substantial, uncontradicted and manifestly credible," so as to compel the trial court to find it as a mitigating factor. State v. Clark, 314 N.C. 638, 336 S.E.2d 83 (1985).

Evidence held not sufficient to mandate a finding that defendant was of good character. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Testimony of witness that she had a good opinion of defendant's character because she had never seen him do anything did not constitute evidence of defendant's good character or good reputation. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Trial court's failure to find mitigating factor was not reversible error where defendant's character witness did not testify as to defendant's reputation in community and although testimony was uncontradicted evidence of good character, witness testified that she and defendant were very good friends but she had known defendant for only five months. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

Where defendant's only evidence as to his good reputation in community was testimony of his mother and where defendant had been away from community for ten years and had returned only two or three months prior to crime, trial court did not err in declining to find, as statutory mitigating factor, defendant's good reputation in community. State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Trial judge's refusal to find as a mitigating factor that defendant was of good character was not improper where the record established, at best, that there was an absence of bad character. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

L. Minor Defendant.

Seventeen Year Old Is Aware That Murder Wrongful. — A person at 17 years of age should be as well aware as any person of the wrong involved in the commission of murder, and the court did not abuse its discretion in failing to find defendant's age a mitigating factor. State v. Moore, 78 N.C. App. 77, 337 S.E.2d 66 (1985), modified on other grounds and aff'd, 317 N.C. 275, 345 S.E.2d 217 (1986).

M. Honorable Discharge.

Failure to Consider Military Service Held Error. — The failure of the trial judge to consider the defendant's honorable military service as a mitigating factor constituted error requiring that defendant be afforded a new sentencing hearing. State v. Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985), rev'd on other grounds, 316 N.C. 337, 341 S.E.2d 565 (1986).

The trial judge's refusal to even consider evidence of the defendant's honorable discharge from military service without documentary proof was error. State v. Hanes, 77 N.C. App. 222, 334 S.E.2d 444 (1985).

N. Nonstatutory Factors.

Discretion of Court as to Nonstatutory Factors. — When considering whether nonstatutory mitigating factors exist, the trial judge is given wide discretion that will not be upset absent a showing of abuse of discretion.

State v. Canty, 321 N.C. 520, 364 S.E.2d 410 (1988).

The consideration of a nonstatutory factor is in the discretion of the sentencing judge and failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 179, 373 S.E.2d 123 (1988).

Court's Discretion Not Disturbed Absent Abuse. — Failure of the court to find a nonstatutory mitigating factor, even when it is supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent an abuse of that discretion. State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988).

Rendering Aid to Victim. — While actions of defendant in rendering aid to his victim should be encouraged and legislative consideration of making such circumstances a statutory mitigating factor would be appropriate, the Supreme Court would decline to reach this goal under the guise of judicial construction. State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985).

Rendering aid to a victim is not a statutory mitigating factor; therefore a finding of this mitigating factor is in the exercise of the trial judge's sound discretion. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Insubstantial Loss to Victim. — The trial court did not err in failing to find, as a nonstatutory mitigating factor on sentencing defendant on convictions of felonious breaking or entering and felonious larceny, that victim suffered only insubstantial loss, where victim's loss was insubstantial merely because the police stopped defendant's accomplice in the middle of the larceny. State v. Litchford, 78 N.C. App. 722, 338 S.E.2d 575 (1986).

Good Work Record. — This section does not require the judge to find nonstatutory factors that the evidence establishes, but merely permits him to do so; thus, when the judge declined to find as a factor in mitigation that the defendant had a good work record, he was exercising his discretion, for which there is no appellate relief in the absence of abuse. State v. Elliott, 77 N.C. App. 647, 335 S.E.2d 774 (1985).

Drug addiction is not per se a statutorily enumerated mitigating factor. It could perhaps be found to mitigate the offense, either under the rubric of the enumerated factors, or otherwise as being reasonably related to the purposes of sentencing. State v. Bynum, 65 N.C. App. 813, 310 S.E.2d 388, cert. denied, 311 N.C. 404, 319 S.E.2d 275 (1984).

Although defendant's evidence could justify a finding that his crimes were committed to support his expensive drug habit, where he presented no evidence that would compel the conclusion that his culpability for the offense committed was significantly reduced because of his drug addiction, there was no error in the sentencing judge's refusal to find defendant's drug addiction a factor in mitigation of his sentence. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

The sentencing judge's refusal to consider that defendant was a long-term drug addict, under the influence of drugs, and stealing to support his habit as a non-statutory mitigating factor did not constitute an abuse of discretion. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498, aff'd, 85 N.C. App. 498, 355 S.E.2d 502 (1987).

Defendant Victim of Child Abuse may not be considered as a mitigating factor. State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984).

The trial court did not abuse its discretion under the circumstances of this case by declining to find as a factor in mitigation that defendant charged with child abuse was himself the victim of child abuse. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Defendant's Prison Conduct. — The trial court in its discretion did not err in failing to find defendant's prison conduct to be a mitigating factor in determining what sentences to impose for all his convictions. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Behavior Pending Resentencing Hearing. — A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Prevention of Jailbreak. — The trial court did not err in failing to find defendant's possible prevention of a jailbreak as a mitigating factor. State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985).

Rejection of Self-Defense as Mitigating Factor Upheld. — Statement made by trial judge to the effect that defendant used self-defense as a defense and the jury rejected it and the court did likewise did not require the conclusion that trial judge relied on the jury verdict in making its decision on the aggravating factor in question. The record clearly showed that prior to the jury verdict, the trial court did not believe defendant was acting in self-defense. Therefore, the trial court did not err in its rejection of self-defense as a factor in mitigation. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Trial court did not abuse its discretion in refusing to find defendant's requested nonstatutory factor in mitigation that defendant had sought treatment for his alcoholism where defendant stated that on the weekend before sentencing, he had a few beers. State v. Santon, 101 N.C. App. 710, 401 S.E.2d 117 (1991).

IV. FINDINGS OF COURT.

Findings Must Be Made Where Sentence Imposed Is Longer Than Presumed Sentence. — If the judge imposed a prison sentence longer than the presumed sentence listed in former G.S. 15A-1340.4(f) for the class of felony of which the defendant was adjudged guilty, the judge had to first find that the factors in aggravation outweighed the factors in mitigation. He also had to specifically list in the record each matter in aggravation or mitigation that he found proved by a preponderance of the evidence. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Wood, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

Trial judge must impose the statutorily set presumptive sentence unless he properly makes written findings of aggravating or mitigating factors and then finds that one set of factors outweighs the other. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

But Findings Are Not Required Where Judge Imposes Presumptive Term. — Where the judge imposed presumptive terms for all offenses of which defendant was convicted, he had no duty to make findings regarding aggravating and mitigating factors. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); State v. Blake, 83 N.C. App. 77, 349 S.E.2d 78 (1986), petition for discretionary review as to additional issues denied, 318 N.C. 697, 351 S.E.2d 751, aff'd, State v. Allison, 307 N.C. 411, 298 S.E.2d 365 (1983).

Judge is required to find factors proved by uncontradicted and manifestly credible evidence. State v. Potts, 65 N.C. App. 101, 308 S.E.2d 754 (1983), cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Failure to Do So Is Error. — In order to give proper effect to the Fair Sentencing Act, the appellate court must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible. State v. Taylor, 309 N.C. 570, 308 S.E.2d 302 (1983); State v. Cameron, 314 N.C. 516, 335 S.E.2d 9 (1985); State v. Faison, 90 N.C. App. 237, 368 S.E.2d 28 (1988).

Record Must Support Factors Found by Preponderance of Evidence. — This section does not require a specific fact finding on each factor to be considered in sentencing. All that is necessary is that the record support the factor by a "preponderance of the evidence." State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982), modified on other grounds and aff'd, 308 N.C. 379, 302 S.E.2d 230 (1983).

The sentencing judge is required to make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

Separate Findings Required for Each Offense. — In every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

Separate findings must be made for each offense, even if the cases are consolidated for hearing. State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986).

In cases where offenses are not consolidated for judgment, where the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately in determining which aggravating or mitigating factors pertain to which offenses. However, if the offenses are consolidated for judgment, this separate treatment is not necessary. State v. Graves, 83 N.C. App. 126, 349 S.E.2d 320 (1986).

Specific Evidence Relied on Need Not Be Specified. — When finding an aggravating factor, the sentencing judge does not have to specify the specific evidence on which he relied to find that factor. The record, however, must contain sufficient evidence to support the aggravating factor. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Failure to Make Findings on Lesser Offenses Consolidated for Judgment. — When cases are consolidated for judgment and the trial judge finds aggravating and mitigating factors as to the most serious offense, but fails to make such findings as to the lesser consolidated offenses, the defendant is not prejudiced, so long as the sentence given does not exceed the maximum sentence permissible for the most serious offense. State v. Miller, 316 N.C. 273, 341 S.E.2d 531 (1986).

Aggravating and Mitigating Factors Form Sheets on Multiple Offenses. — Where in sentencing the defendant to a term of imprisonment for violations of both G.S. 14-54 and 14-72 which exceeded the presumptive term, the trial judge made and listed findings which supported the validity of both judgments under former G.S. 15A-1340.4(b), and in passing judgment on the defendant the court gave separate consideration to each offense and the aggravating and mitigating factors found in each instance, the fact that only one and not two aggravating and mitigating factors form sheets were signed and put in the file, as the judge obviously intended, did not require that defendant be resentenced. State v. Hall, 81 N.C. App. 650, 344 S.E.2d 811, petition for cert. dismissed as moot, 318 N.C. 510, 349 S.E.2d 868 (1986).

Finding on Weight of Factors Not Required Where Only Aggravating Factors Are Found. — Since only aggravating factors were found, it would have been an exercise in futility to require the trial judge to make a specific finding that those factors outweighed nonexistent mitigating factors. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Weight Attached to Particular Factor Need Not Be Justified. — While the trial judge is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor. He may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Factors Rejected Need Not Be Set Forth in Judgment. — Although the trial judge is required to consider all of the statutory aggravating and mitigating factors, he is only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present. He is not required to list in the judgment statutory factors that he considered and rejected as being unsupported by the preponderance of the evidence. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982).

Proceedings Do Not Involve Finding of Elemental Facts. — The proceedings under the Fair Sentencing Act do not involve the finding of elemental facts beyond a reasonable doubt in the nature of a guilt or innocence trial. State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985).

Where defendant was sentenced pursuant to a plea arrangement, trial court was not required to make findings of aggravating or mitigating factors. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Judge Did Not Need to Make Findings in Aggravation and Mitigation. — Trial court did not err in sentencing defendant to two consecutive 40-year terms for trafficking in cocaine without finding any aggravating factors; the statutory mandatory minimum sentence for each conviction of trafficking in more than 400 grams of cocaine is 35 years in prison and since each of the 40-year sentences pronounced was less than the total of the presumptive terms of the consolidated convictions, the trial court's sentences for the substantive offenses were lawful. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989).

On resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

Finding of Different Factors at Later Hearing. — In proceedings under the Fair Sentencing Act, the principles of double jeopardy do not bar the finding of aggravating and mitigating factors different from those found at an earlier sentencing hearing. State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985).

At a de novo resentencing hearing brought about by a defendant, the trial court may find altogether new aggravating and mitigating factors, without regard to the findings in the prior sentencing hearings. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

A resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Finding in Earlier Hearing Not Law of Case. — The trial court erred during resentencing by treating the prior finding in aggravation that defendant was a danger to others, found in the original sentencing hearing and approved on appeal, as the law of the case. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

But May Be Binding Precedent. — If an appellate court has squarely ruled that certain evidence does not support a certain factor in aggravation or mitigation, and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court on resentencing is bound by the appellate ruling, not because it is the law of the case, but because it is binding precedent directly on point. This is not a limitation on the de novo nature of the resentencing proceeding; rather, it is a recognition that the trial court's rulings are always governed by applicable appellate decisions. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

Evidence Held Sufficient to Support Finding. — There was sufficient evidence from which the trial judge could find by a preponderance of the evidence that defendant was armed with a deadly weapon at the time he broke into elderly woman's home. Where the evidence tended to show defendant first acquired the revolver when he shot trooper and had it with him when he was captured, also co-defendant's testimony provided direct evidence defendant had trooper's revolver at the time he entered the house. State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988).

V. ADDITIONAL SENTENCING FACTORS.

Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. State v. Stone, 71 N.C. App. 417, 322 S.E.2d 413 (1984).

Conduct Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Presentencing. — As former G.S. 15A-1335 prohibited the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina could not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct could be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence was no more severe than the original one. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing could, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus, it could not be said from such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Minimum Sentence Under § 14-87 Irreducible Except for Good Behavior. — The following factors lead to the conclusion that the General Assembly considered the relationship between G.S. 14-87 and former Article 81A. First, G.S. 14-87 was rewritten as part of Session Laws 1979, c. 760. Second, the rewritten version specifically referred to this former G.S. 15A-1340.4, which allows credit for good behavior. Third, the General Assembly amended the last part of G.S. 14-87(a) in the 1979 second session changing the phrase "... punished as a Class D felon" to "... guilty of a Class D felony." These factors lead to the conclusion that the General Assembly intended to impose a minimum sentence for armed robbery greater than the presumptive sentence for a Class D felony and also intended that the minimum be irreducible, except for credit for good behavior, notwithstanding any other provision of law. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm or deadly weapon during the commission of the felony.

(a), (b) Repealed by Session Laws 2003-378, s. 2, effective August 1, 2003.

(c) If a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and (ii) the person actually possessed the firearm or deadly weapon about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1).

(d) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information the facts set out in subsection (c) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and the defendant actually possessed the firearm or deadly weapon about the defendant's person. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(e) The State shall prove the issues set out in subsection (c) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (c) of this section, then a jury shall be impaneled to determine the issues.

(f) Subsection (c) of this section does not apply if the evidence of the use, display, or threatened use or display of the firearm or deadly weapon is needed to prove an element of the felony or if the person is not sentenced to an active term of imprisonment. (1994, Ex. Sess., c. 22, s. 20; 2003-378, s. 2; 2008-214, s. 5.)

Editor's Note. — Session Laws 2003-378, s. 7, made this act applicable to offenses committed on or after August 1, 2003. Prosecutions for offenses occurring before August 1, 2003 are not abated or affected by this act, and the statutes that would be applicable before this act remain applicable to those prosecutions.

Effect of Amendments. — Session Laws 2008-214, s. 5, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "or deadly weapon" following "firearm" in the section heading and throughout the section.

CASE NOTES

This firearm enhancement statute is facially unconstitutional pursuant to the Supreme Court's holding in Apprendi, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and violates the defendant's due process rights as it permits the trial court to make the requisite factual findings for an enhancement that might result in a greater prison term than the statutory maximum prescribed by the underlying felony, instead of requiring that such factual determinations be submitted to the jury and proved beyond a reasonable doubt, although there may be hypothetical circumstances under which the statute could be constitutionally applied. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Firearm Enhancement for Armed Robbery. — Sawed-off shotgun used in an armed robbery was properly used to aggravate defendant's sentence for armed robbery since the element used under the aggravation of sentence statute of the shotgun being sawed-off was not an element of the crime of armed robbery. State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138, 2001 N.C. App. LEXIS 1246 (2001), cert. denied, 355 N.C. 219, 560 S.E.2d 152 (2002).

Armed robbery and kidnapping are two distinct criminal statutes which require proof of different elements, and the punishment of each of these separate offenses by consecutive sentences does not violate the constitutional prohibition against double jeopardy. State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (1997), cert. denied, 346 N.C. 551, 488 S.E.2d 813 (1997).

Firearm Enhancement for Kidnapping. — The trial court properly enhanced the defendant's sentence for second-degree kidnapping, although the display of a firearm was neither an essential element of second-degree kidnapping, nor the gravamen of that offense. State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998).

The defendant's sentence was properly enhanced pursuant to this section where the underlying felony was second-degree kidnapping, of which the use or display of a firearm is not an essential element, and in spite of defendant's argument that he was "contemporaneous" convicted on firearm-related charges. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Firearm Enhancement for Homicide. — Fact that defendant's use of a certain weapon to kill his victims was an element of the State's case against him did not prohibit the use of the weapon to aggravate his sentence. State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17, 2002 N.C. App. LEXIS 17 (2002), cert. denied, 355 N.C. 495, 564 S.E.2d 47 (2002).

Firearm Enhancement Held Improper. — Enhanced sentence for use of a firearm was vacated and the case was remanded for resentencing because the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony, and this statutory factor was not submitted to the jury. State v. Guice, 151 N.C. App. 293, 564 S.E.2d 925, 2002 N.C. App. LEXIS 721 (2002).

Indictment Requirement. — Indictment was fatally defective because it failed to allege the required facts to support a firearm enhancement for possessing a firearm during a kidnapping. State v. McNair, 146 N.C. App. 674, 554 S.E.2d 665, 2001 N.C. App. LEXIS 1061 (2001).

Trial court committed error when it enhanced defendant's first-degree burglary sentence, pursuant to G.S. 15A-1340.16A, without the statutory firearm enhancement factors having been charged in the indictment, without submitting those factors to a jury, and without requiring the State to prove them beyond a reasonable doubt. State v. Wimbish, 147 N.C. App. 287, 555 S.E.2d 329, 2001 N.C. App. LEXIS 1142 (2001).

Defendant's plea of guilty had no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment. State v. Wimbish, 147 N.C. App. 287, 555 S.E.2d 329, 2001 N.C. App. LEXIS 1142 (2001).

Where defendant's indictment failed to allege the statutory factors supporting enhancement under G.S. 15A-1340.16A, the imposition of the firearm enhancement penalty for simple assault, assault with a deadly weapon, and kidnapping was improper; thus, defendant's sentence was vacated. State v. Boyd, 148 N.C. App. 304, 559 S.E.2d 1, 2002 N.C. App. LEXIS 16 (2002).

Where the trial court vacated a sentence and imposed a new sentence, the case was not "final" for purposes of the Lucas rule, and since a firearm enhancement was not alleged in indictment, and the case was not final, the firearm enhancement was illegal under the Lucas rule. State v. Wilson, 154 N.C. App. 127, 571 S.E.2d 631, 2002 N.C. App. LEXIS 1401 (2002), aff'd, 357 N.C. 498, 586 S.E.2d 89 (2003).

In every instance where the State seeks an enhanced sentence pursuant to G.S. 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury; however, this ruling has been specifically limited to cases in which a defendant had not yet been indicted, cases that were pending on direct review, and cases that were not yet final as of the certification date of the opinion, and defendant's conviction was final at the time the rule was announced. State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103, 2003 N.C. App. LEXIS 1178 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003), cert. denied, — U.S. —, 124 S. Ct. 30, 156 L. Ed. 2d 692 (2003).

Applied in State v. Williams, 127 N.C. App. 464, 490 S.E.2d 583 (1997).

§ 15A-1340.16B. Life imprisonment without parole for a second or subsequent conviction of a Class B1 felony if the victim was 13 years of age or younger and there are no mitigating factors.

(a) If a person is convicted of a Class B1 felony and it is found as provided in this section that: (i) the person committed the felony against a victim who was 13 years of age or younger at the time of the offense and (ii) the person has one or more prior convictions of a Class B1 felony, then the person shall be sentenced to life imprisonment without parole.

(b), (c) Repealed by Session Laws 2003-378, s. 3, effective August 1, 2003.

(d) An indictment or information for the Class B1 felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony against a victim who was 13 years of age or younger at the time of the felony and that the defendant had one or more prior convictions of a Class B1 felony. One pleading is sufficient for all Class B1 felonies that are tried at a single trial.

(e) The State shall prove the issues set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to the issues. The issues shall be presented in the same manner as provided in G.S. 15A-928(c). If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issues set out in subsection (a) of this section, then a jury shall be impaneled to determine the issues.

(f) Subsection (a) of this section does not apply if there are mitigating factors present under G.S. 15A-1340.16(e). (1998-212, s. 17.16(a); 2003-378, s. 3.)

Editor's Note. — Session Laws 2003-378, s. 7, made this act applicable to offenses committed on or after August 1, 2003. Prosecutions for offenses occurring before August 1, 2003 are not abated or affected by this act, and the statutes that would be applicable before this act remain applicable to those prosecutions.

§ 15A-1340.16C. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bullet-proof vest during the commission of the felony.

(a) If a person is convicted of a felony and it is found as provided in this section that the person wore or had in his or her immediate possession a bullet-proof vest at the time of the felony, then the person is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.

(b) Repealed by Session Laws 2003-378, s. 4, effective August 1, 2003.

(b1) This section does not apply to law enforcement officers, unless the State proves beyond a reasonable doubt, pursuant to subsection (d) of this section, both of the following:

(1) That the law enforcement officer was not performing or attempting to perform a law enforcement function.

(2) That the law enforcement officer knowingly wore or had in his or her immediate possession a bulletproof vest at the time of the commission of the felony for the purpose of aiding the law enforcement officer in the commission of the felony.

(c) An indictment or information for the felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony while wearing or having in the defendant's immediate possession a bulletproof vest. One pleading is sufficient for all felonies that are tried at a single trial.

(d) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to that issue. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(e) Subsection (a) of this section does not apply if the evidence that the person wore or had in the person's immediate possession a bulletproof vest is needed to prove an element of the felony. (1999-263, s. 1; 2003-378, s. 4.)

§ 15A-1340.16D. Enhanced sentence if defendant is convicted of manufacture of methamphetamine and the offense resulted in serious injury to a law enforcement officer, probation officer, parole officer, emergency medical services employee, or a firefighter.

(a) If a person is convicted of the offense of manufacture of methamphetamine under G.S. 90-95(b)(1a) and it is found as provided in this section that a law enforcement officer, probation officer, parole officer, emergency medical services employee, or a firefighter suffered serious injury while discharging or attempting to discharge his or her official duties and that the injury was directly caused by one of the hazards associated with the manufacture of methamphetamine, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 24 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 24 months, as specified in G.S. 15A-1340.17(e) and (e1).

(b) An indictment or information for the offense of manufacture of methamphetamine under G.S. 90-95(b)(1a) shall allege in that indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the offense of manufacture of methamphetamine and that as a result of the offense a law enforcement officer, probation officer, parole officer, emergency medical services employee, or firefighter suffered serious injury while discharging or attempting to discharge his or her official duties. One pleading is sufficient for all felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (b) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the offense of manufacture of methamphetamine unless the defendant pleads guilty or no contest to the issue. If the defendant pleads guilty or no contest to the offense of manufacture of methamphetamine but pleads not guilty to the issue set out in subsection (b) of this section, then a jury shall be impaneled to determine the issue.

(d) This section does not apply if the offense is packaging or repackaging methamphetamine, or labeling or relabeling the methamphetamine container. (2004-178, s. 8.)

Editor's Note. — Session Laws 2004-178, s. 10, made this section effective December 1, 2004, and applicable to offenses committed on or after that date. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

§ 15A-1340.17. Punishment limits for each class of offense and prior record level.

(a) Offense Classification; Default Classifications. — The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. — Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. — The authorized punishment for each class of offense and prior record level is as specified in the chart below. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0-1 Pt	II 2-5 Pts	III 6-9 Pts	IV 10-13 Pts	V 14-17 Pts	VI 18+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A	A	A	A	A	A	DISPOSITION
	240-300	276-345	317-397	365-456	Life Imprisonment Without Parole		Aggravated
B1	192-240	221-276	254-317	292-365	336-420	386-483	PRESUMPTIVE
	144-192	166-221	190-254	219-292	252-336	290-386	Mitigated
	A	A	A	A	A	A	DISPOSITION
	157-196	180-225	207-258	238-297	273-342	314-393	Aggravated
B2	125-157	144-180	165-207	190-238	219-273	251-314	PRESUMPTIVE
	94-125	108-144	124-165	143-190	164-219	189-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	83-104	96-120	110-138	127-159	146-182	Aggravated
C	58-73	67-83	77-96	88-110	101-127	117-146	PRESUMPTIVE
	44-58	50-67	58-77	66-88	76-101	87-117	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	73-92	84-105	97-121	111-139	128-160	Aggravated
D	51-64	59-73	67-84	78-97	89-111	103-128	PRESUMPTIVE
	38-51	44-59	51-67	58-78	67-89	77-103	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	33-41	38-48	44-55	50-63	Aggravated
E	20-25	23-29	26-33	30-38	35-44	40-50	PRESUMPTIVE
	15-20	17-23	20-26	23-30	26-35	30-40	Mitigated

	I 0-1 Pt	II 2-5 Pts	III 6-9 Pts	IV 10-13 Pts	V 14-17 Pts	VI 18+ Pts	
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-23	21-27	25-31	28-36	33-41	Aggravated
F	13-16	15-19	17-21	20-25	23-28	26-33	PRESUMPTIVE
	10-13	11-15	13-17	15-20	17-23	20-26	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	14-18	17-21	19-24	22-27	25-31	Aggravated
G	10-13	12-14	13-17	15-19	17-22	20-25	PRESUMPTIVE
	8-10	9-12	10-13	11-15	13-17	15-20	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for Class F through Class I Felonies. — Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class F through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	

(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. — Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.

15-27	16-29	17-30	18-31	19-32	20-33	21-35	22-36
23-37	24-38	25-39	26-41	27-42	28-43	29-44	30-45
31-47	32-48	33-49	34-50	35-51	36-53	37-54	38-55
39-56	40-57	41-59	42-60	43-61	44-62	45-63	46-65
47-66	48-67	49-68	50-69	51-71	52-72	53-73	54-74
55-75	56-77	57-78	58-79	59-80	60-81	61-83	62-84
63-85	64-86	65-87	66-89	67-90	68-91	69-92	70-93
71-95	72-96	73-97	74-98	75-99	76-101	77-102	78-103
79-104	80-105	81-107	82-108	83-109	84-110	85-111	86-113
87-114	88-115	89-116	90-117	91-119	92-120	93-121	94-122
95-123	96-125	97-126	98-127	99-128	100-129	101-131	102-132
103-133	104-134	105-135	106-137	107-138	108-139	109-140	110-141
111-143	112-144	113-145	114-146	115-147	116-149	117-150	118-151
119-152	120-153	121-155	122-156	123-157	124-158	125-159	126-161

127-162 128-163 129-164 130-165 131-167 132-168 133-169 134-170
135-171 136-173 137-174 138-175 139-176 140-177 141-179 142-180
143-181 144-182 145-183 146-185 147-186 148-187 149-188 150-189
151-191 152-192 153-193 154-194 155-195 156-197 157-198 158-199
159-200 160-201 161-203 162-204 163-205 164-206 165-207 166-209
167-210 168-211 169-212 170-213 171-215 172-216 173-217 174-218
175-219 176-221 177-222 178-223 179-224 180-225 181-227 182-228
183-229 184-230 185-231 186-233 187-234 188-235 189-236 190-237
191-239 192-240 193-241 194-242 195-243 196-245 197-246 198-247
199-248 200-249 201-251 202-252 203-253 204-254 205-255 206-257
207-258 208-259 209-260 210-261 211-263 212-264 213-265 214-266
215-267 216-269 217-270 218-271 219-272 220-273 221-275 222-276
223-277 224-278 225-279 226-281 227-282 228-283 229-284 230-285
231-287 232-288 233-289 234-290 235-291 236-293 237-294 238-295
239-296 240-297 241-299 242-300 243-301 244-302 245-303 246-305
247-306 248-307 249-308 250-309 251-311 252-312 253-313 254-314
255-315 256-317 257-318 258-319 259-320 260-321 261-323 262-324
263-325 264-326 265-327 266-329 267-330 268-331 269-332 270-333
271-335 272-336 273-337 274-338 275-339 276-341 277-342 278-343
279-344 280-345 281-347 282-348 283-349 284-350 285-351 286-353
287-354 288-355 289-356 290-357 291-359 292-360 293-361 294-362
295-363 296-365 297-366 298-367 299-368 300-369 301-371 302-372
303-373 304-374 305-375 306-377 307-378 308-379 309-380 310-381
311-383 312-384 313-385 314-386 315-387 316-389 317-390 318-391
319-392 320-393 321-395 322-396 323-397 324-398 325-399 326-401
327-402 328-403 329-404 330-405 331-407 332-408 333-409 334-410
335-411 336-413 337-414 338-415 339-416

(e1) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms of 340 Months or More. — Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus nine additional months. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 14, ss. 20, 21; c. 22, s. 7; c. 24, s. 14(b); 1995, c. 507, s. 19.5(*l*); 1997-80, s. 3; 2009-555, s. 2; 2009-556, s. 1.)

Effect of Amendments. — Session Laws 2009-555, s. 2, effective December 1, 2009, and applicable to offenses committed on or after that date, restructered the prior record level point changes in the punishment chart following subdivision (c)(4), by substituting ““I. 0-1 Pt; II. 2-5 Pts; III. 6-9 Pts; IV. 10-13 Pts; V. 14-17 Pts; VI. 18+ Pts” for “I. 0 Pts; II. 1-4 Pts; III. 5-8 Pts; IV. 9-14 Pts; V. 15-18 Pts; and VI. 19 + Pts”.

Session Laws 2009-556, s.1, effective December 1, 2009, and applicable to offenses committed on or after that date, revised the terms of imprisonment throughout the punishment chart following subdivision (c)(4).

CASE NOTES

This firearm enhancement statute is facially unconstitutional pursuant to the Supreme Court's holding in Apprendi, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and violates the defendant's due process rights as it permits the trial court to make the requisite factual findings for an enhancement that might result in a greater prison term than the statutory maximum prescribed by the underlying felony, instead of requiring that such factual determinations be submitted to the jury and proved beyond a reasonable doubt, although there may be hypothetical circumstances under which the statute could be constitutionally applied. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Construction with Federal Law. — Defendant was properly indicted for violating 18 U.S.C. § 922(g)(1) where his prior State felon-in-possession conviction resulted in an 8 to 10 month sentence after the application of this section, because he could potentially have been sentenced to 30 months in prison. United States v. Jones, 195 F.3d 205, 1999 U.S. App. LEXIS 29531 (4th Cir. 1999), cert. denied, 529 U.S. 1029, 120 S. Ct. 1443, 146 L. Ed. 2d 330 (2000).

Because the focus in sentencing under federal law is on the potential punishment for the crime, not the individual, the district court properly considered the North Carolina statutory sentence maximums, not defendant's individual maximum, and used defendant's June 1998, conviction as a prior felony for purposes of United States Sentencing Guidelines (USSG) G.S. 4B1.1. United States v. Chavez-Lopez, — F.3d —, 2000 U.S. App. LEXIS 3820 (4th Cir. Mar. 14, 2000).

Determining Maximum Period of Imprisonment. — Unless otherwise indicated, the maximum term of imprisonment applicable to each minimum term of imprisonment is as specified in G.S. 15A-1340.17; thus, after a trial court enhances the minimum term of imprisonment, it must determine the applicable maximum term of imprisonment by utilizing the chart found in G.S. 15A-1340.17(e). State v. Van Trusell, 144 N.C. App. 445, 548 S.E.2d 560, 2001 N.C. App. LEXIS 444 (2001).

Habitual Felons. — Defendant's adjudication as an habitual felon was proper because the trial court conducted the inquiry required by G.S. 15A-1022(a), resulting in defendant's guilt as an habitual felon being duly stipulated, which stipulation was approved by the trial court, and defendant's sentence clearly suggested he was adjudicated an habitual felon as the sentence was within the presumptive range for someone with a prior record level I convicted of a class C felony with a prior record level I and not a class H felony, under G.S. 15A-1340.17(c), (e). State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

To determine under the U.S. Sentencing Guidelines Manual § 4B1.2(b) whether a prior conviction was for a crime punishable by over one year in prison, a court considers the maximum aggravated sentence for a defendant with worst possible criminal history; thus, the fact that the maximum non-aggravated punishment for a violation of G.S. 15A-1340.17 was only 12 months is immaterial for purposes of career criminal status, since the maximum aggravated punishment was 15 months. United States v. Harp, 406 F.3d 242, 2005 U.S. App. LEXIS 7698 (4th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 297, 163 L. Ed. 2d 259 (2005).

Trial court properly treated defendant's prior conviction of possession of marijuana with the intent to distribute, G.S. 15A-1340.17, as a "controlled substance offense" under U.S. Sentencing Guidelines Manual § 4B1.1(a) since the maximum aggravated sentence for a defendant with the worst possible criminal history was 15 months; applying this analysis did not violate Blakely, as North Carolina's sentencing regime can accommodate the process that Blakely demands. United States v. Harp, 406 F.3d 242, 2005 U.S. App. LEXIS 7698 (4th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 297, 163 L. Ed. 2d 259 (2005).

Where defendant, in pleading nolo contendere, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Defendant's sentence as a habitual felon to 232 to 298 months of imprisonment for breaking and/or entering, larceny pursuant to breaking and entering, and felonious possession of stolen goods pursuant to breaking and entering was within the presumptive range of G.S. 15A-1340.17(c), and did not violate the Eighth Amendment. State v. Patterson, — N.C. App. —, 671 S.E.2d 357, 2009 N.C. App. LEXIS 24 (2009).

Deterrence. — Corporation's fine for disseminating obscenity was not excessive considering corporation's financial resources; a lesser fine might have been seen as an acceptable business cost. State v. Sanford Video & News, Inc., 146 N.C. App. 554, 553 S.E.2d 217, 2001 N.C. App. LEXIS 977 (2001), cert. denied, 355 N.C. 221, 560 S.E.2d 359 (2002).

Findings as to Aggravating Factors. — The defendant's lack of remorse was properly considered as an aggravating factor in sentencing even though the trial court's statement about the lack of remorse more closely resembled a comment on the defendant's continued pattern of reckless behavior and his lack of social duty. State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (1998).

Trial court erred when it relied on a copy of a warrant issued by the State of Florida to find that defendant was on pretrial release and was also a fugitive from justice when he committed second-degree murder because the fact that Florida issued a warrant supported a finding of only one aggravating factor, and the appellate court vacated defendant's sentence for second-degree murder and remanded the case for resentencing. State v. Beck, 163 N.C. App. 469, 594 S.E.2d 94, 2004 N.C. App. LEXIS 405 (2004), appeal dismissed, 358 N.C. 546, 599 S.E.2d 558 (2004).

Appellate court vacated the trial court's judgment sentencing defendant for second-degree murder because it was unclear from the record whether the trial court used its finding that defendant participated in a robbery with one other person as a statutory or non-statutory aggravating factor to depart from the presumptive sentence, but it was clear that use of that finding as a statutory aggravating factor under G.S. 15A-1340.16(d)(2) would have been error. State v. Hurt, 163 N.C. App. 429, 594 S.E.2d 51, 2004 N.C. App. LEXIS 406 (2004), rev'd in part, and aff'd in part, 361 N.C. 325, 643 S.E.2d 915 (2007).

Because defendant's sentence for second-degree murder was not in excess of the applicable statutory maximum sentence for a B2 felony, the aggravating factor that defendant shot into occupied property was not required to be proved to a jury beyond a reasonable doubt. State v. Byrd, 164 N.C. App. 522, 596 S.E.2d 860, 2004 N.C. App. LEXIS 972 (2004).

Trial court did not violate defendant's Sixth Amendment right to a jury trial by sentencing him, under G.S. 15A-1340.17(c), within the aggravated range because of aggravating factors that the court found, but which were not admitted by defendant or submitted to the jury because defendant's sentence fell within the presumptive range. State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

Aggravation Proper. — Where two or more offenses are joined for judgment, one offense may properly be aggravated by evidence needed to prove a separate joined offense; in a case where sexual offense by a person in a parental role was not the most serious crime in the consolidated judgment and thus was not the offense from which defendant's sentence was derived, the aggravator of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role, but rather properly applied to the most serious offense in each of the two consolidated judgments, the statutory sexual offense of a person aged 13, 14, or 15. State v. Tucker, 357 N.C. 633, 588 S.E.2d 853, 2003 N.C. LEXIS 1411 (2003).

Where defendant was charged with, inter alia, forgery, assault with a deadly weapon on a government official, and fleeing to elude arrest with a motor vehicle, as all the offenses were Class C felonies, the consolidated judgment was properly aggravated by factors that were an element of one, but not all, of the offenses; thus, the trial court properly found as aggravators that the offense was committed to avoid arrest and he knowingly created a great risk of death to more than one person by means of a weapon. State v. Harrison, 164 N.C. App. 693, 596 S.E.2d 834, 2004 N.C. App. LEXIS 999 (2004).

Aggravation Improper. — Trial court erred in sentencing defendant in the aggravated range because the issue was not submitted to the jury and there was no evidence that defendant admitted that the aggravating factor, that defendant committed the offense while on pretrial release of another charge, applied. State v. Caudle, 172 N.C. App. 261, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005), vacated, in part, on other grounds, 361 N.C. 151 (2006), no error found on remand, 641 S.E.2d 351, 2007 N.C. App. LEXIS 478 (2007).

Mitigating Factors Did Not Have to Be Considered. — Trial court did not err in failing to find the existence of statutory mitigating factors because defendant was sentenced within the presumptive range. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Court's Exercise of Discretion Resulted in Gender Discrimination. — Writ of habeas corpus was issued because the petitioner's prima facie claim of gender discrimination was unrebutted by the respondent where the 19 year-old petitioner was sentenced to between 23 and 36 years whereas a similarly situated 16 year-old female co-defendant received probation and eight months of time already served; where the court found no mitigating or aggravating circumstances but, rather, the totality of the evidence, including arguments of the prosecutor and statements of the court, indicated that the two were equally culpable; and where both were due to be sentenced as adults. Williams v. Currie, 103 F. Supp. 2d 858, 2000 U.S. Dist. LEXIS 9888 (M.D.N.C. 2000).

Scope of Discretion of Court. — This section provides for judicial discretion in choosing a minimum sentence within a specified range, but does not provide for judicial discretion in the determination of maximum sentences. State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174, 2001 N.C. App. LEXIS 322 (2001).

Discretion of Trial Court. — Trial court had the discretion to choose to not consider aggravating or mitigating factors and to choose to sentence defendant convicted of shooting the victim in the back to consecutive sentences within the presumptive range for the two offenses for which the defendant was convicted; the Structured Sentencing Act did not deprive defendant of due process or equal protection and, since the sentences imposed were within the limits set by the legislature, the Eighth Amendment was not offended. State v. Streeter, 146 N.C. App. 594, 553 S.E.2d 240, 2001 N.C. App. LEXIS 989 (2001), cert. denied, 356 N.C. 312, 571 S.E.2d 211 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1319, 154 L. Ed. 2d 1071 (2003).

Effect When Substantial Assistance Rendered. — The trial court's discretion in departing from minimum sentencing upon a finding that the defendant has rendered substantial assistance is not limited by the structured sentencing minimum of this section. State v.

Saunders, 131 N.C. App. 551, 507 S.E.2d 911 (1998).

Statutory Scheme for Statutory Rape Not Disproportionate. — Sentence of 202 to 252 months, for the statutory rape of a 15-year-old victim by 28-year-old defendant, was within the limits fixed by the structured sentencing laws found within G.S. 15A-1340.17, and there was no constitutional infirmity with regard to the issue of disproportionate punishment under G.S. 14-27.7A; the statutory scheme, providing a more severe penalty for younger victims, reflected a rational legislative policy and was not disproportionate to the crime. State v. Howard, 158 N.C. App. 226, 580 S.E.2d 725, 2003 N.C. App. LEXIS 1049 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 460 (2003).

Appeal Dismissed. — Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Sentence Within Presumptive Range Not Cruel and Unusual Punishment. — Since defendant's sentence of a term of 18 3/4 to 23 1/4 years for convictions of taking indecent liberties with a child under G.S. 14-202.1, statutory sex offense under G.S. 14-27.7A(a), and sexual activity by a custodian under G.S. 14-27(a), was within the presumptive range of sentences pursuant to G.S. 15A-1340.17(c), the sentence was not cruel and unusual punishment. State v. Evans, 162 N.C. App. 540, 591 S.E.2d 564, 2004 N.C. App. LEXIS 180 (2004).

Sentence Below Statutory Minimum Required Remand. — Because defendant's 64-month minimum sentence was below the 80-month minimum for a class C felon in the level IV mitigated range prescribed by G.S. 15A-1340.17(c), remand for resentencing was required. State v. Watkins, 189 N.C. App. 784, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

Separate Sentences on Two Underlying Predicate Offenses of Murder and Kidnapping Violated Double Jeopardy. — Where the record revealed that the trial judge actually imposed separate sentences for the accessory-after-the-fact to first-degree murder and accessory-after-the-fact to first-degree kidnapping convictions against the defendant, even though those convictions were consolidated, and imposed three consecutive sentences of 100-129 months' imprisonment, an aggregate sentence for both convictions on each count, the trial court erred by sentencing defendant on both predicate offenses. Thus, a double jeopardy violation occurred entitling defendant to an arrest of judgment on the conviction for accessory-after-the-fact to first-degree kidnapping. State v. Best, — N.C. App. —, — S.E.2d —, 2009 N.C. App. LEXIS 114 (Feb. 3, 2009).

Sentence Held Proper. — Sentence of 66 to 89 months for an assault conviction was not beyond the prescribed statutory maximum, and thus did not violate the holding in Apprendi v. New Jersey, 530 U.S. 466, 147 L. E. 2d 435, 120 S. Ct. 2348 (2000). State v. McDonald, 163 N.C. App. 458, 593 S.E.2d 793, 2004 N.C. App. LEXIS 510 (2004), cert. denied, 358 N.C. 548, 599 S.E.2d 910 (2004).

Trial court did not err in sentencing defendant by imposing sentences within the presumptive range for each of his three convictions, and not making findings regarding aggravating and mitigating factors; the trial court was not required to make findings regarding aggravating and mitigating factors because such findings were not required where there was no departure from the presumptive range of sentences. State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311, 2005 N.C. App. LEXIS 144 (2005), cert. denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

Sentence imposed on defendant of 84 months to 110 months imprisonment, where defendant had a prior record level of III, was not grossly disproportionate under the Eighth Amendment; defendant's sentence was as a Class C felony under G.S. 14-7.6 and his sentence was in the mitigated sentencing range of G.S. 15A-1340.17. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Fact that defendant was sentenced on both a first-degree kidnapping conviction and a robbery with a dangerous weapon conviction did not violate his double jeopardy rights as proof of the kidnapping did not require proof of the commission of the robbery itself; further, as the jury concluded that there was sufficient evidence to find defendant guilty of the separate offenses, the trial court was bound by G.S. 15A-1340.17 to sentence defendant on each conviction. State v. Moffitt, 185 N.C. App. 308, 648 S.E.2d 272, 2007 N.C. App. LEXIS 1737 (2007).

Applied in State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003); State v. Alexander, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Cited in State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996); State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998); State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000); In re Wright, 137 N.C. App. 104, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001); State v. Alexander, 167 N.C. App. 79, 604 S.E.2d 361, 2004 N.C. App. LEXIS 2073 (2004); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005); State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005); State v. Anderson, 177 N.C. App. 54, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006); State v. Roberson, 182 N.C. App. 133, 641 S.E.2d 347, 2007 N.C. App. LEXIS 491 (2007); State v. Byrd, 185 N.C. App. 597, 649 S.E.2d 444, 2007 N.C. App. LEXIS 1953 (2007); State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008); State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008); State v. Melvin, 188 N.C. App. 827, 656 S.E.2d 701, 2008 N.C. App. LEXIS 257 (2008); State v. Smith, — N.C. App. —, 668 S.E.2d 612, 2008 N.C. App. LEXIS 2021 (2008).

§§ 15A-1340.18, 15A-1340.19: Reserved for future codification purposes.

Part 3. Misdemeanor Sentencing.

§ 15A-1340.20. Procedure and incidents of sentence of imprisonment for misdemeanors.

(a) Application to Misdemeanors Only. — This Part applies to sentences imposed for misdemeanor convictions.

(b) Procedure Generally; Term of Imprisonment. — A sentence imposed for a misdemeanor shall contain a sentence disposition specified for the class of offense and prior conviction level, and any sentence of imprisonment shall be within the range specified for the class of offense and prior conviction level, unless applicable statutes require otherwise. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment. Except for the work and earned time credits authorized by G.S. 162-60, or earned time credits authorized by G.S. 15A-1355(c), if applicable, an offender whose sentence of imprisonment is activated shall serve each day of the term imposed.

(c) Suspension of Sentence. — Unless otherwise provided, the court shall suspend a sentence of imprisonment if the class of offense and prior conviction level requires community or intermediate punishment as a sentence disposition.

(c1) Active Punishment Exception. — The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.

(d) Earned Time Authorization. — An offender sentenced to a term of imprisonment that is activated is eligible to receive earned time credit for misdemeanant offenders awarded by the Department of Correction or the custodian of a local confinement facility, pursuant to rules adopted in accordance with law and pursuant to G.S. 162-60. These rules and statute combined shall not award misdemeanant offenders more than four days of earned time credit per month of incarceration. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 1; 1997-79, s. 1.)

CASE NOTES

Cited in State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004).

§ 15A-1340.21. Prior conviction level for misdemeanor sentencing.

(a) Generally. — The prior conviction level of a misdemeanor offender is determined by calculating the number of the offender's prior convictions that the court finds to have been proven in accordance with this section.

(b) Prior Conviction Levels for Misdemeanor Sentencing. — The prior conviction levels for misdemeanor sentencing are:

(1) Level I — 0 prior convictions.
(2) Level II — At least 1, but not more than 4 prior convictions.
(3) Level III — At least 5 prior convictions.

In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor at the time the offense for which the offender is being sentenced is committed.

(c) Proof of Prior Convictions. — A prior conviction shall be proved by any of the following methods:

(1) Stipulation of the parties.
(2) An original or copy of the court record of the prior conviction.
(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing.

(d) Multiple Prior Convictions Obtained in One Court Week. — For purposes of this section, if an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 13.1; 1997-80, s. 8.)

CASE NOTES

Action Not Moot. — The possibility, however slim, that the petitioner could face an enhanced sentence for a subsequent misdemeanor conviction in North Carolina for his conviction for delaying or obstructing a police officer and that he had paid or was liable to pay a fine that the state might choose to refund if he succeeded in overturning his conviction were collateral consequences that kept the action from becoming moot. Brooks v. North Carolina

Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997).

Contempt. — The defendant's 1994 criminal contempt adjudication did not constitute a "prior conviction" under this section; contempt usually constitutes a "petty offense" to which the constitutional guarantee of a trial by jury does not apply. State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001).

Clerical Errors in Prior Convictions. — State presented by a preponderance of the evidence that the defendant was the same person convicted in the disputed convictions, so that the trial court did not err in including the two convictions, despite clerical errors in the spelling of the defendant's name and the defendant's address, in determining the defendant's prior record level. State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380, 2003 N.C. App. LEXIS 187 (2003), cert. denied, 357 N.C. 254, 583 S.E.2d 43 (2003).

Correct Prior Record Level. — When defendant was convicted of contributing to the delinquency of a minor and misdemeanor larceny, and was sentenced to 24 months probation, the trial court failed to comply with G.S. 15A-1343.2(d) because it did not find that more than 18 months probation was necessary, although it properly found he had a Prior Record Level I for two Class 1 misdemeanors, under G.S. 15A-1340.21(b)(1). State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372, 2007 N.C. App. LEXIS 493 (2007).

Appeal Dismissed. — Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Cited in State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5; State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005); State v. Smith, — N.C. App. —, 668 S.E.2d 612, 2008 N.C. App. LEXIS 2021 (2008).

§ 15A-1340.22. Multiple convictions.

(a) Limits on Consecutive Sentences. — If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

(b) Consolidation of Sentences. — If an offender is convicted of more than one offense at the same session of court, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. Any sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1995 (Reg. Sess., 1996), c. 742, s. 16.)

§ 15A-1340.23. Punishment limits for each class of offense and prior conviction level.

(a) Offense Classification; Default Classifications. — The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a misdemeanor for which there is no classification, it is as classified in G.S. 14-3.

(b) Fines. — Any judgment that includes a sentence of imprisonment may also include a fine. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. If a community punishment is authorized, the judgment may consist of a fine only. Unless otherwise provided for a specific offense, the maximum fine that may be imposed is two hundred dollars ($200.00) for a Class 3 misdemeanor and one thousand dollars ($1,000) for a Class 2 misdemeanor. The amount of the fine for a Class 1 misdemeanor and a Class A1 misdemeanor is in the discretion of the court.

(c) Punishment for Each Class of Offense and Prior Conviction Level; Punishment Chart Described. — Unless otherwise provided for a specific offense, the authorized punishment for each class of offense and prior conviction level is as specified in the chart below. Prior conviction levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offenses are indicated by the Arabic numbers placed vertically on the left side of the chart. Each grid on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; and "A" indicates that an active punishment is authorized; and

(2) A range of durations for the sentence of imprisonment: any sentence within the duration specified is permitted.

	PRIOR CONVICTION LEVELS		
MISDEMEANOR OFFENSE CLASS	LEVEL I No Prior Convictions	LEVEL II One to Four Prior Convictions	LEVEL III Five or More Prior Convictions
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A.

(1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 507, s. 19.5(g).)

Local Modification. — Lee: 1999-301, s. 4; Moore: 1999-301, s. 6.1(d); Pitt: 2002-142, s. 6; Robeson: 2004-52, s. 2; Rutherford: 1999-301, s. 4.

CASE NOTES

Career Offenders. — For career offender purposes under federal statute, the date the prior conviction was sustained should control, not the date of later sentencing; thus, defendant was properly determined to be a career offender under federal statute where prior felony offense had been amended to become a misdemeanor. United States v. Johnson, 114 F.3d 435 (4th Cir. 1997), cert. denied, 522 U.S. 903, 118 S. Ct. 257, 139 L. Ed. 2d 184 (1997).

Action Not Moot. — The possibility, however slim, that the petitioner could face an enhanced sentence for a subsequent misdemeanor conviction in North Carolina for his conviction for delaying or obstructing a police officer and that he had paid or was liable to pay a fine that the state might choose to refund if he succeeded in overturning his conviction were collateral consequences that kept the action from becoming moot. Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997).

Appeal Dismissed. — Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Applied in State v. Gregory, 154 N.C. App. 718, 572 S.E.2d 838, 2002 N.C. App. LEXIS 1534 (2002).

Cited in In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002); State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5; State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005); State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005); State v. Taylor, 187 N.C. App. 291, 652 S.E.2d 741, 2007 N.C. App. LEXIS 2358 (2007); State v. Smith, — N.C. App. —, 668 S.E.2d 612, 2008 N.C. App. LEXIS 2021 (2008).

§§ 15A-1340.24 through 15A-1340.33: Reserved for future codification purposes.

ARTICLE 81C.

Restitution.

§ 15A-1340.34. Restitution generally.

(a) When sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question. For purposes of this Article, the term "victim" means a person directly and proximately harmed as a result of the defendant's commission of the criminal offense.

(b) If the defendant is being sentenced for an offense for which the victim is entitled to restitution under Article 46 of this Chapter, the court shall, in addition to any penalty authorized by law, require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant. If the defendant is placed on probation or post-release supervision, any restitution ordered under this subsection shall be a condition of probation as provided in G.S. 15A-1343(d) or a condition of post-release supervision as provided in G.S. 148-57.1.

(c) When subsection (b) of this section does not apply, the court may, in addition to any other penalty authorized by law, require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant. (1998-212, s. 19.4(d).)

Editor's Note. — Session Laws 1998-212, s. 19.4(d), enacted this section as G.S. 15A-1340.24. It was recodified as this section at the direction of the Revisor of Statutes.

CASE NOTES

This Section Only Applicable to Crimes Committed after December 1, 1998. — The trial court's imposition of a civil judgment against the defendant in the amount of $ 11,000 to cover the victim's funeral expenses was improper where the crime was committed before this section became effective. State v. Salmon, 140 N.C. App. 567, 537 S.E.2d 829, 2000 N.C. App. LEXIS 1242 (2000), cert. denied, 353 N.C. 394, 547 S.E.2d 424 (2001).

Pain and Suffering. — Where a trial court grants an award of restitution based on a victim's pain and suffering, the trial court has exceeded the intended bases upon which such an award may be premised. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

Restitution Held Proper. — Where defendant raped a victim, an order of restitution to reimburse the victim for medical expenses resulting from the rape complied with the statutory requirements because the relatively modest amount of restitution, $2,301, and the terms of its payment were not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Restitution Award Held Inappropriate. — Trial court erred in awarding restitution under G.S. 15A-1340.34(c) because (1) the losses for the victim's unrecovered tools and lost wages were not related to possession of stolen property act for which defendant was convicted, (2) there was no evidence of how much income the victim lost as a result of the stolen tools, and (3) the State admitted that its request for restitution included an amount for tools that were not found in defendant's possession. State v. Southards, 189 N.C. App. 152, 657 S.E.2d 419, 2008 N.C. App. LEXIS 403 (2008).

Trial court erred by ordering defendant, convicted of being an accessory after the fact to murder, to pay restitution as there was no direct and proximate causal link between his actions as an accessory-after-the-fact and the harm caused to the victims' families as the only evidence that defendant attempted to cover up the murders and kidnappings was that he washed the exterior and vacuumed the interior of his car, and attempted to pick up the perpetrators at a motel the day after the murders. However, there was no evidence that those actions actually obstructed the murder investigation or assisted the principals in evading detection, arrest, or punishment, and there was contrary evidence tending to show that defendant ultimately assisted in the perpetrators' apprehension in as much as he voluntarily went to the police and gave a statement. State v. Best, — N.C. App. —, — S.E.2d —, 2009 N.C. App. LEXIS 114 (Feb. 3, 2009).

Trial court's G.S. 15A-1340.34(a) restitution award was error. Defendant's actions after the principal crimes were committed—cleaning the car and making a failed attempt to pick up the principals—did not cover up any evidence or obstruct the murder investigation; therefore, there was no direct and proximate causal link between defendant's actions as an accessory-after-the-fact and the harm caused to the victims' families. State v. Best, — N.C. App. —, 674 S.E.2d 467, 2009 N.C. App. LEXIS 369 (2009).

§ 15A-1340.35. Basis for restitution.

(a) In determining the amount of restitution, the court shall consider the following:

(1) In the case of an offense resulting in bodily injury to a victim:
  a. The cost of necessary medical and related professional services and devices or equipment relating to physical, psychiatric, and psychological care required by the victim;
  b. The cost of necessary physical and occupational therapy and rehabilitation required by the victim; and
  c. Income lost by the victim as a result of the offense.

(2) In the case of an offense resulting in the damage, loss, or destruction of property of a victim of the offense:
  a. Return of the property to the owner of the property or someone designated by the owner; or
  b. If return of the property under sub-subdivision (2)a. of this subsection is impossible, impracticable, or inadequate:
    1. The value of the property on the date of the damage, loss, or destruction; or
    2. The value of the property on the date of sentencing, less the value of any part of the property that is returned.

(3) Any measure of restitution specifically provided by law for the offense committed by the defendant.

(4) In the case of an offense resulting in bodily injury that results in the death of the victim, the cost of the victim's necessary funeral and related services, in addition to the items set out in subdivisions (1), (2), and (3) of this subsection.

(b) The court may require that the victim or the victim's estate provide admissible evidence that documents the costs claimed by the victim or the victim's estate under this section. Any such documentation shall be shared with the defendant before the sentencing hearing. (1998-212, s. 19.4(d).)

Editor's Note. — Session Laws 1998-212, s. 19.4(d), enacted this section as G.S. 15A-1340.25. It was recodified as this section at the direction of the Revisor of Statutes.

CASE NOTES

Pain and Suffering. — Where a trial court grants an award of restitution based on a victim's pain and suffering, the trial court has exceeded the intended bases upon which such an award may be premised. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

Basis for Determining Value of Restitution. — Trial court did not err in averaging two values to determine the cost of some illegally cut timber, both of which were supported by evidence, the property owner's testimony and the value set forth in the forestry report. State v. Freeman, 164 N.C. App. 673, 596 S.E.2d 319,

2004 N.C. App. LEXIS 980 (2004).

Evidence of Amount Owed. — Restitution order in an involuntary manslaughter prosecution was improper as the only information as to the amount of restitution owed to the victim's father was provided by the prosecutor and did not constitute evidence; the issue was preserved for appellate review under G.S. 15A-1446(d)(18) even though defendant did not specifically object. State v. Replogle, 181 N.C. App. 579, 640 S.E.2d 757, 2007 N.C. App. LEXIS 257 (2007).

§ 15A-1340.36. Determination of restitution.

(a) In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.

(b) The court may require the defendant to make full restitution no later than a certain date or, if the circumstances warrant, may allow the defendant to make restitution in installments over a specified time period.

(c) When an active sentence is imposed, the court shall consider whether it should recommend to the Secretary of Correction that restitution be made by the defendant out of any earnings gained by the defendant if the defendant is granted work-release privileges, as provided in G.S. 148-33.2. The court shall also consider whether it should recommend to the Post-Release Supervision and Parole Commission that restitution by the defendant be made a condition of any parole or post-release supervision granted the defendant, as provided in G.S. 148-57.1. (1998-212, s. 19.4(d).)

Editor's Note. — Session Laws 1998-212, s. 19.4(d), enacted this section as G.S. 15A-1340.26. It was recodified as this section at the direction of the Revisor of Statutes.

CASE NOTES

Basis for Determining the Value of Restitution. — Trial court did not err in averaging two values to determine the cost of some illegally cut timber, both of which were supported by evidence, the property owner's testimony and the value set forth in the forestry report. State v. Freeman, 164 N.C. App. 673, 596 S.E.2d 319, 2004 N.C. App. LEXIS 980 (2004).

When a trial court ordered defendant to pay restitution in the amount of the original cost of the stereo equipment he stole from the victim's vehicle, this was not erroneous because the trial court inspected the equipment and heard the testimony of the victim and law-enforcement officers, so it had some evidence allowing it to conclude that this amount of restitution was reasonable because of the damage done to the victim's car, as well as to the equipment. State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372, 2007 N.C. App. LEXIS 493 (2007).

Consideration of Restitution Award Factors. — Although G.S. 15A-1340.36(a) expressly does not require the trial court to make findings of fact or conclusions of law on the restitution award factors such as defendant's resources, ability to earn, support obligations, and any other matters that pertain to defendant's ability to pay, a trial court erred when it ordered restitution without considering the required statutory factors pursuant to G.S. 15A-1340.36 and G.S. 14-107. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

Where defendant raped a victim, an order of restitution to reimburse the victim for medical expenses resulting from the rape complied with the statutory requirements because the relatively modest amount of restitution, $2,301, and the terms of its payment were not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Findings of Fact Not Required. — Trial court did not err in failing to make findings of fact as to restitution in sentencing defendant as the court was not required to make such findings under G.S. 15A-1340.36(a). State v. Tuck, 191 N.C. App. 768, 664 S.E.2d 27, 2008 N.C. App. LEXIS 1495 (2008).

Ability to Pay. — Trial court properly set the amount of restitution to be paid by defendant pursuant to G.S. 15A-1340.36 after defendant was convicted of six counts of embezzlement, because defendant failed to show that, considering her entire family income, she could not pay the amount of restitution ordered, and the trial court properly determined the amount of restitution by subtracting the amount received by the victim in an insurance settlement from the total amount taken. State v. Riley, 167 N.C. App. 346, 605 S.E.2d 212, 2004 N.C. App. LEXIS 2186 (2004).

Trial court did not err in ordering defendant to pay restitution in a case in which defendant shot and wounded another person; defendant's counsel pointed out that: (1) defendant was working and (2) that defendant could pay restitution if defendant was granted work release, and defendant did not contradict those assertions even though defendant was given an opportunity to address the restitution requirement. State v. Tate, 187 N.C. App. 593, 653 S.E.2d 892, 2007 N.C. App. LEXIS 2553 (2007).

Court was not required to make findings of fact or conclusions of law regarding defendant's ability to pay restitution, particularly where defendant's counsel represented that defendant would be able to pay, thereby taking the issue out of the case. State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007).

Relation to Criminal Conviction. — When defendant was not convicted of assault with a deadly weapon inflicting serious injury as to a particular victim, he was still properly ordered to pay restitution as to this victim, under G.S. 15A-1340.36(a), because he was convicted of felonious hit and run with personal injury as to this victim, so the restitution order was related to a criminal offense of which defendant was convicted. State v. Valladares, 182 N.C. App. 525, 642 S.E.2d 489, 2007 N.C. App. LEXIS 674 (2007).

§ 15A-1340.37. Effect of restitution order; beneficiaries.

(a) An order providing for restitution does not abridge the right of a victim or the victim's estate to bring a civil action against the defendant for damages arising out of the offense committed by the defendant. Any amount paid by the defendant under the terms of a restitution order under this Article shall be credited against any judgment rendered against the defendant in favor of the same victim in a civil action arising out of the criminal offense committed by the defendant.

(b) The court may order the defendant to make restitution to a person other than the victim, or to any organization, corporation, or association, including the Crime Victims Compensation Fund, that provided assistance to the victim following the commission of the offense by the defendant and is subrogated to the rights of the victim. Restitution shall be made to the victim or the victim's estate before it is made to any other person, organization, corporation, or association under this subsection.

(c) No government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs and except that the State may receive restitution for the total amount of a judgment authorized by G.S. 7A-455(b).

(d) No third party shall benefit by way of restitution as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant, but the liability of a third party to pay indemnity to an aggrieved party or any payment of indemnity actually made by a third party to an aggrieved party does not prohibit or limit in any way the power of the court to require the defendant to make complete and full restitution to the aggrieved party for the total amount of the damage or loss caused by the defendant. (1998-212, s. 19.4(d).)

Editor's Note. — Session Laws 1998-212, s. 19.4(d), enacted this section as G.S. 15A-1340.27. It was recodified as this section at the direction of the Revisor of Statutes.

§ 15A-1340.38. Enforcement of certain orders for restitution.

(a) In addition to the provisions of G.S. 15A-1340.36, when an order for restitution under G.S. 15A-1340.34(b) requires the defendant to pay restitution in an amount in excess of two hundred fifty dollars ($250.00) to a victim, the order may be enforced in the same manner as a civil judgment, subject to the provisions of this section.

(b) The order for restitution under G.S. 15A-1340.34(b) shall be docketed and indexed in the county of the original conviction in the same manner as a civil judgment pursuant to G.S. 1-233, et seq., and may be docketed in any other county pursuant to G.S. 1-234. The judgment may be collected in the same manner as a civil judgment unless the order to pay restitution is a condition of probation. If the order to pay restitution is a condition of probation, the judgment may only be executed upon in accordance with subsection (c) of this section.

(c) If the defendant is ordered to pay restitution under G.S. 15A-1340.34(b) as a condition of probation, a judgment docketed under this section may be collected in the same manner as a civil judgment. However, the docketed judgment for restitution may not be executed upon the property of the defendant until the date of notification to the clerk of superior court in the county of the original conviction that the judge presiding at the probation termination or revocation hearing has made a finding that restitution in a sum certain remains due and payable, that the defendant's probation has been terminated or revoked, and that the remaining balance of restitution owing may be collected by execution on the judgment. The clerk shall then enter upon the judgment docket the amount that remains due and payable on the judgment, together with amounts equal to the standard fees for docketing, copying, certifying, and mailing, as appropriate, and shall collect any other fees or charges incurred as in the enforcement of other civil judgments, including accrued interest. However, no interest shall accrue on the judgment until the entry of an order terminating or revoking probation and finding the amount remaining due and payable, at which time interest shall begin to accrue at the legal rate pursuant to G.S. 24-5. The interest shall be applicable to the amount determined at the termination or revocation hearing to be then due and payable. The clerk shall notify the victim by first-class mail at the victim's last known address that the judgment may be executed upon, together with the amount of the judgment. Until the clerk receives notification of termination or revocation of probation and the amount that remains due and payable on the order of restitution, the clerk shall not be required to update the judgment docket to reflect partial payments on the order of restitution as a condition of probation. The stay of execution under this subsection shall not apply to property of the defendant after the transfer or conveyance of the property to another person. When the criminal order of restitution has been paid in full, the civil judgment indexed under this section shall be deemed satisfied and the judgment shall be cancelled. Payment satisfying the civil judgment shall also be credited against the order of restitution.

(d) An appeal of the conviction upon which the order of restitution is based shall stay execution on the judgment until the appeal is completed. If the conviction is overturned, the judgment shall be cancelled. (1998-212, s. 19.4(d).)

Editor's Note. — Session Laws 1998-212, s. 19.4(d), enacted this section as G.S. 15A-1340.28. It was recodified as this section at the direction of the Revisor of Statutes.

§§ 15A-1340.39 through 15A-1340.49: Reserved for future codification purposes.

ARTICLE 81D.

Permanent No Contact Order Against Convicted Sex Offender.

§ 15A-1340.50. Permanent no contact order prohibiting future contact by convicted sex offender with crime victim.

(a) The following definitions apply in this Article:

(1) Permanent no contact order. — A permanent injunction that prohibits any contact by a defendant with the victim of the sex offense for which the defendant is convicted. The duration of the injunction is the lifetime of the defendant.

(2) Sex offense. — Any criminal offense that requires registration under Article 27A of Chapter 14 of the General Statutes.

(3) Victim. — The person against whom the sex offense was committed.

(b) When sentencing a defendant convicted of a sex offense, the judge, at the request of the district attorney, shall determine whether to issue a permanent no contact order. The judge shall order the defendant to show cause why a permanent no contact order shall not be issued and shall hold a show cause hearing as part of the sentencing procedures for the defendant.

(c) The victim shall have a right to be heard at the show cause hearing.

(d) The judge sentencing the defendant is the trier of fact regarding the show cause hearing.

(e) At the conclusion of the show cause hearing the judge shall enter a finding for or against the defendant. If the judge determines that reasonable grounds exist for the victim to fear any future contact with the defendant, the judge shall issue the permanent no contact order. The judge shall enter written findings of fact and the grounds on which the permanent no contact order is issued. The no contact order shall be incorporated into the judgment imposing the sentence on the defendant for the conviction of the sex offense.

(f) The court may grant one or more of the following forms of relief in a permanent no contact order under this Article:

(1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere with the victim.

(2) Order the defendant not to follow the victim, including at the victim's workplace.

(3) Order the defendant not to harass the victim.

(4) Order the defendant not to abuse or injure the victim.

(5) Order the defendant not to contact the victim by telephone, written communication, or electronic means.

(6) Order the defendant to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.

(7) Order other relief deemed necessary and appropriate by the court.

(g) A permanent no contact order entered pursuant to this Article shall be enforced by all North Carolina law enforcement agencies without further order of the court. A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a permanent no contact order. A person who knowingly violates a permanent no contact order is guilty of a Class A1 misdemeanor.

(h) At any time after the issuance of the order, the State, at the request of the victim, or the defendant may make a motion to rescind the permanent no contact order. If the court determines that reasonable grounds for the victim to fear any future contact with the defendant no longer exist, the court may rescind the permanent no contact order.

(i) The remedy provided by this Article is not exclusive but is in addition to other remedies provided under law. (2009-380, s. 1)

Editor's Note. — Session Laws 2009-380, s. 2, made this Article effective December 1, 2009, and applicable to offenses committed on or after that date.

ARTICLE 82.

Probation.

OFFICIAL COMMENTARY

This Article consolidates the various provisions on probation.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1341. Probation generally.

(a) Use of Probation. — Unless specifically prohibited, a person who has been convicted of any criminal offense may be placed on probation as provided by this Article if the class of offense of which the person is convicted and the person's prior record or conviction level under Article 81B of this Chapter authorizes a community or intermediate punishment as a type of sentence disposition or if the person is convicted of impaired driving under G.S. 20-138.1.

(a1) Deferred Prosecution. — A person who has been charged with a Class H or I felony or a misdemeanor may be placed on probation as provided in this Article on motion of the defendant and the prosecutor if the court finds each of the following facts:

(1) Prosecution has been deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.

(3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.

(4) The defendant has not previously been placed on probation and so states under oath.

(5) The defendant is unlikely to commit another offense other than a Class 3 misdemeanor.

(a2) Deferred Prosecution for Purpose of Drug Treatment Court Program. — A defendant eligible for a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes may be placed on probation if the court finds that prosecution has been deferred by the prosecutor, with the approval of the court, pursuant to a written agreement with the defendant, for the purpose of allowing the defendant to participate in and successfully complete the Drug Treatment Court Program.

(b) Supervised and Unsupervised Probation. — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by or assignment to a probation officer.

(c) Repealed by Session Laws 1995, c. 429, s. 1.

(d) Search of Sex Offender Registration Information Required When Placing a Defendant on Probation. — When the court places a defendant on probation, the probation officer assigned to the defendant shall conduct a search of the defendant's name or other identifying information against the registration information regarding sex offenders compiled by the Division of Criminal Statistics of the Department of Justice in accordance with Article 27A of Chapter 14 of the General Statutes. The probation officer may conduct the search using the Internet site maintained by the Division of Criminal Statistics.

(e) Review of Defendant's Juvenile Record. — The probation officer assigned to a defendant may examine and obtain copies of the defendant's juvenile record in a manner consistent with G.S. 7B-3000(b) and (e1). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 4A, 5; 1981, c. 377, ss. 2, 3; 1993, c. 538, s. 15; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 429, s. 1; 1999-298, s. 1; 2006-247, s. 14; 2009-372, s. 4.)

OFFICIAL COMMENTARY

Subsection (b) specifies both supervised and unsupervised probation. These two categories replace the present probation and release on suspended sentence; in this Article unsupervised probation is the equivalent of the present release on suspended sentence without probation. The Commission felt that any convicted person should be able to choose to serve a sentence rather than probation, and thus drafted subsection (c).

Cross References. — As to restoration of citizenship in case of discharge or pardon, see G.S. 13-1 et seq. As to probation in cases of prostitution, see G.S. 14-208. As to suspension of sentence in bastardy proceedings, see G.S. 49-8.

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

Editor's Note. — Session Laws 1995, c. 429, s. 5, provided that if the constitutional amendment proposed by Session Laws 1995, c. 429, s. 2, were approved, subsection (c) was repealed, effective January 1, 1997, and the repeal of subsection (c) applied to any person whose criminal offense occurred on or after that date. The constitutional amendment was approved by the qualified voters of the State at the general election held in November 1996.

Session Laws 2006-247, s. 1, provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 21, is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2009-372, s. 19 is a severability clause.

Effect of Amendments. — Session Laws 2009-372, s. 4, effective December 1, 2009, and applicable to offenses committed on or after that date, added subsection (e).

Legal Periodicals. — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

For note, "The Modern-Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions," see 5 Duke L.J. 1357 (1989).

A Fourth Amendment Problem with Probation in North Carolina, 23 Campbell L. Rev. 143 (2000).

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under former G.S. 15-197 and 15-200.*

Enactment of Article 81A of this Chapter resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the new "Fair Sentencing Act," see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Purpose of probation is to avoid imprisonment so long as the guilty man gives promise of reform. Clearly, therefore, probation is not intended to be the equivalent of imprisonment. The aim of the statute is reformatory. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Primary purpose of a suspended sentence or parole is to further the reform of the defendant. State v. Baynard, 4 N.C. App. 645, 167 S.E.2d 514 (1969); State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975); Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Probation and Parole Distinguished. — Probation relates to judicial action taken before the prison door is closed, whereas parole relates to executive action taken after the door has closed on a convict. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

Probation or suspension of sentence is not a right granted by either the Constitution of the United States or the Constitution of this State, but is an act of grace to one convicted of crime. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

But an Act of Grace. — Probation is an act of grace accorded one who has been convicted of crime. The defendant carries the keys to his freedom in his willingness to comply with the court's sentence. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

Court has inherent power to suspend judgment or stay execution of a sentence in a criminal case. This Article did not withdraw this authority from the courts. It provides a procedure which is cumulative and concurrent rather than exclusive. State v. Simmington, 235 N.C. 612, 70 S.E.2d 842 (1952).

Courts having jurisdiction may pronounce judgment as by law provided; and then, with the defendant's consent, express or implied, suspend execution thereof upon prescribed conditions. Long recognized as an inherent power of the court, such authority is now recognized expressly by statute. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).

The inherent power of a court having jurisdiction to suspend judgment or stay execution of sentence on conviction in a criminal case for a determinate period and for a reasonable length of time has been recognized and upheld in this jurisdiction. State v. Miller, 225 N.C. 213, 34 S.E.2d 143 (1945); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957).

The adoption of this Article did not affect the inherent power of the court to suspend sentences in criminal cases upon reasonable and just conditions. This Article establishes cumulative and concurrent procedures which supplement rather than limit the inherent sentencing power of the court. This Article only provides the courts with additional authority concurrent with the inherent power of the court. State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

And May Dictate Conditions of Probation. — Because a court has the inherent power to suspend a judgment upon reasonable and just conditions, the trial court need not rely on its additional statutory authority to dictate the conditions of probation. State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

Due Process to Be Afforded Before Probation Is Revoked. — Under subsection (c) of this section, a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, G.S. 15A-1345 guarantees full due process before there can be a revocation of probation and a resulting prison sentence. State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

Evidence in Probation Revocation Proceedings. — The trial court, in probation revocation proceedings, is not bound by strict rules of evidence. State v. Darrow, 83 N.C. App. 647, 351 S.E.2d 138 (1986).

Standard of Proof in Probation Revocation Proceedings. — In probation revocation proceedings, grounds for revocation need not be proven beyond a reasonable doubt. Instead, the court may allow revocation of probation on evidence which is sufficient to satisfy the court, in its discretion, that defendant has violated a valid condition of his probation. State v. Darrow, 83 N.C. App. 647, 351 S.E.2d 138 (1986).

Probation Revocation Upheld. — Trial court's finding that the State proved, by a preponderance of the evidence, that defendant made an obscene telephone call to burglary victim on two occasions supported conclusion that defendant had violated the terms of the agreement he executed with the State pursuant to this section, whereby he would participate in the felony diversion program and be placed on probation in exchange for deferral of prosecution on the burglary charge and would have certain restrictions, one of which was that he could not contact or harass victim, and that his removal from the felony diversion program was for just cause. State v. Darrow, 83 N.C. App. 647, 351 S.E.2d 138 (1986).

Discretion of Trial Judge. — The propriety of suspending the sentence, ordinarily, is a matter resting in the sound discretion of the trial judge. The General Assembly has endeavored to implement the power of the court in this respect by making further provisions for probation and supervision in this and the following sections. State v. Stallings, 234 N.C. 265, 66 S.E.2d 822 (1951).

Prisoner Has Right to Rely on Conditions of Suspension. — Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the sentence imposed, the prisoner has a right to rely upon such conditions. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in a probation judgment, defendant has a right to rely upon such conditions, and as long as he complies therewith the suspension must stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

And so long as he complies with such conditions, the suspension should stand. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Assumption of Obligations of Probation. — Defendant is not required to accept a suspended sentence or probationary judgment, but if he does, he voluntarily assumes the obligations imposed. State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

A person does not serve a prison sentence while on probation or parole any more than he does while free on bail. In both instances, there are certain restrictions generally on the person's movements but the person's condition is very different from that of confinement in a prison. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Period during which the execution of a sentence may be suspended on conditions has been fixed as five years, regardless of the term of imprisonment authorized by the law. State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).

Suspension of sentence for a period of five years is within the limits provided by law. State v. Baynard, 4 N.C. App. 645, 167 S.E.2d 514 (1969).

The maximum period during which the execution of a sentence in a criminal case may be suspended on conditions is five years. A suspension of sentence for a period in excess of that authorized by this section is not void in toto. Ordinarily it is valid to the extent the court had power to suspend or stay execution and void merely as to the excess. State v. McBride, 240 N.C. 619, 83 S.E.2d 488 (1954); State v. Rowland, 32 N.C. App. 756, 233 S.E.2d 682 (1977).

Suspension May Be for Five Years Although Maximum Imprisonment Is Two Years. — The superior court has the power to suspend execution of a sentence in a criminal prosecution for a period of five years, notwithstanding that the maximum imprisonment authorized for the offense of which defendant is convicted is two years. State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939); State v. McMilliam, 243 N.C. 775, 92 S.E.2d 205 (1956), overruled on other grounds, State v. Lomeareo, 306 N.C. 594, 295 S.E.2d 399 (1982).

Period of Suspension Where Not Specified in Judgment. — Where the judgment does not specify the period of time that execution of the sentence is suspended upon conditions, execution of the sentence is suspended or stayed for the period of time that the court is empowered by this section to suspend the sentence. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Probation Must Be Consistent with Right of Appeal. — Where the privilege of probation, granted by this Article, is so conditioned as to be inconsistent with a defendant's right of appeal, the judgment is erroneous. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Waiver of Right to Appeal Conviction. — An order suspending the imposition or execution of sentence on condition is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. He is relegated to his right to contest imposition of judgment or execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. State v. Miller, 225 N.C. 213, 34 S.E.2d 143 (1945).

Where there is a conviction and a sentence imposed, the court may suspend the judgment or its execution upon payment of costs or other conditions, and where no appeal is taken, the judgment will be considered final when the time for appealing the case has expired, and the defendant may not be heard thereafter to complain on the ground that his conviction was not in accord with due process of law. Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

Double Jeopardy Not Violated by Dismissal. — Before trial, defendant failed to comply with the conditions of a deferred prosecution agreement he entered under G.S. 15A-1341(a1); because defendant was neither tried on, nor pled guilty to, the original misdemeanor charges, jeopardy never attached so that his right to be free from double jeopardy under USCS Const. Amend. 5 was not violated by his subsequent trial and conviction for embezzlement by aiding and abetting. State v. Ross, 173 N.C. App. 569, 620 S.E.2d 33, 2005 N.C. App. LEXIS 2084 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Suspension on Condition That Defendant Not Operate Motor Vehicle. — Upon defendant's conviction of operating a motor vehicle while under the influence of intoxicating beverage, the court may not suspend judgment upon condition that the defendant not operate a motor vehicle upon the public roads during the period of suspension, unless defendant consents thereto, expressly or by implication. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); State v. Green, 251 N.C. 141, 110 S.E.2d 805 (1959).

Pretrial Assignment to DAPP. — The legislature has provided for pretrial assignment of a defendant to the Division of Adult Probation and Parole only upon deferred prosecution, and upon the agreement to assume supervision of the person. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Court Had No Authority to Order DAPP to Supervise Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant, who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Cited in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1342. Incidents of probation.

(a) Period. — The court may place a convicted offender on probation for the appropriate period as specified in G.S. 15A-1343.2(d), not to exceed a maximum of five years. The court may place a defendant as to whom prosecution has been deferred on probation for a maximum of two years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

Extension. — In addition to G.S. 15A-1344, the court with the consent of the defendant may extend the period of probation beyond the original period (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation. The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the original period of probation. Any probationary judgment form provided to a defendant on supervised probation shall state that probation may be extended pursuant to this subsection.

(a1) Supervision of Defendants on Deferred Prosecution. — The Division of Community Corrections of the Department of Correction may be ordered by the court to supervise an offender's compliance with the terms of a deferred prosecution agreement entered into under G.S. 15A-1341(a1). Violations of the terms of the agreement shall be reported to the court as provided in this Article and to the district attorney in the district in which the agreement was entered.

(b) Early Termination. — The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (a) if warranted by the conduct of the defendant and the ends of justice.

(c) Conditions; Suspended Sentence. — When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The probation officer must give reasonable notice to the probationer, and the probationer may appear. The court must review the case file of a probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Supervised probationers are subject to out-of-State supervision under the provisions of G.S. 148-65.1.

(f) Appeal from Judgment of Probation. — A defendant may seek post-trial relief from a judgment which includes probation notwithstanding the authority of the court to modify or revoke the probation.

(g) Invalid Conditions; Timing of Objection. — The regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every circumstance valid conditions of probation. A court may not revoke probation for violation of an invalid condition imposed pursuant to G.S. 15A-1343(b1). The failure of a defendant to object to a condition of probation imposed pursuant to G.S. 15A-1343(b1) at the time such a condition is imposed does not constitute a waiver of the right to object at a later time to the condition.

(h) Limitation on Jurisdiction to Alter or Revoke Unsupervised Probation. — In the judgment placing a person on unsupervised probation, the judge may limit jurisdiction to alter or revoke the sentence under G.S. 15A-1344. When jurisdiction to alter or revoke is limited, the effect is as provided in G.S. 15A-1344(b).

(i) Immunity from Prosecution upon Compliance. — Upon the expiration or early termination as provided in subsection (b) of a period of probation imposed after deferral of prosecution and before conviction, the defendant shall be immune from prosecution of the charges deferred.

(j) Immunity for Injury to Defendant Performing Community Service. — Immunity from liability for injury to a defendant performing community service shall be as set forth in G.S. 143B-475.1(d). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 6, 7; 1981, c. 377, ss. 4-6; 1983, c. 435, s. 5.1; c. 561, s. 7; 1985 (Reg. Sess., 1986), c. 960, s. 1; 1993, c. 84, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 6; 1995, c. 330, s. 1; 2008-129, s. 3; 2009-372, s. 10.)

OFFICIAL COMMENTARY

Subsections (a) to (f) codify prior law and practice. Subsection (g) seeks to make clear the resolution of the dilemma a defendant is placed in when he is placed on probation with invalid conditions. The defendant wishes to contest the conditions but is afraid that if he does so he will be given an active sentence. Subsection (g) makes it clear that he may accept the probation and still contest the validity of the condition if his probation is later sought to be revoked for its violation. Prior law provided that alteration or revocation of probation is possible by any judge, but only a judge who enters the order may alter a suspended sentence without probation. Subsection (h), coupled with the concomitant G.S. 15A-1344 strikes a balance between members of the Commission who felt that both supervised and unsupervised probation should be treated the same, and those who felt the traditional arrangement should be retained (because of the lack of knowledge about an unsupervised probationer available to anyone other than the sentencing judge). The compromise is that a judge placing a defendant on unsupervised probation may specify that only he is to be able to alter the unsupervised probation. In the absence of such specification, however, any judge may do so.

Editor's Note. — Session Laws 1983, c. 435, s. 1, provided that that act shall be known as the Safe Roads Act of 1983.

Session Laws 1983, c. 435, s. 41.1, provided: "The original inclusion and ultimate deletion in the course of passing this act of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish beverages to such persons."

G.S 148-65.1, referred to above, has been repealed.

Session Laws 2009-372, s. 19 is a severability clause.

Effect of Amendments. — Session Laws 2008-129, s. 3, effective December 1, 2008, and applicable to probation violation hearings on or after that date, inserted "In addition to G.S. 15A-1344" at the beginning of the second paragraph of subsection (a).

Session Laws 2009-372, s. 10, effective December 1, 2009, and applicable to offenses committed on or after that date, added subsection (a1).

Legal Periodicals. — For note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

CASE NOTES

Condition for Probation of Restitution Error where Defendant Clearly Could Not Comply. — The trial court erred in imposing a condition on defendant's probation for conviction of misdemeanor death by vehicle on the payment of $500,000 restitution, with which she clearly could not comply. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866 (1989), cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Right to Object to Condition at Later Time. — This section means that a probationer is not required to object to a condition of probation at the time probation is imposed, but has the right to object "at a later time" to the condition. State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981).

Words "at a later time" refer to the revocation hearing. State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981).

Section does not mean that probationer has a perpetual right to challenge a condition of probation and exercise such right for the first time at the appellate level. State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981).

Defendant may not raise an initial objection to a condition of probation on appeal, but must first object no later than the revocation hearing. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Where the record on appeal contained no written or oral objections by defendant raising the issue of a defect in the original judgment at the revocation hearing, defendant waived this issue on appeal. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Consent to Extension of Probation. — Where defendant did not move to withdraw a guilty plea pursuant to G.S. 15A-1024, did not give timely notice of appeal pursuant to G.S. 15A-1444, and did not petition for writ of certiorari pursuant G.S. 15A-1444(e) and N.C. R. App. P. 21(c), any challenge to the original judgment was waived; since defendant waived the right to appeal by consenting to an initial extension of probation under G.S. 15A-1342, the trial court was entitled to revoke defendant's probation and activate the sentence under G.S. 15A-1344(d) after a second violation of probation. State v. Rush, 158 N.C. App. 738, 582 S.E.2d 37, 2003 N.C. App. LEXIS 1255 (2003).

Where Defendant Did Not Give Timely Notice of Appeal. — Defendant could not, based on *Blakely,* challenge his aggravated suspended sentences by appealing the order revoking his probation and activating the sentences because it was an impermissible collateral attack on the original judgments from which defendant did not timely give a notice of appeal under G.S. 15A-1342(f), G.S. 15A-1444, and N.C. R. App. P. 4(a). State v. Holmes, 361 N.C. 410, 646 S.E.2d 353, 2007 N.C. LEXIS 594 (2007).

Cited in State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980); State v. Thomas, 346 N.C. 135, 484 S.E.2d 368 (1997); In re McLean, 135 N.C. App. 387, 521 S.E.2d 121, 1999 N.C. App. LEXIS 1150 (1999).

§ 15A-1343. Conditions of probation.

(a) In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Regular Conditions. — As regular conditions of probation, a defendant must:

(1) Commit no criminal offense in any jurisdiction.
(2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.
(3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.
(4) Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).
(5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.
(6) Pay a supervision fee as specified in subsection (c1).

(7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.

(8) Notify the probation officer if he fails to obtain or retain satisfactory employment.

(9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).

(10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.

(11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.

(12) Attend and complete an abuser treatment program if (i) the court finds the defendant is responsible for acts of domestic violence and (ii) there is a program, approved by the Domestic Violence Commission, reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice.

(13) Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

(14) Submit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, upon a reasonable suspicion that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court.

(15) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

A defendant shall not pay costs associated with a substance abuse monitoring program or any other special condition of probation in lieu of, or prior to, the payments required by this subsection.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), (11), (13), (14), and (15) of this subsection.

(b1) Special Conditions. — In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions:

(1) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(2) Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.

(2a) Repealed by Session Laws 2002, ch. 126, s. 17.18, effective August 15, 2002.

(2b) Participate in and successfully complete a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes.

(3) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(3a) Repealed by Session Laws 1997-57, s. 3.

(3b) Submit to intensive supervision and abide by the rules adopted by the Division of Community Corrections for that level of supervision.

(3c) Remain at his or her residence. The court, in the sentencing order, may authorize the offender to leave the offender's residence for employment, counseling, a course of study, vocational training, or other specific purposes and may modify that authorization. The probation officer may authorize the offender to leave the offender's residence for specific purposes not authorized in the court order upon approval of the probation officer's supervisor. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically and to pay a fee for the device as specified in subsection (c2) of this section.

(4) Surrender his or her driver's license to the clerk of superior court, and not operate a motor vehicle for a period specified by the court.

(5) Compensate the Department of Environment and Natural Resources or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environment and Natural Resources or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

(6) Perform community or reparation service under the supervision of the Division of Community Corrections and pay the fee required by G.S. 143B-262.

(7), (8) Repealed by Session Laws 2009-372, s. 9(b), effective December 1, 2009, and applicable to offenses committed on or after that date.

(8a) Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, and 113-272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he was convicted.

(9) If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

(9a) Repealed by Session Laws 2004-186, s. 1.1, effective December 1, 2004, and applicable to offenses committed on or after that date.

(10) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

(b2) Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — As special conditions of probation, a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.

(6) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

(7) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(1).

(8) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is in the category described by G.S. 14-208.40(a)(2), and the Department of Correction, based on the Department's risk assessment program, recommends that the defendant submit to the highest possible level of supervision and monitoring.

(9) Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the probationer's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the probation supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

Defendants subject to the provisions of this subsection shall not be placed on unsupervised probation.

(b3) Screening and Assessing for Chemical Dependency. — A defendant ordered to submit to a period of residential treatment in the Drug Alcohol Recovery Treatment program (DART) operated by the Department of Correction must undergo a screening to determine chemical dependency. If the screening indicates the defendant is chemically dependent, the court shall order an assessment to determine the appropriate level of treatment. The assessment may be conducted either before or after the court imposes the condition, but participation in the program shall be based on the results of the assessment.

(b4) Intermediate Conditions. — The following conditions of probation apply to each defendant subject to intermediate punishment:

(1) If required in the discretion of the defendant's probation officer, perform community service under the supervision of the Division of Community Corrections and pay the fee required by G.S. 143B-262.

(2) Not use, possess, or control alcohol.

(3) Remain within the county of residence unless granted written permission to leave by the court or the defendant's probation officer.

(4) Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer, keeping all appointments and abiding by the rules, regulations, and direction of each program.

These conditions apply to each defendant subject to intermediate punishment unless the court specifically exempts the defendant from one or more of the conditions in its judgment or order. It is not necessary for the presiding judge to state each of these conditions in open court, but the conditions must be set forth in the judgment or order of the court.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

(c1) Supervision Fee. — Any person placed on supervised probation pursuant to subsection (a) of this section shall pay a supervision fee of thirty dollars ($30.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(c2) Electronic Monitoring Device Fee. — Any person placed on house arrest with electronic monitoring under subsection (b1) of this section shall pay a fee of ninety dollars ($90.00) for the electronic monitoring device. The court may exempt a person from paying the fee only for good cause and upon motion of the person placed on house arrest with electronic monitoring. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by those methods if the officer is authorized by subsection (g) of this section to determine the payment schedule. The fee must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S. 15A-1340.36. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done.

(e) Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and all fees and costs for appointed counsel, public defender, or counsel employed by or under contract with the Office of Indigent Defense Services in the case in which the person was convicted. The fees and costs for appointed counsel, public defender, or other counsel services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs and fees to be repaid and the method of payment.

(f) Repealed by Session Laws 1983, c. 561, s. 5.

(g) Probation Officer May Determine Payment Schedules and May Transfer Low-Risk Misdemeanants to Unsupervised Probation. — If a person placed on supervised probation is required as a condition of that probation to pay any moneys to the clerk of superior court, the court may delegate to a probation officer the responsibility to determine the payment schedule. The court may also authorize the probation officer to transfer the person to unsupervised probation after all the moneys are paid to the clerk. If the probation officer transfers a person to unsupervised probation, he must notify the clerk of that action. In addition, a probation officer may transfer a misdemeanant from supervised to unsupervised probation if the misdemeanant is not subject to any special conditions and was placed on probation solely for the collection of court-ordered payments, and the risk assessment shows the misdemeanant to be a low-risk offender; however, such a transfer to unsupervised probation does not relieve the misdemeanant of the obligation to continue making court-ordered payments under the terms of the misdemeanant's probation. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2; 1987, c. 282, s. 33; c. 397, s. 1; c. 579, ss. 1, 2; c. 598, s. 1; c. 819, s. 32; c. 830, s. 17; 1989, c. 529, s. 5; c. 727, s. 218(4); 1989 (Reg. Sess., 1990), c. 1010, s. 1; c. 1034, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 1; 1993, c. 538, s. 16; 1994, Ex. Sess., c. 9, s. 1; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(c); 1997-57, s. 3; 1997-443, ss. 11A.119(a), 19.11(a); 1998-212, ss. 17.21(a), 19.4(f); 1999-298, s. 2; 2000-125, s. 8; 2000-144, s. 31; 2002-105, s. 3; 2002-126, ss. 17.18(a), 29A.2(a); 2003-141, s. 1; 2004-186, s. 1.1; 2005-250, s. 4; 2005-276, ss. 17.29, 43.1(f), 43.2(a); 2006-247, s. 15(b); 2007-213, s. 7; 2009-275, s. 1; 2009-372, s. 9(a)-(c); 2009-547, s. 7.)

OFFICIAL COMMENTARY

This section specifies a number of conditions of probation, primarily ones that will be used fairly frequently, that may be imposed. The list is meant neither to be exclusive nor to suggest that these conditions should be imposed in all cases. Condition (15), dealing with searches, recognizes that the ability to search a probationer in some instances is an essential element of successful probation. It includes two important limits: (1) only a probation officer, and not a law-enforcement officer, may search the probationer under this condition, and (2) the search may be only for purposes reasonably related to the probation supervision.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 st seq.

Editor's Note. — Session Laws 2006-247, s. 15(*l*) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 17, provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Session Laws 2009-372, s. 19 is a severability clause.

Effect of Amendments. — Session Laws 2009-275, s. 1, effective July 1, 2009, in subsection (g), added "and May Transfer Low-Risk Misdemeanants to Unsupervised Probation" at the end of the subsection heading, and added the last sentence.

Session Laws 2009-372, s. 9(a)-(c), effective December 1, 2009, and applicable to offenses committed on or after that date, in subsection (b), added subdivisions (b)(13) through (b)(15), and substituted "(11), (13), (14), and (15) of this subsection" for "and (11)" at the end of the last paragraph; rewrote subdivisions (b1)(3b) and (b1)(6); deleted subdivisions (b1)(7) and (b1)(8); and added subsection (b4).

Session Laws 2009-547, s. 7, effective December 1, 2009, and applicable to offenses committed on or after that date, in subdivision (b1)(3c), deleted "unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training" at the end of the first sentence, and added the present second and third sentences.

Legal Periodicals. — For note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

A Fourth Amendment Problem with Probation in North Carolina, 23 Campbell L. Rev. 143 (2000).

CASE NOTES

I. General Consideration.
II. Valid Conditions.
III. Invalid Conditions.
IV. Restitution.

I. GENERAL CONSIDERATION.

Editor's Note. *— Many of the cases cited below were decided under former G.S. 15-199.*

Legislative Intent. — The legislature plainly did not intend that this section import wholesale each and every condition precedent to recovery in a civil action as bearing on the trial court's requiring appropriate restitution as a condition of probation. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

By tying the amount which may be imposed as restitution to such compensation as could ordinarily be recovered in a civil action, the General Assembly meant only that the trial court must refer to the measure of recoverable damages applying in the relevant civil action — such as the measure of damages in a wrongful death action — for the limited purpose of computing an appropriate restitutionary amount to be imposed as a condition of probation. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Conditions Which Curtail Constitutional Rights. — This section recognizes a wide variety of conditions which may be imposed upon suspension of sentence, many of which touch upon and curtail rights guaranteed by State and federal Constitutions. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Statute of Limitations in § 1-53(4) Not Applicable. — In the context of sentencing proceedings under subsection (d) of this section, the two-year statute of limitations in G.S. 1-53(4) pertaining to actions instituted under the wrongful death act is not applicable. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Defendant must not be oppressed or unduly burdened by the suspension. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Defendant's consent does not preclude him from contesting reasonableness of condition which he has broken when such breach is made the ground for putting the prison sentence into effect. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Determination of Appropriate Conditions. — In determining appropriate conditions of a suspended sentence, it is not necessary that there be evidence to satisfy the sentencing judge beyond a reasonable doubt of the correctness of these conditions. It is sufficient that the conditions be supported by the evidence. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Applicability to Juvenile. — The trial court erred in ordering a juvenile to submit to a search by any law enforcement officer without a warrant; while a trial judge can require an adult probationer to "submit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises while he is present, for purposes specified by the court and reasonably related to his probation supervision . . ." under this section, an adult probationer may not be required to submit to warrantless searches conducted by any officer; a juvenile is entitled to the same legal protection. In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

Discretion of Court. — The court has substantial discretion in devising conditions under subdivision (b1)(9) of this section. State v. Harrington, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

A trial court need not make specific findings in support of its recommendation of work release. State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Acknowledgement of Condition of Probation Sufficient. — Defendant's executed acknowledgment of the monetary condition of probation was sufficient to prove notification of probation conditions. State v. Henderson, 179 N.C. App. 191, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

Independent Findings as to Probation Violations. — Whether or not the violations of probation by the defendant were adjudicated as criminal charges was irrelevant where the judge, upon revoking defendant's probation, made independent findings of his own as to the commission of these crimes, hearing testimony from four witnesses, including the defendant himself. State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986).

A verdict acquitting the defendant of criminal charges is not binding on a judge making independent findings as to revocation of probation based upon the evidence before him or her. State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986), cert. denied, 322 N.C. 484, 370 S.E.2d 232 (1988).

Defendant may not raise an initial objection to a condition of probation on appeal, but must first object no later than the revocation hearing. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Where the record on appeal contained no written or oral objections by defendant raising the issue of a defect in the original judgment at the revocation hearing, defendant waived this issue on appeal. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Defendant Not Given Written Notice of Modifications. — Where a judge modified a defendant's probation and a written statement setting forth the terms of the new condition was not given to the defendant and where, subsequently, the defendant violated the new condition, the provision of subsection (c) of this section requiring written notice of modifications was mandatory and the modification of the probation terms had no effect; oral notice was not a satisfactory substitute for the written statement. State v. Suggs, 92 N.C. App. 112, 373 S.E.2d 687 (1988).

Defendant did not receive adequate notice of the probation modification because he never received written notice as required by statute; therefore, he could not be convicted of violating his probation. State v. Seek, 152 N.C. App. 237, 566 S.E.2d 750, 2002 N.C. App. LEXIS 872 (2002).

Normal Operating Cost. — When the phrase "normal operating cost" in subsection (d) of this section is interpreted to refer to overhead costs, and not to those incurred in connection with a specific prosecution, former G.S. 90-95.3(b), authorizing the court to order the payment of $100 restitution by a defendant for the expense of analyzing any controlled substance possessed by him or his agent as part of an investigation leading to his conviction, would not conflict with subsection (d) of this section, as the cost of analyzing drugs is incurred by the prosecution only in connection with particular cases. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Costs in Criminal Cases. — At common law, costs in criminal cases were unknown; therefore, liability for costs in criminal cases is dictated purely by statute. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Applied in State v. Stephenson, 43 N.C. App. 323, 258 S.E.2d 806 (1979); North Carolina Farm Bureau Mut. Ins. Co. v. Greer, 54 N.C. App. 170, 282 S.E.2d 553 (1981); State v. Seay, 59 N.C. App. 667, 298 S.E.2d 53 (1982); State v. Tedder, 62 N.C. App. 12, 302 S.E.2d 318 (1983); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); State v. Hunter, 71 N.C. App. 602, 323 S.E.2d 43 (1984); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Cited in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978); State v. Lambert, 40 N.C. App. 418, 252 S.E.2d 855 (1979); State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981); State v. Wilburn, 57 N.C. App. 40, 290 S.E.2d 782 (1982); State v. Dula, 312 N.C. 80, 320 S.E.2d 405 (1984); State v. Bryant, 318 N.C. 632, 350 S.E.2d 358 (1986); State v. Church, 110 N.C. App. 569, 430 S.E.2d 462 (1993); In re Davis, 345 N.C. App. 749, 483 S.E.2d 440 (1997); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

II. VALID CONDITIONS.

Constitutionality. — Language of subdivision (b)(1) of this section stating that a probationer must "commit no criminal offense" is not unconstitutionally vague. State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986), cert. denied, 322 N.C. 484, 370 S.E.2d 232 (1988).

Condition directly related to and growing out of the offense for which the defendant is convicted, and consistent with proper punishment for the crime, neither violates the defendant's constitutional rights nor is otherwise unreasonable. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Where defendant had been convicted of disseminating obscene materials, trial court did not abuse its discretion when it imposed as a condition of defendant's probation that he refrain from "working in any retail establishment that sells sexually explicit materials." State v. Johnston, 123 N.C. App. 292, 473 S.E.2d 25 (1996).

Legislature intended the "reasonably related" language of subdivision (b)(17) (which is now subdivision (b1)(9)) to serve as a check on the discretion of judges in devising conditions of probation. Where the judge elects to impose one of the conditions enumerated by this section, no such check is needed since the legislature has deemed all of these conditions "appropriate" to the rehabilitation of criminals and their assimilation into law-abiding society. State v. Parker, 55 N.C. App. 643, 286 S.E.2d 366 (1982).

Condition that Defendant Remain Law-Abiding. — Upon conviction of a misdemeanor, judgment was entered that defendant be imprisoned in the county jail for a term of eight months, with further provision that execution of the judgment should be suspended upon the payment of a fine and upon further condition that defendant remain law-abiding for a period of five years. It was held that the condition upon which execution was suspended was twofold; first, the payment of the fine and, second, that defendant remain law-abiding for a term of five years; and upon conviction of defendant of a subsequent violation of the criminal law within the period of five years, the order of the court putting into effect the suspended execution is proper, notwithstanding defendant had paid the fine, defendant's contention that judgment suspending execution did not contemplate imprisonment if the fine should be paid, being untenable. State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939).

Probation condition that defendant not violate any rule or regulation of the Department of Correction was a valid condition of probation, even though defendant was housed in a county detention facility and not a Department of Correction facility; statutory law provided that such a condition could be imposed regardless of whether a defendant was imprisoned in the Department of Correction or a local confinement facility. State v. Payne, 156 N.C. App. 687, 577 S.E.2d 166, 2003 N.C. App. LEXIS 192 (2003).

Condition that a probationer avoid injurious or vicious habits is a valid condition of probation. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

Condition that probationer shall avoid persons or places of disreputable or harmful character, is within the power of the court to impose. State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

Condition That Probationer Stay Away from Children. — Where probation condition stated that defendant "shall not be in the presence of any child, male or female, under the age of 16 years, at any time", the term "presence" was not unconstitutionally vague. State v. White, 129 N.C. App. 52, 496 S.E.2d 842 (1998), cert. denied, 348 N.C. 508, 510 S.E.2d 670 (1998), aff'd, 350 N.C. 302, 512 S.E.2d 424 (1999).

G.S. 15A-1343(b2)(4) imposed a mandatory condition prohibiting defendant from living with a minor, and did not permit exceptions for defendant's own children; where defendant was convicted of taking indecent liberties with a child arising from his sexual misconduct with his minor sister-in-law, G.S. 15A-1343(b2)(4) was a valid probation condition, and did not violate due process even though it prohibited defendant from living with his own child. State v. Strickland, 169 N.C. App. 193, 609 S.E.2d 253, 2005 N.C. App. LEXIS 522 (2005).

The requirement that defendant attend Alcoholics Anonymous meetings during the period of his supervised probation at least two times per week and that defendant provide his probation officer with verification of such attendance was reasonably related to defendant's rehabilitation. State v. McGill, 114 N.C. App. 479, 442 S.E.2d 166 (1994).

Interpretation of "Disreputable or Harmful Character." — In the exercise of common reasoning in the interpretation and understanding of the meaning of the English language, persons who use heroin and marijuana and who have been convicted of a conspiracy to bomb an occupied building are "persons of a disreputable or harmful character." State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

Condition of Consent to Warrantless Search. — Conditions of the prior suspended sentences by which defendants gave consent to search of their premises at reasonable hours without a search warrant were valid. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Voluntary waiver and consent to a warrantless search of one's premises may effectively be given by agreeing thereto as one of the conditions of a suspended sentence, and this should especially be true where such a condition is clearly designed to facilitate the State's supervision of the probationer's rehabilitation. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Where a probation officer, after receiving a tip that defendant might have been in possession of a firearm, asked police officers to search defendant's person, vehicle, and house for contraband, the searches did not violate G.S. 15A-1343(b1)(7) because the probation officer directed and maintained supervision over the police officers. United States v. Midgette, 478 F.3d 616, 2007 U.S. App. LEXIS 4153 (4th Cir. 2007).

Restrictions that G.S. 15A-1343(b1)(7) places on probationer searches assure that the searches conducted pursuant to G.S. 15A-1343(b1)(7) are justified by the state's special needs; therefore, searches conducted in conformity with G.S. 15A-1343(b1)(7) are reasonable under the Fourth Amendment. United States v. Midgette, 478 F.3d 616, 2007 U.S. App. LEXIS 4153 (4th Cir. 2007).

Effect of Consent to Warrantless Search. — Where defendants agreed to consent to a warrantless search of their premises as a condition of a suspended sentence, officers appearing to conduct the search did not have the right to break unannounced into defendants' home. They should have first announced their presence and requested entry. Had entry been refused, defendants as probationers could have been cited for violation of the terms of their probation, and upon a finding that the conditions had been violated, the previously suspended sentences could have been put into effect. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

Requiring Submission to Search by Any Officer Is Invalid. — Under subdivision (b)(15) (now subdivision (b1)(7)) of this section, a condition of probation that a defendant submit to a search by any law-enforcement officer without a warrant is invalid. State v. Grant, 40 N.C. App. 58, 252 S.E.2d 98 (1979); State v. McCoy, 45 N.C. App. 686, 263 S.E.2d 801, cert. denied and appeal dismissed, 300 N.C. 378, 267 S.E.2d 681 (1980).

Where subdivision (b)(15) (now subdivision (b1)(7)) was inapplicable because defendant was convicted before the effective date of this section, waiver by the defendant of his constitutional right against a search without a warrant by a law enforcement officer was a valid condition of the suspension of his sentence and probation. State v. Moore, 37 N.C. App. 729, 247 S.E.2d 250 (1978).

Fruit of Unlawful Search Is Admissible to Revoke Probation. — Although a court cannot require, as a condition of probation, that the probationer submit to unlawful searches, it is able to admit evidence obtained from an unlawful search to revoke the probation. To exclude it would not further the interest of deterring police misconduct. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

Physical Examination for Detection of Drugs. — A condition of defendant's probation requiring him to submit to physical testing or examination at the request of his probation officer for the detection of drugs or controlled substances was directly related to and grew out of the offense for which defendant was convicted and was therefore reasonable, and it was not an invalid condition of probation under subdivision (b)(15) (now subdivision (b1)(7)) of this section. State v. McCoy, 45 N.C. App. 686, 263 S.E.2d 801, cert. denied and appeal dismissed, 300 N.C. 378, 267 S.E.2d 681 (1980).

Reasonably Related to Defendant's Rehabilitation. — It was not an abuse of discretion to sentence defendant to 30 days of imprisonment, suspended for 18 months, and to probation as defendant argued only that the sanction was unreasonable, but not that it was an abuse of discretion; defendant did not argue that the special conditions of defendant's probation were not reasonably related to defendant's rehabilitation under G.S. 15A-1343(b1)(10). State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007), cert. denied, 649 S.E.2d 398, 2007 N.C. LEXIS 759 (N.C. 2007).

Where defendant was convicted of driving while impaired, the court did not err in imposing, as a condition of probation, the requirement that defendant not go upon the premises of any business or private club licensed by the state for the sale or the on-premises consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. the following day, as such condition was reasonably aimed at preventing recurrence of the subject misconduct by keeping defendant away from alcohol in public places during the hours when he would most likely be tempted to drink and drive. State v. Harrington, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

III. INVALID CONDITIONS.

Condition which violates defendant's constitutional rights and, therefore, beyond the power of the court to impose is per se unreasonable. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Firearm Ammunition Not an Explosive Device. — Trial court erred in finding that defendant was in possession of an explosive device, pursuant to G.S. 15A-1343(b)(5), and in revoking defendant's probation as a result because the firearm ammunition which was found in defendant's residence was not an explosive device as connoted in G.S. 15A-1343(b)(5). State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

IV. RESTITUTION.

Constitutionality. — The constitutionality of a reparation requirement may only be considered if and when restitution is ordered. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

The constitutionality of a reparation requirement may only be determined by considering defendant's financial status at the time when restitution may be paid. Because restitution has not been imposed as a condition of parole or work release, there has been no equal protection violation here. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

A requirement that a defendant pay restitution as a condition of parole or work release is not inherently unconstitutional. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

The provision in subsection (d) of this section "that no third party shall benefit by way of restitution or reparation as a result of liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant" does not violate the equal protection clause of the federal Constitution or N.C. Const., Art. I, § 19 or N.C. Const., Art. I, § 32. State v. Stanley, 79 N.C. App. 379, 339 S.E.2d 668 (1986).

Purpose of Reparation Is Not Punitive. — The purpose of G.S. 148-33.2 and subdivision (b)(6) (now subdivision (b)(9)) of this section is rehabilitation and not additional penalty or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred. If the trial evidence does not support the amount ordered or recommended, then supporting evidence should be required in the sentencing hearing. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Restitution is intended to be compensatory, not punitive. State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

What Restitution Orders Are Constitutionally Valid. — If a restitution order is directly related to the criminal offense for which the defendant was convicted, it is constitutionally valid. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

For an order of restitution to be valid it must be related to the criminal act for which defendant was convicted, or else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Necessity of Findings of Fact. — The trial court is not required to make specific findings of fact in support of its recommendation of work release. However, any order or recommendation for restitution to the aggrieved party as a condition of obtaining work release must be supported by the evidence. State v. Burkhead, 85 N.C. App. 535, 355 S.E.2d 175 (1987).

Restitution Is an Option. — Restitution, imposed as a condition of probation, is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Restitution Does Not Affect Victim's Right to Institute Civil Action. — An imposition of restitution does not affect, and is not affected by, the victim's right to institute a civil action against the defendant based on the same conduct. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Restitution cannot be comprised of punitive damages. State v. Burkhead, 85 N.C. App. 535, 355 S.E.2d 175 (1987).

Restitution Cannot Be Imposed with Active Prison Sentence. — When the court imposes an active sentence, it may recommend restitution as a condition of work-release or as a condition of post-release supervision and parole or as a condition of probation, but it may not require the defendant to make restitution while serving an active sentence. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

Court Not Required to Consider Ability to Pay. — Trial court did not err in failing to consider defendant's ability to pay restitution, as the potentially binding determination at a later date requiring defendant to pay restitution as a condition of work release or parole by either the Department of Correction or the Parole Commission would by necessity require sufficient evidence of defendant's ability to pay at that time. State v. Wilson, 340 N.C. 720, 459 S.E.2d 192 (1995).

Condition for Probation of Restitution Error Where Defendant Clearly Could Not Comply. — The trial court erred in imposing a condition on defendant's probation for conviction of misdemeanor death by vehicle on the payment of $500,000 restitution, with which she clearly could not comply. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Trial court erred where it conditioned probation on an amount of restitution the defendant clearly could not pay. State v. Hayes, 113 N.C. App. 172, 437 S.E.2d 717 (1993).

Subsection (d) merely precludes an indemnitor from receiving court-ordered restitution as a condition of a criminal defendant's probation. An indemnitor's right to pursue civil remedies against the criminal defendant, or against the insured to recover funds paid by the criminal defendant to the insured, remains intact. State v. Stanley, 79 N.C. App. 379, 339 S.E.2d 668 (1986).

Reparation of injuries to a party aggrieved as a result of or incident to an offense committed by a criminal defendant as a condition to suspension of sentence has long been recognized in North Carolina judicially and by statute. State v. Gallamore, 6 N.C. App. 608, 170 S.E.2d 573 (1969).

Subdivision (b)(6) (now subdivision (b)(9)) of this section permits the court, as a condition of probation, to require a defendant to make restitution or reparation for loss or injury resulting from the crime for which the defendant is convicted. The amount determined must be limited to that supported by the evidence. It may, but does not necessarily represent the amount of damages that might be recoverable as a result of a civil action. Shew v. Southern Fire & Cas. Co., 307 N.C. 438, 298 S.E.2d 380 (1983).

It is well settled that the trial court has discretionary authority to recommend restitution as a condition of obtaining parole. Further, any order or recommendation of the trial court for restitution must be supported by the evidence. State v. Malloy, 60 N.C. App. 218, 298 S.E.2d 735, rev'd on other grounds, 309 N.C. 176, 305 S.E.2d 718 (1983).

Restitution should not be used as a substitute for determination in the proper forum of a defendant's civil liability: Criminal and civil liability are not synonymous. A criminal conviction does not necessarily establish the existence of civil liability. Civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition. Shew v. Southern Fire & Cas. Co., 307 N.C. 438, 298 S.E.2d 380 (1983).

The "duty to pay reparations does not affect, and is not affected by, the victim's right to institute a civil action for damages against the defendant based on the same conduct, although, if the victim recovers, a setoff might be ordered for the money already received by the victim under the condition of probation." Shew v. Southern Fire & Cas. Co., 307 N.C. 438, 298 S.E.2d 380 (1983).

Although the North Carolina Supreme Court has never definitively decided the issue, there is persuasive authority in North Carolina law supporting the State's right to claim the status of an aggrieved party for the expenses associated with providing court-appointed counsel. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina, like every jurisdiction, has an irrevocable constitutional duty to provide court-appointed counsel to an indigent defendant once he requests it. The developing jurisprudence in this area, however, does not require the State to absorb the expenses of providing such counsel when the defendant has acquired the financial ability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The North Carolina Legislature has included government agencies, whether federal, State or local in its definition of an aggrieved party. This definition, however, also contains an important proviso limiting the inmate's restitution obligations to particular and definite expenses not related to the government agency's normal operating costs. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Order Must Be Supported by Evidence. — Together G.S. 148-33.2(c) and subdivision (b)(6) (now subdivision (b)(9)) of this section require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

A recommendation of restitution must be supported by the evidence before the trial court. State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

A trial court's award of restitution must be supported by competent evidence in the record. State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992).

Amount of Restitution Must Be Supported by Evidence. — Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557 (1986), aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986); State v. Wilson, 340 N.C. 720, 459 S.E.2d 192 (1995).

Fair Market Value as Measure of Restitution. — The court could order defendant to pay to victim a sum no higher than the largest figure contained in the evidence representing fair market value as a condition of probation, where defendant destroyed victim's automobile in the course of unauthorized use of it. State v. Maynard, 79 N.C. App. 451, 339 S.E.2d 666 (1986).

This section does not require the trial judge to find and enter facts when imposing a judgment of probation. Rather, it requires the court to take into consideration the resources of defendant, her ability to earn, her obligation to support dependents, and such other matters as shall pertain to her ability to make restitution or reparation. State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

Law-Enforcement Agencies Are Not "Victims". — North Carolina statutes authorize the imposition of a condition upon parole eligibility of restitution to victims of crime who have suffered economic loss as a result of that crime, but law-enforcement agencies are not within the class of such victims. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

North Carolina Bureau of Investigation is not a "victim of crime" within the meaning of subsection (d) of this section. It could qualify as such a victim if it suffered losses through embezzlement, but its expenses in investigating drug offenses are among its normal operating costs, restitution of which is specifically excluded by the statute. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Expenses of Investigating Charges May Not Be Charged to Defendant. — Where, following guilty pleas to drug offenses pursuant to a plea bargain, the trial court ordered as a condition of parole that defendants reimburse the Bureau of Investigation Drug Division for the expenses it had incurred in investigating the charges and obtaining the proof, imposition of the condition without having advised defendants of it before acceptance of their pleas made their pleas both involuntary and unintelligent, since the condition was illegal under state law and quite unanticipated in connection with the plea bargains, and since it clearly was a special limitation on parole eligibility. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Restitution of Amount Paid by State. — Where defendant was convicted of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying $600.00 restitution, and the amount ordered was patently relevant to the pecuniary injury inflicted upon the State by defendant's criminal activities, in that $600.00 was paid by an agent of the State for the purchase of cocaine, the restitution ordered was reasonably related to the rehabilitative objectives of probation, and the condition was reasonable and just under the circumstances of the case. State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

Where a trial court properly ordered restitution to law enforcement agencies for undercover purchases under G.S. 90-95.3 and G.S. 15A-1343(d) and non-payment of a fine would not increase the sentence under G.S. 15A-1351(a), the trial court did not err. State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003).

Pawnbrokers as "Aggrieved Parties." — Where, shortly after defendant committed larceny, he presented the stolen items to pawnshops as collateral for loans, and the stolen items were returned to the rightful owner, so that the pawnbrokers thus lost the collateral that secured their loans and were at risk of loss or damage if the loans were not repaid, under the particular facts presented, the pawnbrokers were within the meaning and intent of the phrase "aggrieved parties" as used in subsection (d) of this section and were proper subjects for restitution as a condition of defendant's probation. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Restitution as a condition of a criminal judgment cannot include the requirement that defendant return, to the loser, money paid on a gambling debt. State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

Neither the Parole Commission nor the Department of Correction is bound by the

judge's recommendation of restitution as a condition of parole or work release. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

A recommendation of restitution as a condition of work-release is not binding on the Parole Commission or Department of Corrections. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

There is no single model to which all State repayment programs must conform. However, the Supreme Court in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); and James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), has carefully identified the basic features separating a constitutionally acceptable recoupment or restitution program from one that is fatally defective. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Though far from a paragon of clarity and detail as a complete program, the North Carolina statutes relating to the repayment of attorneys' fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Review of Court's Recommendation. — Where there is some evidence as to the appropriate amount of restitution, the trial court's recommendation will not be overruled on appeal. State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Award Denied Because of Lack of Evidence of Pain and Suffering. — Even if a trial court's recommendation of restitution can include damages for pain and suffering, where the only evidence supporting the amount of restitution was that the victim had unpaid medical bills in the amount of $442.00, and there was no evidence as to the amount of the victim's pain and suffering, the evidence as reported in the record did not support restitution in the amount of $5,000.00. State v. Burkhead, 85 N.C. App. 535, 355 S.E.2d 175 (1987).

Award Supported by Evidence. — Restitution of $2,000 was properly awarded under G.S. 15A-1343(d) where: (1) there was testimony and documentation showing that the victims had already accumulated $680.00 in treatment bills over the span of a few months; (2) there was testimony tending to show that the victims were still undergoing treatment as a result of defendant's actions: (3) there was testimony that the insurance of the victims' parents would not cover the total cost of the treatment, which would be needed for an appreciable amount of time; and (4) the restitution award was not punitive. State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262, 2002 N.C. App. LEXIS 1170 (2002).

Trial court did not err in averaging two values to determine the cost of some illegally cut timber, both of which were supported by evidence, the property owner's testimony and the value set forth in the forestry report. State v. Freeman, 164 N.C. App. 673, 596 S.E.2d 319, 2004 N.C. App. LEXIS 980 (2004).

Award Not Supported by Evidence. — Where an exhaustive review of the record revealed that no evidence was presented at trial or at sentencing which supported the figures offered by the State, the trial court therefore based the amount of restitution only upon the unsworn statements of the prosecutor, which did not constitute evidence and could not support the amount of restitution recommended. State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992).

Order Vacated. — Order requiring defendant to pay one-third of his income to the clerk was vacated where the record revealed only that the victim was separated from his wife, and that they had two children who lived with their mother at the time the victim died. State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

§ 15A-1343.1: Repealed by Session Laws 2002-126, s. 17.18, effective August 15, 2002.

§ 15A-1343.2. Special probation rules for persons sentenced under Article 81B.

(a) Applicability. — This section applies only to persons sentenced under Article 81B of this Chapter.

(b) Purposes of Probation for Community and Intermediate Punishments. — The Department of Correction shall develop a plan to handle offenders sentenced to community and intermediate punishments. The probation program designed to handle these offenders shall have the following principal purposes: to hold offenders accountable for making restitution, to ensure compliance with the court's judgment, to effectively rehabilitate offenders by directing them to specialized treatment or education programs, and to protect the public safety.

(c) Probation Caseload Goals. — It is the goal of the General Assembly that, subject to the availability of funds, caseloads for probation officers supervising persons sentenced to community punishment should not exceed an average of 90 offenders per officer, and caseloads for offenders sentenced to intermediate punishments should not exceed an average of 60 offenders per officer by July 1, 1998.

(d) Lengths of Probation Terms Under Structured Sentencing. — Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:

(1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;
(2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months;
(3) For felons sentenced to community punishment, not less than 12 nor more than 30 months; and
(4) For felons sentenced to intermediate punishment, not less than 18 nor more than 36 months.

If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years, as specified in G.S. 15A-1342 and G.S. 15A-1351.

Extension. — The court may with the consent of the offender extend the original period of the probation if necessary to complete a program of restitution or to complete medical or psychiatric treatment ordered as a condition of probation. This extension may be for no more than three years, and may only be ordered in the last six months of the original period of probation.

(e) Delegation to Probation Officer in Community Punishment. — Unless the presiding judge specifically finds in the judgment of the court that delegation is not appropriate, the Division of Community Corrections in the Department of Correction may require an offender sentenced to community punishment to:

(1) Perform up to 20 hours of community service, and pay the fee prescribed by law for this supervision;
(2) Report to the offender's probation officer on a frequency to be determined by the officer; or
(3) Submit to substance abuse assessment, monitoring or treatment.

If the Division imposes any of the above requirements, then it may subsequently reduce or remove those same requirements.

If the probation officer exercises authority delegated by the court pursuant to this subsection, the offender may file a motion with the court to review the action taken by the probation officer. The offender shall be given notice of the right to seek such a court review. The Division may exercise any authority delegated to it under this subsection only if it first determines that the offender has failed to comply with one or more of the conditions of probation imposed by the court.

(f) Delegation to Probation Officer in Intermediate Punishments. — Unless the presiding judge specifically finds in the judgment of the court that delegation is not appropriate, the Division of Community Corrections in the Department of Correction may require an offender sentenced to intermediate punishment to:

(1) Perform up to 50 hours of community service, and pay the fee prescribed by law for this supervision;

(2) Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically;

(3) Submit to substance abuse assessment, monitoring or treatment; or

(4) Participate in an educational or vocational skills development program.

(5) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2).

If the Division imposes any of the above requirements, then it may subsequently reduce or remove those same requirements.

If the probation officer exercises authority delegated to him or her by the court pursuant to this subsection, the offender may file a motion with the court to review the action taken by the probation officer. The offender shall be given notice of the right to seek such a court review. The Division may exercise any authority delegated to it under this subsection only if it first determines that the offender has failed to comply with one or more of the conditions of probation imposed by the court.

(f1) Mandatory Condition of Satellite-Based Monitoring for Some Sex Offenders. — Notwithstanding any other provision of this section, the court shall impose satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes as a condition of probation on any offender who is described by G.S. 14-208.40(a)(1).

(g) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 19, s. 3.

(h) Definitions. — For purposes of this section, the definitions in G.S. 15A-1340.11 apply. (1993, c. 538, s. 17.1; 1994, Ex. Sess., c. 14, s. 22; c. 19, s. 3; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 8; 1997-57, s. 4; 2001-487, s. 47(b); 2006-247, ss. 15(c), 15(d).)

Editor's Note. — Session Laws 2006-247, s. 15(*l*) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Resentencing was required for defendant's reckless driving conviction when trial court sentenced defendant to a longer period than that provided in this section without making the required finding. State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

Findings Required for Exceptional Probation Terms. — Trial court erred in placing defendant on supervised probation for a period of 60 months without making findings that a period longer than 36 months was necessary. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

Appellate court vacated the trial court's judgment sentencing defendant to 24 months' supervised probation because the trial court imposed that sentence without making a specific finding that a period of probation longer than 18 months was necessary, as required by G.S. 15A-1343.2(d). State v. Love, 156 N.C. App. 309, 576 S.E.2d 709, 2003 N.C. App. LEXIS 114 (2003).

G.S. 15A-1343.2(d)(3) clearly mandates that where a felon is sentenced to community punishment, probation may not be for more than 30 months unless the trial court specifically finds that a longer term is required; because a trial court erred made no specific finding that a probation term longer than 30 months was required, it erred in sentencing defendant to a 36 month probation term. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

When defendant was convicted of contributing to the delinquency of a minor and misdemeanor larceny, and was sentenced to 24 months probation, the trial court failed to comply with G.S. 15A-1343.2(d) because it did not find that more than 18 months probation was necessary, although it properly found he had a Prior Record Level I for two Class 1 misdemeanors, under G.S. 15A-1340.21(b)(1), sentenced him to 45 days for each offense, and placed him on supervised probation. State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372, 2007 N.C. App. LEXIS 493 (2007).

Cited in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 15A-1343.3. Department of Corrections to establish regulations for continuous alcohol monitoring systems.

The Department of Correction shall establish regulations for continuous alcohol monitoring systems that are authorized for use by the courts as evidence that an offender on probation has abstained from the use of alcohol for a specified period of time. A "continuous alcohol monitoring system" is a device that is worn by a person that can detect, monitor, record, and report the amount of alcohol within the wearer's system over a continuous 24-hour daily basis. The regulations shall include the procedures for supervision of the offender, collection and monitoring of the results, and the transmission of the data to the court for consideration by the court. All courts, including those using continuous alcohol monitoring systems prior to July 4, 2007, shall comply with the regulations established by the Department pursuant to this section.

The Secretary, or the Secretary's designee, shall approve continuous alcohol monitoring systems for use by the courts prior to their use by a court as evidence of alcohol abstinence, or their use as a condition of probation. The Secretary shall not unreasonably withhold approval of a continuous alcohol monitoring system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against. (2007-165, s. 6)

Editor's Note. — Session Laws 2007-165, s. 9, effective July 4, 2007, was codified as this section at the direction of the Revisor of Statutes.

Session Laws 2007-165, s. 7, provides: "The Department of Correction shall issue Requests for Information for continuous alcohol monitoring equipment and monitoring services to consider the development of pilot programs for the use of alcohol monitoring systems for offenders supervised by the Division of Community Corrections as an intermediate punishment pursuant to Article 81B of Chapter 15A of the General Statutes or as a condition of probation. The RFIs shall require separate submissions as follows:

"(1) For use as an intermediate punishment:

"a. One submission for equipment, maintenance, and technical support.

"b. One submission for equipment, maintenance, technical support, and monitoring services.

"(2) For use as a condition of probation:

"a. One submission for equipment, maintenance, and technical support.

"b. One submission for equipment, maintenance, technical support, and monitoring services.

"The Department shall design the RFIs to use the most recent, cost-effective technology available; the Department shall not restrict vendors to the specifications of any equipment currently used by the courts as evidence of abstinence from alcohol by an offender. The RFIs shall be issued by January 1, 2008."

Session Laws 2007-165, s. 8, provides: "The Department of Correction shall report to the Chairs of the House of Representatives and Senate Appropriations Committees, the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety, and the Joint Legislative Corrections, Crime Control, and Juvenile Justice

Oversight Committee by October 1, 2008, on the following:

"(1) The Department's evaluation of continuous alcohol monitoring systems as evidence of an offender's abstinence from alcohol.

"(2) The results of the Requests for Information issued in the 2007-2008 fiscal year for continuous alcohol monitoring of offenders supervised by the Division of Community Corrections.

"(3) The Department's recommendations for implementing continuous alcohol monitoring, including:

"a. An evaluation of the costs and benefits of alcohol monitoring technology.

"b. The size and characteristics of the offender population and the proposed number of offenders to be monitored.

"c. The contractual and internal costs of the monitoring program.

"d. The proposed caseloads for probation officers who would supervise offenders using continuous alcohol monitoring technology.

"e. Whether the State should conduct a pilot program for continuous alcohol monitoring in limited jurisdictions or statewide.

"The Department shall also explore funding options through grants and other sources, including the possibility of charging a fee to offenders to partially offset the costs of the program. The Department shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on any funds identified."

Session Laws 2007-165, s. 9, provides in part: "Nothing in this act shall be construed to prohibit a court from either continuing or allowing the use of continuous alcohol monitoring systems as evidence of alcohol abstinence prior to the effective date of Sections 1 through 5 [December 1, 2007]."

§ 15A-1344. Response to violations; alteration and revocation.

(a) Authority to Alter or Revoke. — Except as provided in subsection (a1) or (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. Upon a finding that an offender sentenced to community punishment under Article 81B has violated one or more conditions of probation, the court's authority to modify the probation judgment includes the authority to require the offender to comply with conditions of probation that would otherwise make the sentence an intermediate punishment. The district attorney of the prosecutorial district as defined in G.S. 7A-60 in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(a1) Authority to Supervise Probation in Drug Treatment Court. — Jurisdiction to supervise and revoke probation imposed in cases in which the offender is required to participate in a drug treatment court is as provided in G.S. 7A-272(e) and G.S. 7A-271(f). Proceedings to modify or revoke probation in these cases must be held in the county in which the drug treatment court.

(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.

(b1) Service of Notice of Hearing on Violation of Unsupervised Probation. —

(1) Notice of a hearing in response to a violation of unsupervised probation shall be given either by personal delivery to the person to be notified or by depositing the notice in the United States mail in an envelope with postage prepaid, addressed to the person at the last known address available to the preparer of the notice and reasonably believed to provide actual notice to the offender. The notice shall be

mailed at least 10 days prior to any hearing and shall state the nature of the violation.

(2) If notice is given by depositing the notice in the United States mail, pursuant to subdivision (1) of this subsection, and the defendant does not appear at the hearing, the court may do either of the following:

a. Terminate the probation and enter appropriate orders for the enforcement of any outstanding monetary obligations as otherwise provided by law.

b. Provide for other notice to the person as authorized by this Chapter for further proceedings and action authorized by Article 82 of Chapter 15A of the General Statutes for a violation of a condition of probation.

If the person is present at the hearing, the court may take any further action authorized by Article 82 of Chapter 15A of the General Statutes for a violation of a condition of probation.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. In cases where the probation is revoked in a county other than the county of original conviction the clerk in that county must issue a commitment order and must file the order revoking probation and the commitment order, which will constitute sufficient permanent record of the proceeding in that court, and must send a certified copy of the order revoking probation, the commitment order, and all other records pertaining thereto to the county of original conviction to be filed with the original records. The clerk in the county other than the county of original conviction must issue the formal commitment to the North Carolina Department of Correction.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. A hearing extending or modifying probation may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a probationer violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(d1) Reduction of Initial Sentence. — If the court elects to reduce the sentence of imprisonment for a felony, it shall not deviate from the range of minimum durations established in Article 81B of this Chapter for the class of offense and prior record level used in determining the initial sentence. If the presumptive range is used for the initial suspended sentence, the reduced sentence shall be within the presumptive range. If the mitigated range is used for the initial suspended sentence, the reduced sentence shall be within the mitigated range. If the aggravated range is used for the initial suspended sentence, the reduced sentence shall be within the aggravated range. If the court elects to reduce the sentence for a misdemeanor, it shall not deviate from the range of durations established in Article 81B for the class of offense and prior conviction level used in determining the initial sentence.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. Except for probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense. For probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed one-fourth the maximum penalty allowed by law. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(e1) Criminal Contempt in Response to Violation. — If a defendant willfully violates a condition of probation, the court may hold the defendant in criminal contempt as provided in Article 1 of Chapter 5A of the General Statutes. A finding of criminal contempt by the court shall not revoke the probation. If the offender serves a sentence for contempt in a local confinement facility, the Department of Correction shall pay for the confinement at the standard rate set by the General Assembly pursuant to G.S. 148-32.1(a) regardless of whether the offender would be eligible under the terms of that subsection.

(e2) Mandatory Satellite-Based Monitoring Required for Extension of Probation in Response to Violation by Certain Sex Offenders. — If a defendant who is in the category described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(2) violates probation and if the court extends the probation as a result of the violation, then the court shall order satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes as a condition of the extended probation.

(f) Extension, Modification, or Revocation after Period of Probation. — The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

(4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

(g) If there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved. The probationer shall remain subject to the conditions of probation, including supervision fees, during the tolled period. If the probationer is acquitted or if the new charge is dismissed, the time spent on probation during the tolled period shall be credited against the period of probation. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A; 1979, c. 749, ss. 1-3; 1981, c. 377, s. 7; 1983, c. 536; 1987, (Reg. Sess., 1988), c. 1037, ss. 67, 68; 1993, c. 538, s. 18; 1994, Ex. Sess., c. 19, s. 2; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 9; c. 769, s. 21.7(a); 1998-212, s. 17.21(c); 2003-151, s. 1; 2006-247, s. 15(e); 2008-129, s. 4; 2008-187, s. 46; 2009-372, s. 11(a), (b); 2009-411, s. 1; 2009-452, ss. 3, 4; 2009-516, ss. 9, 10(a), (b).)

OFFICIAL COMMENTARY

Except for subsection (b), discussed in the commentary to G.S. 15A-1342, the first several subsections codified prior law and practice. Subsection (e) permits the imposition of special probation, of the same kind that may be imposed in sentencing in the first instance under G.S. 15A-1351(a), following a probation violation. Subsection (f) provides that probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period and if the court was unable to bring the probationer before it in order to revoke at that time.

Editor's Note. — Session Laws 2006-247, s. 15(*l*) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2008-187, s. 46, amended G.S. 15A-1344(f)(2), as enacted by House Bill 1003 of the 2007 Regular Session of the General Assembly, contingent on that act becoming law. House Bill 1003 was enacted as Session Laws 2008-129.

Session Laws 2009-372, s. 19 is a severability clause.

Session Laws 2009-372, s. 20, made the amendment to this section by Session Laws 2009-372, s. 11(a), applicable to hearings held on or after December 1, 2009, and made the amendment to this section by Session Laws 2009-372, s. 11(b), applicable to offenses committed on or December 1, 2009.

Session Laws 2009-516, s. 10(b) provides that if Senate Bill 851, 2009 Regular Session, becomes law, G.S. 15A-1344(a1) as enacted by that act is repealed. Senate Bill 851 is Session Laws 2009-452.

Effect of Amendments. — Session Laws 2008-129, s. 4, effective December 1, 2008, and applicable to probation violation hearings on or after that date, inserted "or in accordance with subsection (f) of this section" near the middle of the first sentence of subsection (d); and rewrote subsection (f).

Session Laws 2008-187, s. 46, effective August 7, 2008, inserted "of the" preceding "period of probation" in subdivision (f)(2).

Session Laws 2009-372, s. 11(a), (b), effective December 1, 2009, in subsection (d), deleted the former second sentence, which read: "The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation "in the present second sentence, substituted "A hearing extended or modifying probation" for "The hearing" at the beginning and in the third sentence, substituted "probationer" for "convicted defendant" near the beginning; and added subsection (g). For applicability, see Editor's note.

Session Laws 2009-411, s. 1, effective December 1, 2009, added subsection (b1).

Session Laws 2009-452, ss. 3 and 4, effective October 1, 2009, and applicable to probation judgments entered or deferred prosecution agreements executed on or after that date, substituted "subsection (a1) or (b)" for "subsection (b)" in the first sentence of subsection (a); and added subsection (a1).

Session Laws 2009-516, ss. 9 and 10(a), effective December 1, 2009, and applicable to probation judgments entered or deferred prosecution agreements executed on or after that date, substituted "subsection (a1) or (b)" for "subsection (b)" in the first sentence of subsection (a); and added subsection (a1).

CASE NOTES

Jurisdiction. — Trial court lacked jurisdiction to hold a probation revocation hearing because the hearing was held after defendant's probation had expired and the State of North Carolina did not follow the requirements in G.S. 15A-1344(f) necessary to hold a probation revocation hearing after the expiration of defendant's term of probation. State v. Black, — N.C. App. —, 677 S.E.2d 199, 2009 N.C. App. LEXIS 693 (2009).

Grant of probation is a privilege afforded by the court and not a right to which a felon is entitled. State v. Coltrane, 58 N.C. App. 210, 292 S.E.2d 736 (1982), rev'd on other grounds, 307 N.C. 511, 299 S.E.2d 199 (1983).

Court Has Discretion to Run Revoked Probation Sentence Either Concurrently or Consecutively with Other Sentences. — Where at the time defendant's probation was revoked, he was subject to a separate term of imprisonment of 10 years, it was therefore within the authority and discretion of the judge revoking defendant's probation to run the sentence either concurrently or consecutively. State v. Campbell, 90 N.C. App. 761, 370 S.E.2d 79, appeal dismissed, 323 N.C. 367, 373 S.E.2d 550 (1988).

Subsection (d), which allows the court to activate defendant's suspended probationary sentence and to run it consecutively to another sentence, does not violate the double jeopardy clauses of the U.S. Constitution and the N.C. Constitution. State v. Campbell, 90 N.C. App. 761, 370 S.E.2d 79, appeal dismissed, 323 N.C. 367, 373 S.E.2d 550 (1988).

This section permits the trial court to impose a consecutive sentence when a suspended sentence is activated upon revocation of a probationary judgment without regard to whether the sentence previously imposed ran concurrently or consecutively. State v. Paige, 90 N.C. App. 142, 369 S.E.2d 606 (1988).

Although an original judgment did not state whether eight sentences for forgery and uttering were consecutive or concurrent, a district court judge did not err by imposing consecutive sentences when defendant's probation was revoked; the judge was permitted to impose a consecutive sentence without regard to what the original judgment stated. State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003).

Pursuant to G.S. 15A-1344(d), the trial court did not err by activating defendant's suspended sentences and specifying that the sentences should run consecutively instead of concurrently after defendant's probation was revoked. State v. Hanner, 188 N.C. App. 137, 654 S.E.2d 820, 2008 N.C. App. LEXIS 70 (2008).

Reduction of Prison Sentence. — Subsection (d) authorizes the court to reduce a prison sentence previously imposed only when prison sentence is activated and probation is revoked. State v. Mills, 86 N.C. App. 479, 358 S.E.2d 86 (1987).

Effect of Consent to Probation Conditions. — By consenting to the conditions of probation, defendants do nothing more than acknowledge that they are "subject to" imposition of the original sentence. They do not forfeit their right to a knowing and voluntary waiver of counsel in a subsequent probation revocation hearing. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Power of Court to Revoke Suspension. — Absent specific prohibition by the legislature, courts have the power to suspend sentence in their discretion. Obviously, if the sentence is suspended on lawful conditions, the court can revoke the suspension for a violation that occurs during the term of the suspension, even though the act occurs after a period of supervised probation has expired. State v. Cannady, 59 N.C. App. 212, 296 S.E.2d 327 (1982).

Where defendant did not move to withdraw a guilty plea pursuant to G.S. 15A-1024, did not give timely notice of appeal pursuant to G.S. 15A-1444, and did not petition for writ of certiorari pursuant to G.S. 15A-1444(e) and N.C. R. App. P. 21(c), any challenge to the original judgment was waived; since defendant waived the right to appeal by consenting to an initial extension of probation under G.S. 15A-1342, the trial court was entitled to revoke defendant's probation and activate the sentence under G.S. 15A-1344(d) after a second violation of probation. State v. Rush, 158 N.C. App. 738, 582 S.E.2d 37, 2003 N.C. App. LEXIS 1255 (2003).

Trial Court Lacked Jurisdiction to Revoke Probation. — Defendant's 60-month probation term began on the date it was imposed, ran concurrently with his active sentence on another offense under G.S. 15A-1346, and expired when its 60-month term elapsed without allegations of violation; a trial court therefore lacked jurisdiction under G.S. 15A-1344(f) to revoke the probation after the term expired because it could have brought defendant before it to revoke his probation when it modified the conditions of his probation without allegations of violation during the 60-month term. State v. Surratt, 177 N.C. App. 551, 629 S.E.2d 341, 2006 N.C. App. LEXIS 1025 (2006).

Trial court was without jurisdiction to revoke defendant's probation and to activate defendant's sentence following a revocation hearing conducted 70 days after expiration of the probationary period because the trial court failed to find that the state made a reasonable effort to conduct the revocation hearing during the period of probation, as required by G.S. 15A-1344(f). State v. Bryant, 361 N.C. 100, 637 S.E.2d 532, 2006 N.C. LEXIS 1288 (2006).

First court lacked jurisdiction to extend defendant's probation since probation could not be extended after it expired under G.S. 15A-1344(d), and there was no finding that there was a reasonable effort to notify defendant and to conduct the extension hearing earlier as required by § 15A-1344(f); since the first court lacked jurisdiction to extend defendant's probation, a second court lacked jurisdiction to subsequently revoke defendant's probation and to activate defendant's suspended sentence. State v. Reinhardt, 183 N.C. App. 291, 644 S.E.2d 26, 2007 N.C. App. LEXIS 1035 (2007).

Because defendant's probation expired on the date when the trial court entered the first of two extensions, the trial court also lacked jurisdiction to enter the second extension. Hence, the court lacked jurisdiction to revoke defendant's probation in the second extension, warranting vacation of that revocation. State v. Satanek, 190 N.C. App. 653, 660 S.E.2d 623, 2008 N.C. App. LEXIS 997 (2008).

Judgment Revoking Probation Arrested. — Judgment revoking defendant's probation was arrested because the hearing was held after defendant's term of probation had ended and the record failed to disclose any finding that the State had made reasonable efforts to conduct an earlier hearing; as a result, the trial court lost jurisdiction to conduct the revocation hearing or to enter its judgment. State v. Hall, 160 N.C. App. 593, 586 S.E.2d 561, 2003 N.C. App. LEXIS 1836 (2003).

G.S. 15A-1344(f) requirement applied to G.S. 90-96, and except as provided in G.S. 15A-1344(f), a trial court lacked jurisdiction to revoke a defendant's probation after the expiration of the probationary term; a trial court's revocation of defendant's probation after his probation period expired, without the specific findings of G.S. 15A-1344(f), was error. State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

Judgment revoking defendant's first probation was arrested because the revocation hearing was held 18 months after defendant's probationary period expired. State v. Henderson, 179 N.C. App. 191, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

Reasonable Effort to Notify Defendant of Probation Violation. — "Reasonable effort" has been defined to mean the diligent and timely implementation of a plan of action; in the context of G.S. 15A-1344(f) that would mean those actions a reasonable person would pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter. State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

Trial court had jurisdiction under G.S. 15A-1344(f) over defendant's probation revocation proceedings as the findings that defendant had absconded and that a probation officer then turned the case over to a surveillance officer who, from time to time, checked to see if there was any record of defendant's arrest or whether defendant was in jail supported the conclusion that the state met its G.S. 15A-1344(f)(2) obligations, and the failure to enter a revocation judgment within the probationary period was chargeable to defendant's conduct. State v. High, 183 N.C. App. 443, 645 S.E.2d 394, 2007 N.C. App. LEXIS 1171 (2007).

Reasonable Effort to Conduct Hearing Before Expiration of Probationary Period. — Case revoking defendant's probation after expiration of his probationary period was remanded because there was sufficient evidence to support a finding that the state made reasonable efforts to conduct the hearing before the expiration of defendant's probation, including: (1) calling defendant's employer, only to be informed that defendant no longer worked there; (2) leaving a note at defendant's home, only to receive a phone call from defendant's mother saying that defendant no longer lived there; (3) trying to personally serve the warrant at defendant's home, but being unable to locate defendant; and (4) soliciting the help of a surveillance officer to locate defendant after the warrant was returned unserved. State v. Daniels, 185 N.C. App. 535, 649 S.E.2d 400, 2007 N.C. App. LEXIS 1807 (2007).

Revocation of Probation Improper When Decision Delegated to Victim. — Trial court's judgment revoking defendant's probation imposed upon his conviction for obtaining property by false pretenses was reversed because the trial court improperly abdicated its discretionary authority to determine whether probation should be revoked and, instead, delegated to the victim the authority of determining whether revocation was proper by stating that it would continue defendant on probation only if the victim agreed to that course of action. State v. Arnold, 169 N.C. App. 438, 610 S.E.2d 396, 2005 N.C. App. LEXIS 672 (2005).

Probation Properly Revoked. — Trial judge made the appropriate inquiry under G.S. 15A-1242 as to whether defendant's waiver of counsel was knowing, intelligent, and voluntary, because: (1) the trial judge informed defendant of the right of assistance of counsel, including the right to a court-appointed attorney if defendant was entitled to one; (2) the trial judge made sure that defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve 11-15 months in prison; and (3) cognizant of those facts, defendant waived her right to counsel. Because defendant's waiver of counsel was knowing, intelligent, and voluntary, the trial judge acted properly in revoking defendant's probation, pursuant to G.S. 15A-1344, for her probation violations and activating her prison sentence. State v. Whitfield, 170 N.C. App. 618, 613 S.E.2d 289, 2005 N.C. App. LEXIS 1090 (2005).

Trial court did not abuse its discretion in revoking defendant's probation, even if there was error in basing the violation, in part, on defendant's failure to meet her curfew, as there was substantial evidence supporting a finding that defendant tested positive for cocaine, failed to complete her community service, failed to notify her probation officer of her change of address, and was in arrears on her restitution payments. State v. Belcher, 173 N.C. App. 620, 619 S.E.2d 567, 2005 N.C. App. LEXIS 2112 (2005).

Probation of defendant, who had been convicted of sexual exploitation of a minor, was properly revoked because the evidence sufficiently showed that he willfully violated the conditions of his probation in that he refused to participate in a sexual abuse treatment program. State v. Howell, 184 N.C. App. 369, 646 S.E.2d 622, 2007 N.C. App. LEXIS 1432 (2007), appeal dismissed, review denied, 362 N.C. 240, 660 S.E.2d 490 (2008).

Because an order granting defendant a continuance of his probation violation hearing did not amount to an adjudication of a probation violation, the trial court not only retained jurisdiction over the case, but thereafter, properly revoked said probation upon defendant's admission at the later-scheduled hearing, pursuant to G.S. 15A-1344(d). State v. Bridges, 189 N.C. App. 524, 658 S.E.2d 527, 2008 N.C. App. LEXIS 609 (2008).

Because defendant's probationary period was automatically suspended when new criminal charges were brought under G.S. 15A-1344(d), the hearing was conducted during defendant's probation, and the trial court had jurisdiction to revoke his probation and activate his sentences in the three files. State v. Patterson, 190 N.C. App. 193, 660 S.E.2d 155, 2008 N.C. App. LEXIS 875 (2008).

When Suspended Sentence May Be Put into Effect. — When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, at any time during the period of probation, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. But the State may not do so after the expiration of the period of probation except as provided in subsection (f) of this section. State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

Court is given considerable discretion in determining whether good cause exists for modifying the terms of probation. State v. Coltrane, 58 N.C. App. 210, 292 S.E.2d 736 (1982), rev'd on other grounds, 307 N.C. 511, 299 S.E.2d 199 (1983).

Under this statute a defendant is entitled to receive notice that a hearing is to take place; the statute does not require that a defendant be given notice of the court's intent to modify the terms of probation. State v. Coltrane, 307 N.C. 511, 299 S.E.2d 199 (1983).

Evidence Required. — In a probation revocation hearing, all that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that defendant has willfully violated a valid condition of probation or that defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. State v. Lucas, 58 N.C. App. 141, 292 S.E.2d 747, cert. denied, 306 N.C. 390, 293 S.E.2d 593 (1982).

Period May Not Be Tolled with Erroneous Violation Reports. — This section clearly provides that the violation must have occurred during the probation period. The State may not file erroneous violation reports to toll the probation period, and then revoke probation for an action which occurred after the probation period ended. State v. Cannady, 59 N.C. App. 212, 296 S.E.2d 327 (1982).

The court is not to state in its judgment that it considered alternatives to revoking defendant's probation. State v. Parker, 55 N.C. App. 643, 286 S.E.2d 366 (1982).

Compliance with Subsection (f) Required. — Trial court's revocation of defendant's probation was an error where the State failed to comply with G.S. 15A-1344(f)(1) by not filing a written motion before the expiration of the probation period indicating the State's intent to conduct a revocation hearing. State v. Hicks, 148 N.C. App. 203, 557 S.E.2d 594, 2001 N.C. App. LEXIS 1289 (2001).

To satisfy subsection (f), three conditions must be met: the probationer must have committed a violation during his probation, the State must file a motion indicating its intent to conduct a revocation hearing, and the State must have made a reasonable effort to notify the probationer and conduct the hearing sooner. State v. Cannady, 59 N.C. App. 212, 296 S.E.2d 327 (1982).

Failure to Make Findings Not Abuse of Discretion. — Trial court did not abuse its discretion in revoking defendant's probation, even though it failed to enter findings regarding the sufficiency of the explanations defendant gave at her probation revocation hearing. State v. Belcher, 173 N.C. App. 620, 619 S.E.2d 567, 2005 N.C. App. LEXIS 2112 (2005).

Failure to Make Findings Required Remand. — Remand for the trial court at defendant's revocation of probation hearing to enter sufficient material findings was required because the revocation hearing occurred after the term of defendant's probation had expired and, although the record provided sufficient evidence for the trial court to find that the State of North Carolina made reasonable efforts to conduct a hearing prior to the expiration of defendant's probation, the trial court, as required by G.S. 15A-1344(f), failed to make a finding that the State made reasonable efforts to hold the hearing during defendant's probationary term. State v. Jackson, 190 N.C. App. 437, 660 S.E.2d 165, 2008 N.C. App. LEXIS 877 (2008).

Applied in State v. Partridge, 110 N.C. App. 786, 431 S.E.2d 550 (1993).

Cited in State v. Williamson, 61 N.C. App. 531, 301 S.E.2d 423 (1983); In re McLean, 135 N.C. App. 387, 521 S.E.2d 121, 1999 N.C. App. LEXIS 1150 (1999); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002); State v. Edgerson, 164 N.C. App. 712, 596 S.E.2d 351, 2004 N.C. App. LEXIS 1013 (2004).

§ 15A-1344.1. Procedure to insure payment of child support.

(a) When the court requires, as a condition of supervised or unsupervised probation, that a defendant support his children, the court may order at any time that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) apply. If child support is to be paid through income withholding, the payments shall be made in accordance with G.S. 110-139(f).

(b) After entry of such an order by the court, the clerk of court shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

(c) The parties affected by the order shall inform the clerk of court and the State Child Support Collection and Disbursement Unit of any change of address or of other condition that may affect the administration of the order. The court may provide in the order that a defendant failing to inform the court and the State Child Support Collection and Disbursement Unit of a change of address within reasonable period of time may be held in violation of probation.

(d) When a defendant in a non-IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, upon notification by the State Child Support Collection and Disbursement Unit the clerk of superior court may mail by regular mail to the last known address of the defendant a notice of delinquency that sets out the amount of child support currently due and that demands immediate payment of the amount. Failure to receive the delinquency notice is not a defense in any probation violation hearing or other proceeding thereafter. If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or is not paid within 30 days after the defendant becomes delinquent if the clerk has elected not to send a delinquency notice, the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both.

When a defendant in a IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, at the request of the IV-D obligee the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both. (1983, c. 567, s. 1; 1983 (Reg. Sess., 1984), c. 1100, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 949, s. 7; 1993, c. 517, s. 4; 1999-293, ss. 10, 23.)

§ 15A-1345. Arrest and hearing on probation violation.

(a) Arrest for Violation of Probation. — A probationer is subject to arrest for violation of conditions of probation by a law-enforcement officer or probation officer upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

(b) Bail Following Arrest for Probation Violation. — If at any time during the period of probation the probationer is arrested for a violation of any of the conditions of probation, he must be taken without unnecessary delay before a judicial official to have conditions of release pending a revocation hearing set in the same manner as provided in G.S. 15A-534.

(b1) If the probationer is arrested for a violation of any of the conditions of probation and (i) has a pending charge for a felony offense or (ii) has been convicted of an offense at any time that requires registration under Article 27A of Chapter 14 of the General Statutes or an offense that would have required registration but for the effective date of the law establishing the Sex Offender and Public Protection Registration Program, the judicial official shall determine whether the probationer poses a danger to the public prior to imposing conditions of release and must record that determination in writing.

(1) If the judicial official determines that the probationer poses a danger to the public, the probationer shall be denied release pending a revocation hearing.

(2) If the judicial official finds that the defendant does not pose a danger to the public, then conditions of release shall be imposed as otherwise provided in Article 26 of this Chapter.

(3) If there is insufficient information to determine whether the defendant poses a danger to the public, then the defendant shall be retained in custody for not more than seven days from the date of the arrest in order for the judicial official, or a subsequent reviewing judicial official, to obtain sufficient information to determine whether the defendant poses a danger to the public.

(4) If the defendant has been held seven days from the date of arrest pursuant to subdivision (3) of this subsection, and the court has been unable to obtain sufficient information to determine whether the defendant poses a danger to the public, then the defendant shall be brought before any judicial official, who shall record that fact in writing and shall impose conditions of pretrial release as otherwise provided in this section.

(c) When Preliminary Hearing on Probation Violation Required. — Unless the hearing required by subsection (e) is first held or the probationer waives the hearing, a preliminary hearing on probation violation must be held within seven working days of an arrest of a probationer to determine whether there is probable cause to believe that he violated a condition of probation. Otherwise, the probationer must be released seven working days after his arrest to continue on probation pending a hearing, unless the probationer has been denied release pursuant to subdivision (1) of subsection (b1) of this section, in which case the probationer shall be held until the revocation hearing date.

(d) Procedure for Preliminary Hearing on Probation Violation. — The preliminary hearing on probation violation must be conducted by a judge who is sitting in the county where the probationer was arrested or where the alleged violation occurred. If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

(e) Revocation Hearing. — Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing. When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 12, 13; 1979, c. 749, s. 4; 1979, 2nd Sess., c. 1316, s. 39; 1987 (Reg. Sess., 1988), c. 1037, s. 69; 2008-117, s. 19; 2009-412, s. 2.)

OFFICIAL COMMENTARY

This section also codifies prior law and practice. Subsections (c) and (d) in particular respond primarily to the dictates of Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) which applies the due process requirements first stated in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) to probation revocation. An important point to notice is that the provisions permit the consolidation of the preliminary hearing on revocation and the revocation hearing if the revocation hearing is held within five working days of the probationer's arrest. The preliminary hearing on a probation violation may, of course, be omitted if the probationer is not taken into custody before his revocation hearing, since the preliminary hearing serves roughly the same purpose as the appearance before a magistrate following a conventional arrest for a crime. In granting entitlement to the probationer to representation by counsel at the revocation hearing, subsection (e) goes beyond the Supreme Court requirement and beyond the present requirements of G.S. 7A-451 which provides counsel only "if confinement is likely to be adjudged."

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 19, effective December 1, 2008, and applicable to offenses committed on or after that date, added the last sentence in subsection (b).

Session Laws 2009-412, s. 2, effective December 1, 2009 and applicable to offenses committed on or after that date, designated the former second sentence of subsection (b) as subsection (b1); in subsection (b1), inserted "is arrested for a violation of any of the conditions of probation and (i) has a pending charge for a felony offense or (ii)" near the beginning, and substituted "the judicial official shall determine whether the probationer poses a danger to the public prior to imposing conditions of release and must record that determination in writing" for "the court must make a finding that the probationer is not a danger to the public prior to release with or without bail" at the end; added subdivisions (b1)(1) through (b1)(4); and, in subsection (c), added "unless the probationer has been denied release pursuant to subdivision (1) of subsection (b1) of this section, in which case the probationer shall be held until the revocation hearing date" at the end of the last sentence.

Legal Periodicals. — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

CASE NOTES

I. General Consideration.
II. Notice.
III. Burden and Standard of Proof.
IV. Evidence.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases cited below were decided under former G.S. 15-200.*

Constitutionality. — The evidentiary standard and State's burden of proof applied to probation revocation hearings pursuant to subsection (e) of this section are not unconstitutionally indefinite. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Legislative Intent. — This statute, enacted by the North Carolina legislature in 1977, was intended to go beyond the federal constitutional right to counsel enunciated by the United States Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). State v. Coltrane, 307 N.C. 511, 299 S.E.2d 199 (1983).

Due Process to Be Afforded Prior to Revocation. — Under G.S. 15A-1341(c), a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, this section guarantees full due process before there can be a revocation of probation and a resulting prison sentence. State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

Procedure in This Section Should Be Followed Rather Than Contempt Proceeding. — When a probationer is charged with violating a condition of his probation, the procedure provided in this section should be followed rather than a proceeding to hold him in contempt. State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

Inquiry of the court at the hearing is not directed to the probationer's guilt or innocence, but to the truth of the accusation of a violation of probation. The crucial question is: "Has the probationer abused the privilege of grace extended to him by the court?" State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Jury Question Not Presented. — Whether defendant has violated valid conditions of probation is not an issue of fact for a jury, but is a question of fact for the judge to be determined in the exercise of his sound discretion. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

A hearing to determine whether or not the terms of a suspended sentence have been violated is not a jury matter, but is to be determined in the sound discretion of the judge. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

Judge has discretion whether to revoke probation upon his finding that a condition of probation has been violated. Thus, liberty hangs in the balance. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

In hearings under this section the findings of fact and the judgment entered thereupon are matters to be determined in the sound discretion of the court, and the exercise of that discretion in the absence of gross abuse cannot be reviewed. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

Revocation of probation is a matter of discretion with the trial court. In making the determination as to whether the conditions of probation have been violated the evidence need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended. State v. Ginn, 59 N.C. App. 363, 296 S.E.2d 825, cert. denied and appeal dismissed, 307 N.C. 271, 299 S.E.2d 217 (1982).

Trial Court Required to Make Findings of Fact. — Because the trial court failed to make the requisite findings of fact at the defendant's revocation hearing resolving the conflicts in the evidence on crucial factual matters, the appellate court was unable to determine whether the trial court properly considered the law and the particular circumstances of the case in determining to revoke the defendant's probation. Accordingly, the appellate court vacated the trial court's judgment as to the issues that could not be determined and remanded the case to the trial court to make the necessary findings. State v. Turner, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1884 (Apr. 16, 2002).

Section does not involve defendant's rights under U.S. Const., Amend. VI, since a hearing to determine whether the terms of a suspended sentence have been violated is not a criminal prosecution and is not a jury matter. State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973).

Proceeding to revoke probation is not a criminal prosecution. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

But is a proceeding solely for the determination of whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered. State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

And Formal Trial Is Not Required. — There is no statute in this State requiring a formal trial in a proceeding to revoke probation. State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967); State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Proceedings to revoke probation are often regarded as informal or summary. State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967); State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

But substantial rights are litigated in every revocation of probation proceeding, irrespective of the preciseness of the claimed violation or the complexity of the factual inquiry. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

At stake in a revocation proceeding is individual liberty, and the substantiality of this right may not be disputed. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

And appointment of counsel is constitutionally required when proceedings to revoke probation are conducted. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

A defendant charged with the violation of conditions of a probation sentence is entitled to representation by an attorney. State v. Atkinson, 7 N.C. App. 355, 172 S.E.2d 249 (1970).

While the right to counsel applies to "criminal proceedings," there is little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

Under subsection (e) of this section the defendant is entitled to have counsel present at the probation revocation hearing. State v. Coltrane, 307 N.C. 511, 299 S.E.2d 199 (1983).

Statutory Right to Counsel at Probation Revocation Hearings. — There is a statutorily recognized right to counsel at probation revocation hearings in North Carolina that goes beyond the federal constitutional right enunciated in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Waiver of Right to Counsel. — Right to counsel at probation revocation hearing can be knowingly, intelligently and voluntarily waived; however, waiver cannot be inferred from a silent record. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Trial court sufficiently ensured that defendant's waiver of counsel at his probation revocation hearing was knowing and voluntary in that (1) both defendant and the trial court completed a Waiver of Counsel form, (2) the trial court's discussion with defendant in open court apprised defendant of his right to counsel, directly advised defendant that, while he had a constitutional right to self-representation, his appointed counsel would continue to represent him unless defendant affirmatively chose to excuse her and to proceed pro se, and (3) where even after defendant discharged his appointed counsel and signed the written waiver of his right to assistance of counsel, the trial court offered defendant the opportunity to request a continuance for the purpose of hiring a private attorney, which defendant declined; although the trial judge did not directly ask defendant if he was aware of the nature of the charges and proceedings, the prosecutor announced the charges in open court and defendant confirmed to the trial court his awareness that he was facing an active prison sentence. State v. Hill, 168 N.C. App. 391, 607 S.E.2d 670, 2005 N.C. App. LEXIS 259 (2005), cert. denied, 359 N.C. 324, 611 S.E.2d 839 (2005).

Because defendant had nearly eight months within which to retain private counsel after waiving court-appointed counsel, and failed to do so, his conduct amounted to an obstruction and delay of the proceedings; defendant knowingly and voluntarily waived his right to appointed counsel and forfeited his right to proceed with the counsel of his choice. State v. Quick, 179 N.C. App. 647, 634 S.E.2d 915, 2006 N.C. App. LEXIS 2026 (2006).

What Record Must Show on Waiver of Counsel. — When a defendant waives counsel at or before the trial phase of the proceedings against him, the record must show that the defendant was literate and competent, that he understood the consequences of the waiver, and that, in waiving the right, the defendant was voluntarily exercising his own free will. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

A waiver of counsel is ineffective at the probation revocation stage when the record fails to show that the defendant has knowingly and voluntarily waived the right; that is, after the trial court has made thorough inquiry and is satisfied that the defendant has been clearly advised of the right to counsel, that the defendant understands and appreciates the consequences of the decision to proceed pro se, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Consenting to Conditions of Probation Does Not Waive Right to Counsel. — By consenting to the conditions of probation, defendants do nothing more than acknowledge that they are "subject to" imposition of the original sentence. They do not forfeit their right to a knowing and voluntary waiver of counsel in a subsequent probation revocation hearing. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Denial of Substitute Counsel Upheld. — Where counsel withdrew at defendant's request, presumably because defendant was not satisfied with her, the trial court's denial of substitute counsel was entirely appropriate. State v. Tucker, 111 N.C. App. 907, 433 S.E.2d 476, 1993 N.C. App. LEXIS 928 (1993), appeal dismissed, 335 N.C. 564, 439 S.E.2d 160 (1993), cert. dismissed, 463 S.E.2d 249 (1995).

Right to Counsel Violated. — Trial court erred in denying defendant's request to withdraw his waiver of court appointed counsel, and the error violated defendant's right to an attorney, under G.S. 15A-1345(e), because defendant carried his burden of proving a change in his desire for the assistance of counsel, and his request was for good cause in that (1) defendant withdrew his prior waiver by explicitly asking the trial court to appoint counsel to represent him; (2) defendant indicated that he had sought to hire an attorney, but that he did not know it would have been that much; (3) the contention that defendant made no inquiry into the cost of retaining counsel was simply not supported by the transcript; (4) defendant's request for appointed counsel was not a tactic to delay and frustrate the orderly processes of the trial court; and (5) defendant's "tactic" amounted to an attempt to withdraw his waiver at his second appearance, less than one month after signing the waiver form. State v. Scott, 187 N.C. App. 775, 653 S.E.2d 908, 2007 N.C. App. LEXIS 2552 (2007).

Jurisdiction to Conduct Hearing. — The resident judge of a judicial district, the judge holding the courts of a judicial district, or any judge commissioned at the time to hold court in a judicial district, is clothed with jurisdiction to conduct a revocation hearing with respect to all probationers who reside in the district or who were placed on probation in any county in the district or who violated the conditions of probation in any county in the district. State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973).

When Warrant May Issue. — This section authorizes issuance of a probation violation warrant at any time during the period of probation. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Defendant Need Not Be Apprehended During Probation Period. — This section does not require that the defendant be apprehended and brought into court for hearing during the probation period. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

To argue that the language of this section must be interpreted to require that the warrant not only be issued but that it also be actually served on the defendant and he be taken into custody during the probationary period, else the court lacks power to hear the matter, obviously rewards the defaulting probationer for his skill in eluding the officers, and is required neither by reason nor authority. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Hearing May Be Held After Period of Probation Has Expired. — If a probation violation warrant and order of arrest is issued during the probationary period, a valid probation revocation hearing may be held and order entered after the period of probation has expired, at least in situations where the delay is not due to any lack of diligence on the part of the probation authorities or the court. State v. Best, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Although the court failed to comply with the provisions of subsection (c) of this section, which requires a preliminary hearing within seven working days of arrest of probationer unless the probationer waives his right to a hearing, defendant was not prejudiced by the lack of a preliminary hearing where he was arrested in Virginia, there was prima facie evidence of a probation violation, and he did not deny that he violated the conditions of his probation. State v. Clemmons, 97 N.C. App. 502, 389 S.E.2d 135, appeal dismissed and cert. denied, 327 N.C. 434, 395 S.E.2d 691 (1990).

Absence from State After Service of Capias. — Upon issuance of notice of service of capias the defendant was under duty to respond and appear and time ceased to run against the period of probation during the period defendant absented himself from the State and was a fugitive from justice. State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

Warrantless Arrest of Probationer. — If a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a warrant, then it is reasonable to conclude that G.S. 15-205 and this section read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Informing Defendant of Right to Remain Silent. — The court at a probation revocation hearing is not required to inform a defendant who is unrepresented by counsel of his constitutional right to remain silent at the hearing. State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981).

Any violation of a valid condition of probation is sufficient to revoke defendant's probation. All that is required to revoke probation is evidence satisfying the trial court, in its discretion, that the defendant violated a valid condition of probation without lawful excuse. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Breach of Condition Need Not Be "Willful". — It is not necessary for a court to find that a defendant's breach of a condition of his probation was "willful" in order to activate defendant's suspended sentence where the court found that such breach was without lawful excuse. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

But Must Be Without Lawful Excuse. — If a court concludes that a breach of a probationary condition by a defendant is without lawful excuse, this is sufficient to support the activation of a suspended sentence. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

All that is required in a probation hearing is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

Court Held Not Required to Find Defendant's Action to Constitute Lawful Excuse. — It is not incumbent upon a court in a probation revocation proceeding to find that a defendant's voluntary payment of certain expenses was a "lawful excuse" for his failure to make periodic payments into the office of the clerk of court as required by a condition of his probation. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Conduct Violating Condition of Suspension on Good Behavior. — Behavior such as will warrant a finding that a defendant has breached the condition of suspension on good behavior must be conduct which constitutes a violation of some criminal law of the State. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965).

Scope of Inquiry into Changed Circumstances. — Where the superior court finds that the terms of the suspended sentence have been violated, it "shall enforce the judgment unless" it finds that the circumstances surrounding the conditions have changed so much that revocation would be unjust. However, the inquiry into changed circumstances is directed only to circumstances which are relevant to the conditions of suspension. State v. Cash, 30 N.C. App. 677, 228 S.E.2d 85 (1976).

Effect of Conviction in Another State. — Order suspending a sentence on condition "that the defendant be of good behavior and violate none of the laws of the State" was not violated by proof that defendant was convicted of a criminal law in another state. State v. McBride, 240 N.C. 619, 83 S.E.2d 488 (1954). See also State v. Millner, 240 N.C. 602, 83 S.E.2d 546 (1954).

Provision that the judge "shall proceed to deal with the case as if there had been no probation or suspension of sentence" is not statutory authority for the judge, at a probation revocation hearing, to order the sentence imposed by the trial judge to run consecutively with some other sentence unless the trial judge ordered it at the time the sentence was imposed. State v. Fields, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

Probationary judgment does not have to be formally introduced into evidence at the revocation hearing if the record indicates, as in the case at bar, that the judge has the order before him, and where reference is made in the judgment to specific conditions that defendant allegedly violated. State v. Hogan, 27 N.C. App. 34, 217 S.E.2d 712 (1975).

Imprisonment Is for Original Crime. — A petitioner, upon revocation of his suspended sentence, suffers imprisonment under a sentence, not for the matters that may have caused the revocation of his probation, but for the crime for which he was originally found guilty. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Although revocation of probation results in the deprivation of a probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty. State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Denial of Credit for Probation or Parole Time. — There is nothing unusual in the denial by North Carolina law of credit for probation or parole time against a prison sentence; it is common to both State and federal probation and parole systems and the validity of such denial has been universally recognized both in federal and State decisions. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

The refusal to credit probation time against the prison sentence is not double jeopardy, or an extension or enlargement of the original sentence of imprisonment, since the period of probation is not counted as a part of the period of imprisonment. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Constitutionality of Revocation Held Not Moot. — The fact that whether or not a person was actually incarcerated will have an effect upon the time at which he may, under state law, petition the courts for restoration of his civil rights is a sufficiently important legal distinction to preserve his case, as to the constitutionality of his probation revocation, from being moot, although he had served his prison term. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

Applied in State v. Jackson, 190 N.C. App. 437, 660 S.E.2d 165, 2008 N.C. App. LEXIS 877 (2008).

Cited in State v. Cunningham, 63 N.C. App. 470, 305 S.E.2d 193 (1983); State v. Evans, 153 N.C. App. 313, 569 S.E.2d 673, 2002 N.C. App. LEXIS 1123 (2002); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

II. NOTICE.

Written Notice of Hearing. — A defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. State v. Butcher, 10 N.C. App. 97, 177 S.E.2d 730 (1970); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

Notice of Intent to Seek Revocation Held Sufficient. — Defendant was given sufficient notice of the State's intent to pray revocation of the suspension of his sentence for abandonment and nonsupport of his wife and children, where the warrant providing the basis for the revocation hearing stated that the defendant had failed to comply with a support order and was in arrears in the amount of $690. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977), decided under former § 15-200.1.

Defendant received proper notice, as required by G.S. 15A-1345(e), that defendant allegedly violated defendant's probation because a violation report defendant received alleged that defendant failed to report in a reasonable manner to defendant's probation officer during a curfew check due to being extremely intoxicated, and the evidence offered at defendant's revocation hearing established these same facts, so defendant had notice of the facts relied on to find defendant violated defendant's probation. State v. Hubbard, — N.C. App. —, 678 S.E.2d 390, 2009 N.C. App. LEXIS 1061 (July 7, 2009).

The defendant was given sufficient written notice of his probation revocation hearing as called for under subsection (e) of this section, where defendant was served with an arrest order which alleged that he failed to comply with the probation judgment in an earlier criminal conviction, and where the defendant signed a waiver of counsel form 10 days prior to the hearing which acknowledged that he had been informed of the charges against him. State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981).

III. BURDEN AND STANDARD OF PROOF.

The burden is on the defendant to present competent evidence of his inability to comply with the terms of his probation; otherwise, evidence of defendant's failure to comply may justify a finding that defendant's failure to comply was wilful or without lawful excuse. State v. Crouch, 74 N.C. App. 565, 328 S.E.2d 833 (1985); State v. Tozzi, 84 N.C. App.

517, 353 S.E.2d 250 (1987).

Burden of Proving Inability to Pay Fine or Restitution. — In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation, the burden is upon the defendant to offer evidence of his inability to pay money according to the terms of the probationary judgment. State v. Jones, 78 N.C. App. 507, 337 S.E.2d 195 (1985).

Burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965).

Evidence Must Reasonably Satisfy Judge. — All that is required in a hearing to revoke probation is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967); State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967); State v. Martin, 27 N.C. App. 666, 220 S.E.2d 94 (1975); State v. Freeman, 47 N.C. App. 171, 266 S.E.2d 723, cert. denied, 301 N.C. 99, 273 S.E.2d 304 (1980).

The State's burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation. State v. Tozzi, 84 N.C. App. 517, 353 S.E.2d 250 (1987).

Standard of Proof Is Not Reasonable Doubt. — The alleged violation of the terms of a suspended sentence need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

Upon a hearing to determine whether or not probation should be revoked, and a sentence previously suspended should be activated, all that is required is that the evidence be such as reasonably to satisfy the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition upon which the sentence was so suspended. State v. Seagraves, 266 N.C. 112, 145 S.E.2d 327 (1965).

The alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Probation revocation hearings do not require proof beyond a reasonable doubt since probation is an act of grace. All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. State v. Seay, 59 N.C. App. 667, 298 S.E.2d 53 (1982).

IV. EVIDENCE.

Rules of Evidence. — In a probation hearing, the court is not bound by strict rules of evidence. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974); State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974).

At a hearing to revoke the suspension of a prison sentence for the alleged violation of a valid condition of suspension, the court is not bound by strict rules of evidence. All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

In a probation revocation hearing, all that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that defendant has willfully violated a valid condition of probation or that defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. State v. Lucas, 58 N.C. App. 141, 292 S.E.2d 747, cert. denied, 306 N.C. 390, 293 S.E.2d 593 (1982).

Formal rules of evidence do not apply in a probation revocation hearing pursuant to G.S. 15A-1345(e). State v. Young, 190 N.C. App. 458, 660 S.E.2d 574, 2008 N.C. App. LEXIS 863 (2008).

Reasons Why Evidentiary Rules Need Not Be Enforced. — The evidence showing violation of terms of probation need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended. Because of this and also because it is a matter which a judge hears and not a jury, the rules of evidence need not be strictly enforced. State v. Freeman, 47 N.C. App. 171, 266 S.E.2d 723, cert. denied, 301 N.C. 99, 273 S.E.2d 304 (1980).

Evidence Insufficient to Revoke Probation. — Trial court could not revoke the defendant's probation on the ground that the defendant failed to complete a drug treatment program where the defendant was ordered to attend the program for eight months in one case and to complete the program in another case, and wherein the defendant attended the program, which was normally for one year, for one year and one week before being dismissed from the program under disputed grounds. State v. Turner, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1884 (Apr. 16, 2002).

Evidence Sufficient to Revoke Probation. — Completed form for judgment and commitment upon revocation, together with a probation violation report which alleged that defendant failed to report to defendant's probation officer and which was incorporated by reference, contained sufficient findings to support revocation of defendant's second probation. State v. Henderson, 179 N.C. App. 191, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

Judge's decision to revoke the probationary sentence of defendant was supported by competent evidence showing constructive possession of firearms in violation of a condition of probation because defendant, when visited by a police officer at the home defendant shared with two other people, knew the precise location of the firearms in the home, needed no assistance in locating them, appeared to make statements demonstrating ownership, and never made statements either during the search or at trial denying ownership. Though the State of North Carolina was not able to show that defendant had exclusive possession of the premises, the evidence established sufficient incriminating circumstances to support constructive possession. State v. Young, 190 N.C. App. 458, 660 S.E.2d 574, 2008 N.C. App. LEXIS 863 (2008).

Evidence which does not meet the standards of U.S. Const., Amends. IV and XIV may be admitted in a probation revocation hearing. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

Exclusionary rule is not applicable in probation revocation hearings. State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).

Where defendant has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can properly order revocation. State v. Crouch, 74 N.C. App. 565, 328 S.E.2d 833 (1985).

Counsel's statements with respect to defendant's inability to comply with the terms of his defendant's probation were not competent evidence, and the trial court was not, therefore, under a duty to make specific findings with respect to defendant's alleged inability to comply. State v. Crouch, 74 N.C. App. 565, 328 S.E.2d 833 (1985).

OPINIONS OF ATTORNEY GENERAL

A probation officer may not turn a probationer over to a jail's custody based upon a special condition of probation that the probation officer had up to 30 days of incarceration if deemed necessary for minor infractions or technical violations. See opinion of the Attorney General to Thomas Thornburg, Legal Counsel, N.C. Department of Correction, 60 N.C.A.G. 110 (1992).

§ 15A-1346. Commencement of probation; multiple sentence.

(a) Commencement of Probation. — Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.

(b) Consecutive and Concurrent Sentences. — If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Probation would be stayed pending appeal under G.S. 15A-1451(a)(4), although under subsection (a) it would start on imposition of sentence. Subsection (b) clarifies the point that a probationary sentence may be imposed to run consecutively after a period of active imprisonment for a different crime.

CASE NOTES

Consecutive Sentences Were Error. — Trial court erred in imposing two consecutive five-year probation sentences for taking indecent liberties with a minor under G.S. 15A-1346(a). State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262, 2002 N.C. App. LEXIS 1170 (2002).

No Violation Where Probation Order Not for Consecutive Terms. — Although the imposition of consecutive terms of probation is prohibited by G.S. 15A-1346, defendant's sentence was upheld because he did not receive consecutive probationary sentences; the judgment indicated that if his five year probation was revoked, defendant would serve consecutive active sentences. State v. Howell, 169 N.C. App. 58, 609 S.E.2d 417, 2005 N.C. App. LEXIS 524 (2005).

Probationary Term Runs Concurrently. — While two probationary sentences were ordered to run consecutively, the two probationary judgments were devoid of any language that would have suggested that defendant was to have two consecutive terms of 36 months probation. In the absence of any specific language, the provisions of G.S. 15A-1346 controlled and the period of probation, if not specified, ran concurrently. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Because the revocation order did not specify that defendant's probation was to run consecutively with defendant's remaining term of imprisonment, this two-year probationary period ran concurrently with the other probationary period set to begin four days later. State v. Patterson, 190 N.C. App. 193, 660 S.E.2d 155, 2008 N.C. App. LEXIS 875 (2008).

Probationary Term Runs Concurrently With Another Sentence. — Defendant's 60-month probation term began on the date it was imposed, ran concurrently with his active sentence on another offense under G.S. 15A-1346, and expired when its 60-month term elapsed without allegations of violation; a trial court therefore lacked jurisdiction under G.S. 15A-1344(f) to revoke the probation after the term expired because it could have brought defendant before it to revoke his probation when it modified the conditions of his probation without allegations of violation during the 60-month term. State v. Surratt, 177 N.C. App. 551, 629 S.E.2d 341, 2006 N.C. App. LEXIS 1025 (2006).

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.

When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. When the defendant appeals to the superior court because a district court has found he violated probation and has activated his sentence or imposed special probation, and the superior court, after a de novo revocation hearing, orders that the defendant continue on probation under the same or modified conditions, the superior court is considered the court that originally imposed probation with regard to future revocation proceedings and other purposes of this Article. When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 14.)

OFFICIAL COMMENTARY

This section carries forward prior law, except that under prior law, upon appeal to superior court from a revocation in the district court, the superior court, upon a finding that a violation occurred, must simply affirm the response to the violation imposed by the lower court judge. This section intends that the superior court judge at the hearing have complete freedom if he finds a violation; even if the lower court judge revoked the probation, the superior court judge may instead continue the probationer on probation or alter the terms of his probation.

CASE NOTES

Editor's Note. *— Most of the cases cited below were decided under former G.S. 15-200.1.*

Court May Not Try Defendant Anew. — The jurisdiction of the superior court under this section is derivative and that court is without authority to try defendant anew. State v. Riddle, 18 N.C. App. 490, 197 S.E.2d 8 (1973).

Adjudication of Guilt May Not Be Challenged. — A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

Since This Is Impermissible Collateral Attack. — Questioning the validity of the original judgment where sentence was suspended, on appeal from an order activating the sentence, is an impermissible collateral attack. State v. Noles, 12 N.C. App. 676, 184 S.E.2d 409 (1971).

Superior Court Is Not Limited to Evidence Heard in Inferior Court. — Since the hearing on appeal must be de novo in superior court, that court is not limited to the evidence heard in the inferior court, and may hear and consider any competent evidence so long as it bears on the issue of whether or not there has been a violation of the terms of the suspended sentence. State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961).

Where matter was not heard de novo by the superior court, on appeal thereto, as required by this section, the judgment putting the sentence into execution was set aside, and the cause remanded to the superior court for further hearing in accordance with law. State v. Thompson, 244 N.C. 282, 93 S.E.2d 158 (1956).

Defendant was required to appeal the district court's judgment revoking his probation to the superior court before he was allowed to appeal that judgment to the court of appeals; the court of appeals dismissed defendant's appeal from the district court's judgment because he had not appealed that judgment to the superior court. State v. Harless, 160 N.C. App. 78, 584 S.E.2d 339, 2003 N.C. App. LEXIS 1669 (2003).

Where there was no factual basis for any change in the sentence imposed by the trial judge, it was error for the judge at the probation revocation hearing, after finding that the conditions were violated, to do anything other than enforce the judgment of the lower court. State v. Fields, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

No Right to Appeal Modification of Probation That Does Not Result in Special Probation. — Defendant's right to appeal in a criminal proceeding is purely a creation of state statute and since defendant's probation was modified after a violation was found, and the modification did not include imposition of a sentence or a special probation, defendant had no right to appeal and the State was granted a motion to dismiss the defendant's appeal of the probation modification. State v. Edgerson, 164 N.C. App. 712, 596 S.E.2d 351, 2004 N.C. App. LEXIS 1013 (2004).

Jurisdiction to Review Revocation of Probation. — When a district court revokes a defendant's probation, that defendant's appeal is to the superior court rather than the Court of Appeals of North Carolina; thus, G.S. 15A-1347, rather than G.S. 7A-272(d), governed defendant's appeal of a probation revocation and the court of appeals lacked jurisdiction to hear the appeal. State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004).

Trial Court Lacked Jurisdiction to Revoke Probation. — Because defendant's probation expired on the date when the trial court entered the first of two extensions, the trial court lacked jurisdiction to enter the second extension. Hence, the court lacked jurisdiction to revoke defendant's probation in the second extension, warranting vacation of that revocation. State v. Satanek, 190 N.C. App. 653, 660 S.E.2d 623, 2008 N.C. App. LEXIS 997 (2008).

No Right to Appeal Voluntary Election to Serve Sentence. — Where the trial court activated defendant's sentence upon his voluntary election to serve the sentence in lieu of the remainder of his probation and not as a result of a finding of a violation of probation, defendant had no right to appeal from his activated sentence. State v. Ikard, 117 N.C. App. 460, 450 S.E.2d 927 (1994).

Construction with G.S. 7A-272(d). — Appeal procedures in G.S. 7A-272(d) prevail over the general rule of G.S. 15A-1347; therefore, after defendant's felony probation was revoked in district court, defendant was allowed to appeal the case to the North Carolina Court of Appeals instead of a superior court. State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003).

Cited in State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990); State v. Henderson, 179 N.C. App. 191, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

§§ 15A-1348 through 15A-1350: Reserved for future codification purposes.

ARTICLE 83.

Imprisonment.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.

(a) The judge may sentence to special probation a defendant convicted of a criminal offense other than impaired driving under G.S. 20-138.1, if based on the defendant's prior record or conviction level as found pursuant to Article 81B of this Chapter, an intermediate punishment is authorized for the class of offense of which the defendant has been convicted. A defendant convicted of impaired driving under G.S. 20-138.1 may also be sentenced to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. Except for probationary sentences of impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. For probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed one-fourth the maximum penalty allowed by law. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The original period of probation, including the period of imprisonment required for special probation, shall be as specified in G.S. 15A-1343.2(d), but may not exceed a maximum of five years, except as provided by G.S. 15A-1342(a). The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

(b) Sentencing of a person convicted of a felony or of a misdemeanor other than impaired driving under G.S. 20-138.1 that occurred on or after the effective date of Article 81B is subject to that Article. For persons convicted of impaired driving under G.S. 20-138.1, a sentence to imprisonment must impose a maximum term and may impose a minimum term. The impaired driving judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. If the impaired driving judgment states no minimum term, the defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

(c) Repealed by Session Laws 1979, c. 749, s. 7.

(d), (e). Repealed by Session Laws 1993, c. 538, s. 19.

(f) Work Release. — When sentencing a person convicted of a felony, the sentencing court may recommend that the sentenced offender be granted work release as authorized in G.S. 148-33.1. When sentencing a person convicted of a misdemeanor, the sentencing court may recommend or, with the consent of the person sentenced, order that the sentenced offender be granted work release as authorized in G.S. 148-33.1.

(g) Credit. — Credit towards a sentence to imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes.

(h) Repealed by Session Laws 2003-141, s. 2, effective December 1, 2003. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17; 1979, c. 749, ss. 5-7; c. 760, s. 4; 1985 (Reg. Sess., 1986), c. 1014, s. 201(a); 1987, c. 738, s. 111(e); 1993, c. 84, s. 2; c. 538, s. 19; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, ss. 7, 10; 1998-212, s. 17.21(b); 2003-141, s. 2; 2003-151, s. 2.)

OFFICIAL COMMENTARY

The idea of subsection (a), similar to the former G.S. 15-197.1, is to permit a "taste of jail" to the convicted offender without subjecting him to a full term of imprisonment. A number of points about this provision are worthy of note: the judgment may designate that the active time be served either in the Department of Correction or in a local jail; the active time can be either consecutive or nonconsecutive (that is, the judge may direct that the defendant serve a three weeks' imprisonment immediately after conviction or he may direct that the defendant serve 10 two-day weekends over a 10-week period); the total length of time that may be served is limited — only if the maximum allowable imprisonment for the offense is two years or more may the defender serve as much as six months in prison under special probation; otherwise he is limited to one fourth the maximum penalty allowed by law (in the case of the six-month misdemeanor, for example, the period of imprisonment under special probation would be limited to one and one-half months); no imprisonment as part of special probation may occur more than two years after a person's conviction (that is, one of the weekends in jail an offender is supposed to serve could not occur in February, 1980, if he were convicted in January, 1978); credit for time in confinement prior to conviction does *not* have to be credited to the time of imprisonment under special probation — it may be credited instead to the suspended sentence.

Subsection (b) contemplates the end of "flat time"; every sentence either by the terms of the judgment or by operation of law will have a minimum and a maximum term (although the judgment could specify that the minimum and maximum are the same). An especially important point is that by operation of law if the judge specifies no minimum term and if no minimum term is required by law, the minimum will automatically be regarded as zero years (which means under the terms of G.S. 15A-1371 the prisoner would be eligible for parole immediately). The significance of the minimum is drastically altered from prior law. Under prior law a minimum term served only to prevent parole of the person before he served one fourth of that minimum term; its real effect under prior law was to give authority to the Secretary of Correction to grant conditional release to the inmate during the period following service of the minimum term. That effect has been totally obliterated by the provisions of this Subchapter. Instead, the minimum term serves as a much more substantial limit on the authority of the Parole Commission to parole a sentenced offender and the device of conditional release is abolished, an effect resulting from the provisions of G.S. 15A-1371(a). Since the minimum term of imprisonment is a more limiting factor, subsection (c) permits reduction of a minimum sentence. It is intended to be used when the Department of Correction has determined from its experience with an inmate that earlier release than that allowed by the minimum sentence would be appropriate. The requirement that a copy of the motion for reduction of a minimum sentence go to the district attorney is intended to deter abuses of the power.

Subsection (d) in conjunction with the provisions of G.S. 15A-1371(c), gives the judge a somewhat more flexible alternative to the imposition of a minimum sentence; he may recommend a minimum that the sentenced offender should serve before parole, but the Parole Commission may override that recommendation if, and only if, it makes a written statement of its reasons for doing so.

Cross References. — As to provision that if the court sentences a defendant pursuant to subsection (a) of this section the period during which that defendant is awaiting imprisonment shall be considered part of the probationary sentence, see G.S. 15A-1353(a).

Legal Periodicals. — For article "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

CASE NOTES

The Fair Sentencing Act, as codified in Article 81A of this Chapter resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the new "Fair Sentencing Act," see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Resentencing of One Originally Sentenced Under Former § 148-42. — Resentencing of defendant under this section was proper although defendant was originally sentenced while former G.S. 148-42 was in effect, where he was resentenced after enactment of this section. In re Gallimore, 59 N.C. App. 338, 296 S.E.2d 509 (1982).

This section did not govern credit for time served where a trial court revoked probation and activated a suspended sentence. State v. Farris, 336 N.C. 552, 444 S.E.2d 182 (1994).

Defendant was entitled to credit for time he was incarcerated as a condition of special probation when his probation was revoked and the suspended sentence activated. State v. Farris, 336 N.C. 552, 444 S.E.2d 182 (1994).

Statutory law permitted the trial court to impose on defendant a special condition of probation that defendant obey the rules and regulations of the Department of Correction, and that special condition applied even though defendant was housed in a county jail facility, and not in a Department of Correction facility; consequently, the trial court had the authority to revoke defendant's probation for violation of the Department of Correction rule that prohibited inmates from using threatening or abusive language. State v. Payne, 156 N.C. App. 687, 577 S.E.2d 166, 2003 N.C. App. LEXIS 192 (2003).

Fines. — Where a trial court properly ordered restitution to law enforcement agencies for undercover purchases under G.S. 90-95.3 and G.S. 15A-1343(d), and non-payment of a fine would not increase the sentence under G.S. 15A-1351(a), the trial court did not err. State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003).

Applied in State v. Bonds, 43 N.C. App. 467, 259 S.E.2d 377 (1979); State v. Thornton, 43 N.C. App. 564, 259 S.E.2d 381 (1979); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bishop, 55 N.C. App. 211, 284 S.E.2d 720 (1981); State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803 (1993); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 15A-1352. Commitment to Department of Correction or local confinement facility.

(a) A person sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter shall be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed for a misdemeanor is for a period of 90 days or less, the commitment must be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

If a person is sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter, the sentencing judge shall make a finding of fact as to whether the person would be suitable for placement in a county satellite jail/work release unit operated pursuant to G.S. 153A-230.3. If the sentencing judge makes a finding of fact that the person would be suitable for placement in a county satellite jail/work release unit and the person meets the requirements listed in G.S. 153A-230.3(a)(1), then the custodian of the local confinement facility may transfer the misdemeanant to a county satellite jail/work release unit.

(b) A person sentenced to imprisonment for a felony under this Article shall be committed for the term designated by the court to the custody of the Department of Correction; except that, upon request of the sheriff or the board of commissioners of a county, the presiding judge may, in his discretion, sentence the person to a local confinement facility in that county.

(c) A person sentenced to imprisonment for nonpayment of a fine under Article 84, Fines, shall be committed for the term designated by the court:

(1) To the custody of the Department of Correction if the person was fined for conviction of a felony;

(2) To the custody of the Department of Correction or to a local confinement facility if the person was fined for conviction of a misdemeanor, provided that if the sentence imposed is for a period of 90 days or less, the commitment shall be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

(d) Notwithstanding any other provision of law, when the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the court may commit the person to a specific prison facility or local confinement facility or satellite jail/work release unit within the county of the sentencing court in order to facilitate the work release arrangement. When appropriate to facilitate the work release arrangement, the sentencing court may, with the consent of the sheriff or board of commissioners, commit the person to a specific local confinement facility or satellite jail/work release unit in another county, or, with the consent of the Department of Correction, commit the person to a specific prison facility in another county. The Department of Correction may transfer a prisoner committed to a specific prison facility to a different facility when necessary to alleviate overcrowding or for other administrative purposes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18; 1979, c. 456, s. 1; c. 787, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1014, s. 201(b); 1987, c. 207, s. 3; 1989, c. 761, s. 6; 1991, Ex. Sess., c. 486, s. 1; c. 8, s. 1; 1993, c. 538, s. 37; 1994, Ex. Sess., c. 24, s. 14(b).)

OFFICIAL COMMENTARY

This section makes clear that a commitment is only to the custody of the Department of Correction, not to any particular facility, including Central Prison, operated by that Department. It also provides that short sentences of imprisonment must be to local jails.

Legal Periodicals. — For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

OPINIONS OF ATTORNEY GENERAL

Definition of "Local Confinement Facility". — Although by its terms, the definition of "local confinement facility in G.S. 153A-217(5) applies only to Chapter 153A, Article 10, Pt. 1, as this definition is the only definition of "local confinement facility" appearing in the General Statutes, it may be assumed that this was the meaning intended by the General Assembly when it adopted G.S. 15A-1352(a). See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Effect of Section on § 15-6. — This section is an exception to G.S. 15-6, regarding imprisonment in county jail, as to those misdemeanants with sentences of more than 180 days, because they may be sentenced to serve their term of imprisonment under the jurisdiction of the Department of Correction, but as to those not placed in the custody of the Department of Correction, the only effect of G.S. 15A-1352 is to broaden the term "common jail" to include other types of local facilities which may be used under appropriate circumstances. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Section Overrides § 15-6 as to Certain Criminals. — While G.S. 15-6 applies to both felons and misdemeanants, this section overrides G.S. 15-6 to the extent it provides for certain felons and misdemeanants to be sentenced to terms of imprisonment under the jurisdiction of the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Place of Imprisonment Where Sentence Less Than and Greater Than 180 Days. — Absent specific statutory authorization (see, e.g., G.S. 15A-711, 148-32.1, 162-38 to 162-40), imprisonment of misdemeanants with sentences of 180 days or less must be in the local confinement facility of the county where the crime was committed. If the sentence is greater than 180 days, commitment may be either to such a local facility or to the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Misdemeanants with sentences of 180 days or less are not to be sent to the Department of Correction, but must be jailed in a "local confinement facility" (subject to the limited exception found at G.S. 148-32.1). See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

(a) When a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.

If a female defendant is convicted of a nonviolent crime and the court is provided medical evidence from a licensed physician that the defendant is pregnant or the court otherwise determines that the defendant is pregnant, the court may specify in the order that the date of service of the sentence is not to begin until at least six weeks after the birth of the child or other termination of the pregnancy unless the defendant requests to serve her term as the court would otherwise order. The court may impose reasonable conditions upon defendant during such waiting period to insure that defendant will return to begin service of the sentence.

If the court sentences a defendant pursuant to G.S. 15A-1351(a), the period during which that defendant is awaiting imprisonment shall be considered part of the probationary sentence and such defendant shall be subject to all incidents and conditions of probation.

(b) There must be included in the commitment, or in a separate order referred to in the commitment, any provisions with regard to release under Article 26, Bail, if an appeal is taken, and the conditions of the release. If the commitment has been entered before appeal or the setting of the conditions for release, appropriate copies of those documents must be forwarded to the agency having custody of the defendant.

(c) Unless a later time is directed in the order of commitment, or the defendant has been released from custody pursuant to Article 26, Bail, or the defendant is appealing from a judgment of the district court to the superior court for a trial de novo, the sheriff must cause the defendant to be placed in the custody of the agency specified in the judgment on the day service of sentence is to begin or as soon thereafter as practicable.

(d) A certified copy of the order of commitment, together with any separate order providing for release of the defendant pending appeal, must be delivered to the custodian of the confinement facility.

(e) When a defendant has been committed pursuant to this section:

(1) If appeal has been entered and conditions of release have been set as provided in Article 26, Bail, the agency having custody of the defendant may effect his release in the manner provided in G.S. 15A-537; or

(2) If appeal is entered and the conditions of release are not set until after the order of commitment has been issued, and the defendant has been placed in the custody of the agency directed therein, appropriate copies of the conditions of release must be certified by the clerk and forwarded to the agency, which then may effect his release in the manner provided in G.S. 15A-537.

(f) When the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the following provisions must be included in the commitment, or in a separate order referred to in the commitment:

(1) The date work release is to begin;

(2) The prison or local confinement facility to which the offender is to be committed;

(3) A provision that work release terminates the date the offender loses his job or violates the conditions of the work-release plan established by the Department of Correction; and

(4) A determination whether the earnings of the offender are to be disbursed by the Department of Correction or the clerk of the sentencing court in the manner that the court in its order directs. (1977, c. 711, s. 1; 1979, c. 758, s. 1; 1983, c. 389; 1985 (Reg. Sess., 1986), c. 1014, s. 201(c).)

OFFICIAL COMMENTARY

Subsection (a) applies both to an initial sentence to imprisonment and to the activation of a sentence following probation revocation. Although the presumptive beginning date for the term of imprisonment is the date of the commitment order, the judge may specify a delayed beginning dated to permit the defendant to get his affairs in order.

CASE NOTES

Cited in Allen v. Lowder, 875 F.2d 82 (4th Cir. 1989).

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

(a) Authority of Court. — When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. — In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences. (1977, c. 711, s. 1; 1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 40; 1985, c. 21; 1994, Ex. Sess., c. 14, s. 23.)

OFFICIAL COMMENTARY

This section authorizes consecutive sentences and carries forward the prior law that sentences are to run concurrently unless otherwise specified. Subsection (b) sets out the rules for calculating the effects of consecutive terms, primarily on minimum terms, in order to determine parole eligibility.

Legal Periodicals. — For comment discussing the North Carolina Fair Sentencing Act, see N.C.L. Rev. 631 (1982).

CASE NOTES

Due Process Rights. — Robbins decision, which retroactively altered the inmate's parole eligibility calculation, did not infringe upon the inmate's due process rights because the decision rested on the express and unambiguous language of G.S. 15A-1354(b)(2). Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247, 2002 N.C. App. LEXIS 1253, cert. denied, 356 N.C. 615, 575 S.E.2d 26 (2002).

Fair Sentencing Act Did Not Remove Power to Impose Consecutive Sentences. — Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, G.S. 15A-1340.1 et seq., it left substantially intact subsection (a) of this section, which vests the sentencing judge with discretion to impose either consecutive or concurrent sentences. Since subsection (a) of this section was in effect when the Legislature enacted the Fair Sentencing Act, the Legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

The General Assembly, by leaving this section substantially intact when it enacted the Fair Sentencing Act, must have intended that the sentencing judge retain discretion to impose consecutive sentences. State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

The court retained the discretion to impose consecutive sentences after the enactment of the Fair Sentencing Act. State v. Shea, 80 N.C. App. 705, 343 S.E.2d 437, cert. denied, 317 N.C. 713, 347 S.E.2d 452 (1986).

Consecutive Sentencing Does Not Violate Fair Sentencing Act. — Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, the Legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the Legislature, there is nothing inherent in consecutive sentencing which violates the Fair Sentencing Act, G.S. 15A-1340.1 et seq. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Consecutive Sentences Authorized by Subsection (a). — A trial court is given express authority by subsection (a) of this section to require that the sentence imposed for a conviction be served consecutive to any sentence imposed at the same time or any undischarged term of imprisonment to which the defendant is already subject. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Trial judge was not required to inform jurors whether he intended to impose concurrent or consecutive sentences before they deliberated concerning whether or not to recommend the death sentence. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Trial courts retain discretion to impose consecutive sentences for multiple offenses, and it is not an unusual punishment in this state when they exercise this option in cases involving first degree rape combined with other offenses. State v. Johnson, 320 N.C. 746, 360 S.E.2d 676 (1987).

Consecutive Sentences for Burglary Convictions. — The defendant, who was already serving a sentence for prior convictions, was required, properly, to serve consecutive sentences. State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998).

Sentences to Be Aggregated. — Trial court erred by failing to find that defendants are required, pursuant to subsection (b), to aggregate consecutive sentences for armed robbery committed prior to October 1, 1994 for purposes of determining parole eligibility. Robbins v. Freeman, 127 N.C. App. 162, 487 S.E.2d 771 (1997), aff'd, 347 N.C. 664, 496 S.E.2d 375 (1998).

Trial court erred in finding that the North Carolina Department of Correction's practice of applying gain and merit time to a sentence served consecutive to a life term contravened G.S. 15A-1354(b), where an inmate's sentencing terms were properly aggregated after the proper amounts of accumulated time credits were applied to both. Teasley v. Beck, 155 N.C. App. 282, 574 S.E.2d 137, 2002 N.C. App. LEXIS 1600 (2002), cert. denied, 357 N.C. 169, 581 S.E.2d 755 (2003).

Reference in subsection (a) to individual who, at time of sentencing, is "already" subject to an undischarged term of imprisonment does not mean any term of imprisonment to which defendant might become subject in the future. State v. Campbell, 90 N.C. App. 761, 370 S.E.2d 79, appeal dismissed, 323 N.C. 367, 373 S.E.2d 550 (1988).

Imposition of Consecutive Sentences Upheld. — The imposition of consecutive sentences for conspiracy to commit armed robbery, first-degree murder, armed robbery, second-degree burglary, and breaking or entering and larceny does not violate any constitutional proportionality requirement. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

The trial court had the discretion to impose consecutive sentences for multiple offenses where the defendant was convicted of three counts of first-degree murder, and the jury recommended sentences of life imprisonment after finding and weighing the mitigating circumstances and aggravating circumstances. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

The imposition of consecutive sentences was not cruel or unusual punishment, where the defendant was convicted for trafficking in cocaine by possession, conspiracy to traffic in cocaine, possession of drug paraphernalia, and employing a minor to traffic in cocaine. State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999).

The trial court did not abuse its discretion when it sentenced defendant to three life sentences plus a term of 288-355 months, all to be served consecutively, in light of the sheer brutality of the sexual acts committed against the victim. State v. Thompson, 139 N.C. App. 299, 533 S.E.2d 834, 2000 N.C. App. LEXIS 895 (2000).

In light of the acts committed by defendant to his biological daughter over the course of several years, there was no abuse of discretion with respect to defendant's sentence for statutory rape and statutory sexual offense. The trial court had the statutory authority to enter consecutive sentences of up to 270 to 333 months for each of the seven offenses of which defendant was found guilty, yielding a combined maximum sentence of 1,890 to 2,331 months. State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003).

New Sentence Made Consecutive to Prior Sentences on Probation Revocation. — It was not necessary for the trial court, in probation revocation proceedings, to state that the activated sentences in 1983 and 1984 cases would run consecutively with 1985 case, because it was to happen the other way around, and the court properly designated the sentence in the 1985 case to run consecutive with any sentence defendant might receive from probation revocation. State v. Warren, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Failure to state that the imposed sentence was to run concurrently with other undischarged sentences was not in error since there was no provision in G.S. 14-17 requiring that sentences imposed under that statute run consecutively with any other undischarged sentences, under G.S. 15A-1354, the sentence would run concurrently by default. State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003), cert. denied, 357 N.C. 464, 586 S.E.2d 274 (2003), aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004).

Imposition of Consecutive Sentences Outside Defendant's Presence. — Where the written judgment entered by the trial court provided that defendant's sentences would run consecutively, not concurrently, and thereby substantively changed the sentence outside the presence of the defendant, the sentence would be vacated and the case remanded for the entry of a new sentencing judgment. State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (1999).

Imposition of consecutive sentences for rape, first-degree sex offense, first-degree burglary and armed robbery violates neither the Fair Sentencing Act, G.S. 15A-1340.1 et seq., nor any constitutional proportionality requirement. State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983).

Remand for Resentencing Required. — It could not be determined if the trial court ultimately chose not to consolidate sentences based on the prosecutor's statements or as an exercise of its discretion, pursuant to G.S. 5A-1340.15(b), where: (1) defendant was sentenced, in open court, for felonious breaking and entering and common law robbery, and the trial court initially consolidated the offenses and imposed a single sentence, but, when judgment was imposed, did not provide that the sentence was to run consecutively to a first degree sexual offense sentence, pursuant to G.S. 15A-1354(a); and (2) in open court, the trial court initially consolidated defendant's second degree kidnapping and first degree burglary convictions and imposed a single sentence, but the judgment imposed as to those convictions resulted in separate sentences running consecutively; and (3) the judgments were preceded by statements by the prosecutor that were contrary to the laws on structured sentencing; thus, a remand was required to make this determination and sentence defendant accordingly. State v. Edwards, 164 N.C. App. 130, 595 S.E.2d 213, 2004 N.C. App. LEXIS 728 (2004), cert. denied, 358 N.C. 735, 603 S.E.2d 879 (2004).

Applied in State v. Grier, 314 N.C. 59, 331 S.E.2d 669 (1985); State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989); State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994); State v. LaPlanche, 349 N.C. 279, 507 S.E.2d 34 (1998); State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003); State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004); State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006); State v. Mead, 184 N.C. App. 306, 646 S.E.2d 597, 2007 N.C. App. LEXIS 1456 (2007); State v. Hanner, 188 N.C. App. 137, 654 S.E.2d 820, 2008 N.C. App. LEXIS 70 (2008); State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

OPINIONS OF ATTORNEY GENERAL

Aggregation Not Permitted. — The post release supervision and parole commission cannot aggregate, pursuant to subsection (b), the sentences imposed for armed robberies committed prior to October 1, 1994. See opinion of Attorney General to Sam F. Boyd, Executive Director Post-Release Supervision and Parole Commission, — N.C.A.G. — (Aug. 1, 1995).

Aggregation Appropriate. — If an inmate is sentenced to consecutive armed robbery sentences at the same sentencing hearing, his sentence should be aggregated pursuant to subsection (b). See opinion of Attorney General to Sam F. Boyd, Executive Director Post-Release Supervision and Parole Commission, — N.C.A.G. — (Aug. 1, 1995).

§ 15A-1355. Calculation of terms of imprisonment.

(a) Commencement of Sentence. — The commencement date of a sentence of imprisonment under authority of this Article is as provided in G.S. 15A-1353(a), except when the sentence is a consecutive sentence. When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence.

(b) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 19.

(c) Earned Time; Credit for Good Behavior for Impaired Drivers. — Persons convicted of felonies or misdemeanors under Article 81B of this Chapter may, consistent with rules of the Department of Correction, earn credit which may be used to reduce their maximum terms of imprisonment as provided in G.S. 15A-1340.13(d) for felony sentences and in G.S. 15A-1340.20(d) for misdemeanor sentences.

For sentences of imprisonment imposed for convictions of impaired driving under G.S. 20-138.1, the Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment and toward eligibility for parole for allowances of time as provided in rules and regulations made under G.S. 148-11 and 148-13.

(d) Earned Time Credit for Medically and Physically Unfit Inmates. — Inmates in the custody of the Department of Correction who suffer from medical conditions or physical disabilities that prevent their assignment to work release or other rehabilitative activities may, consistent with rules of the Department of Correction, earn credit based upon good behavior or other criteria determined by the Department that may be used to reduce their maximum term of imprisonment as provided in G.S. 15A-1340.13(d) for felony sentences and in G.S. 15A-1340.20(d) for misdemeanor sentences. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 19; 1979, c. 749, s. 8; c. 760, s. 4; 1981, c. 571; c. 1127, s. 84; 1983, c. 560, § 1; 1993, c. 538, s. 20; 1994, Ex. Sess., c. 24, s. 14(b); 2001-424, s. 25.1(a); 2002-126, s. 17.19(d); 2002-159, s. 77.)

OFFICIAL COMMENTARY

Subsection (b) allows direct crediting by the Department of Correction for appropriate time which was not credited at judgment. Crediting by the judge is left to the provisions of Article 19A of General Statutes Chapter 15.

CASE NOTES

Conduct Prior to Original Trial and Sentencing. — An inmate's good behavior prior to his original trial and/or the sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Resentencing. — As G.S. 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus it could not be said by such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984).

§§ 15A-1356 through 15A-1360: Reserved for future codification purposes.

ARTICLE 84.

Fines.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the

1977 General Assembly, as revised by the Commission.

§ 15A-1361. Authorized fines and penalties.

A person who has been convicted of a criminal offense may be ordered to pay a fine as provided by law. A person who has been found responsible for an infraction may be ordered to pay a penalty as provided by law. Unless the context clearly requires otherwise, references in this Article to fines also include penalties. (1977, c. 711, s. 1; 1985, c. 764, s. 6.)

OFFICIAL COMMENTARY

This section merely states that payment of a fine is an appropriate penalty when law otherwise provides for a fine as a punishment available for that offense.

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

§ 15A-1362. Imposition of fines.

(a) General Criteria. — In determining the method of payment of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant.

(b) Installment or Delayed Payments. — When a defendant is ordered to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, the fine is payable forthwith.

(c) Nonpayment. — When a defendant is ordered, other than as a condition of probation, to pay a fine, costs, or both, the court may impose at the same time a sentence to be served in the event that the fine is not paid. The court also may impose an order that the defendant appear, if he fails to make the required payment, at a specified time to show cause why he should not be imprisoned. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) is a precatory provision urging that fines be tailored to the financial resources of the defendant and not be always imposed at the same amount for the same offense.

Subsection (b) specifically authorizes the practice of permitting installment payment of the fine or deferred payment of a fine, but only if such payment is specified in the judgment.

Subsection (c) specifically authorizes the suspended sentence to encourage payment of the fine. Although this section does not say so, it is intended that the suspended sentence is terminated upon payment of the fine unless the fine is merely one condition of a probationary sentence.

§ 15A-1363. Remission of a fine or costs.

A defendant who has been required to pay a fine or costs, including a requirement to pay fine or costs as a condition of probation, or a prosecutor, may at any time petition the sentencing court for a remission or revocation of the fine or costs or any unpaid portion of it. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine or costs no longer exist, that it would otherwise be unjust to require payment, or that the proper administration of justice requires resolution of the case, the court may remit or revoke the fine or costs or the unpaid portion in whole or in part or may modify the method of payment. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section gives specific approval to the practice of removing or reducing an unpaid fine that is due. Three grounds for this act are stated: that the circumstances warranting imposition of the fine no longer exist; that to require payment would be unjust; or the proper administrator of justice declares resolution of the case. The first two grounds go to changed factual circumstances or changed ability of the defendant to pay. That last ground is aimed at the situation in which an unpaid fine will apparently go unpaid forever and the court wishes to close the case.

§ 15A-1364. Response to nonpayment.

(a) Response to Default. — When a defendant who has been required to pay a fine or costs or both defaults in payment or in any installment, the court, upon the motion of the prosecutor or upon its own motion, may require the defendant to appear and show cause why he should not be imprisoned or may rely upon a conditional show cause order entered under G.S. 15A-1362(c). If the defendant fails to appear, an order for his arrest may be issued.

(b) Imprisonment; Criteria. — Following a requirement to show cause under subsection (a), unless the defendant shows inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the suspended sentence, if any, activated, or, if the law provides no term of imprisonment for the offense for which the defendant was convicted or if no suspended sentence was imposed, the court may order the defendant imprisoned for a term not to exceed 30 days. The court, before activating a sentence of imprisonment, may reduce the sentence. The court may provide in its order that payment or satisfaction at any time of the fine and costs imposed by the court will entitle the defendant to his release from the imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

(c) Modification of Fine or Costs. — If it appears that the default in the payment of a fine or costs is not attributable to failure on the defendant's part to make a good faith effort to obtain the necessary funds for payment, the court may enter an order:

(1) Allowing the defendant additional time for payment; or
(2) Reducing the amount of the fine or costs or of each installment; or
(3) Revoking the fine or costs or the unpaid portion in whole or in part.

(d) Organizations. — When an organization is required to pay a fine or costs or both, it is the duty of the person or persons authorized to make disbursement of the assets of the organization to make payment from assets of the organization, and a failure to do so constitutes contempt of court. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section is intended to respond to the demands of Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1970), holding unconstitutional the imprisonment of a defendant who does not pay his fine because he is unable to. When imprisonment is appropriate it is for the period specified in the suspended sentence. If there is no suspended sentence it is an automatic 30-day jail term. Even after being jailed, however, the defendant may be released if he pays the fine.

Subsection (d) provides jailing of a corporate officer who refuses to pay a fine imposed against the corporation.

CASE NOTES

Burden of Proving Inability to Pay. — In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation, the burden is upon the defendant to offer evidence of his inability to pay money according to the terms of the probationary judgment. State v. Jones, 78 N.C. App. 507, 337 S.E.2d 195 (1985).

Good Faith Effort to Pay Required. — A convicted defendant ordered to pay a fine or costs may not be imprisoned for failure to comply if the delinquency in paying was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Trial court erred in revoking the defendant's probation on the ground that the defendant was in arrears on the payment of court ordered payments because the defendant's delinquency was not attributable to a failure on the defendant's part to make a good faith effort to obtain the necessary funds for payment, but was rather attributable to the defendant's inability to obtain employment to obtain the funds to make the required payments due to a back injury that the defendant suffered while working on a job. Accordingly, the defendant could not be imprisoned on the ground that the defendant failed to comply with the monetary conditions of the defendant's probation. State v. Turner, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1884 (Apr. 16, 2002).

§ 15A-1365. Judgment for fines docketed; lien and execution.

When a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed. Upon being docketed, the judgment becomes a lien on the real estate of the defendant in the same manner as do judgments in civil actions. Executions on docketed judgments may be stayed only when an appeal is taken and security is given as required in civil cases. If the judgment is affirmed on appeal to the appellate division, the clerk of the superior court, on receipt of the certificate from the appellate division, must issue execution on the judgment. The clerk may not issue an execution, however, if the fine or costs were imposed for an offense other than trafficking in controlled substances or conspiring to traffic in controlled substances under G.S. 90-95(h) and (i), respectively, and the defendant elects to serve the suspended sentence, if any, or serve a term of 30 days, if no suspended sentence was imposed. (1977, c. 711, s. 1; 1985, c. 411.)

OFFICIAL COMMENTARY

This section largely carries forward prior law except for the last sentence. That provision is new and essentially gives the defendant in any case an election to serve a term of imprisonment rather than pay a fine. It also tries to make clear that the judgment need not be docketed until default.

§§ 15A-1366, 15A-1367: Reserved for future codification purposes.

Article 84A.

Post-Release Supervision.

§ 15A-1368. Definitions and administration.

(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. — The time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. — A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. — The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. — The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. — The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.

(b) Administration. — The Post-Release Supervision and Parole Commission, as authorized in Chapter 143 of the General Statutes, shall administer post-release supervision as provided in this Article. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 14, ss. 24, 25; c. 24, s. 14(b); 1997-237, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been G.S. 15A-1370.1.

§ 15A-1368.1. Applicability of Article 84A.

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this Chapter, but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 14, s. 26; c. 22, s. 8; c. 24, s. 14(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been G.S. 15A-1370.2.

§ 15A-1368.2. Post-release supervision eligibility and procedure.

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less nine months, less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison term less nine months.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is an offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in G.S. 15A-1368.5.

(c1) Notwithstanding subsection (c) of this section, a person required to submit to satellite-based monitoring pursuant to G.S. 15A-1368.4(b1)(6) shall continue to participate in satellite-based monitoring beyond the period of post-release supervision until the Commission releases the person from that requirement pursuant to G.S. 14-208.43.

(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 20.14(a); 1997-237, s. 7; 2006-247, s. 15(f).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been G.S. 15A-1370.3.

Session Laws 2006-247, s. 15(*l*) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

§ 15A-1368.3. Incidents of post-release supervision.

(a) Conditionality. — Post-release supervision is conditional and subject to revocation.

(b) Modification. — The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. — If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the conditions, or if continuation or modification is not appropriate, may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison up to the time remaining on his maximum imposed term.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under G.S. 15A-1340.13.

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for

all time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) Re-Release After Revocation of Post-Release Supervision. — A prisoner who has been reimprisoned prior to completing a post-release supervision period may again be released on post-release supervision by the Commission subject to the provisions which govern initial release.

(e) Timing of Revocation. — The Commission may revoke post-release supervision for violation of a condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 14, s. 27; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 5.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been G.S. 15A-1370.4.

CASE NOTES

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 15A-1368.4. Conditions of post-release supervision.

(a) In General. — Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).

(b) Required Condition. — The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless a court of competent jurisdiction expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(6) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the offense is a reportable conviction as defined by G.S. 14-208.6(4) and the supervisee is in the category described by G.S. 14-208.40(a)(1).

(7) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the offense is a reportable conviction as defined by G.S. 14-208.6(4) and the supervisee is in the category described by G.S. 14-208.40(a)(2).

(8) Submit at reasonable times to warrantless searches by a post-release supervision officer of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present, for purposes reasonably related to the post-release supervision, but the supervisee may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the supervisee's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the post-release supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

(c) Discretionary Conditions. — The Commission, in consultation with the Division of Community Corrections, may impose conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. — Appropriate reintegrative conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. — Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. — The Commission shall not impose community service as a condition of post-release supervision.

(f) Required Supervision Fee. — The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(b); 1997-57, s. 6; 1997-237, s. 6; 2001-487, s. 47(c); 2002-126, s. 29A.2(b); 2006-247, s. 15(g); 2007-213, s. 9.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1.

Session Laws 2006-247, s. 15(*l*) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 17 provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 15A-1368.5. Commencement of post-release supervision; multiple sentences.

A period of post-release supervision begins on the day the prisoner is released from imprisonment. Periods of post-release supervision run concurrently with any federal or State prison, jail, probation, or parole terms to which the prisoner is subject during the period, only if the jurisdiction which sentenced the prisoner to prison, jail, probation, or parole permits concurrent crediting of supervision time. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been G.S. 15A-1370.6.

§ 15A-1368.6. Arrest and hearing on post-release supervision violation.

(a) Arrest for Violation of Post-Release Supervision. — A supervisee is subject to arrest by a law enforcement officer or a post-release supervision officer for violation of conditions of post-release supervision only upon issuance of an order of temporary or conditional revocation of post-release supervision by the Commission. However, a post-release supervision revocation hearing under subsection (e) of this section may be held without first arresting the supervisee.

(b) When and Where Preliminary Hearing on Post-Release Supervision Violation Required. — Unless the hearing required by subsection (e) of this section is first held or a continuance is requested by the supervisee, a preliminary hearing on supervision violation shall be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a supervisee to determine whether there is probable cause to believe that the supervisee violated a condition of post-release supervision. Otherwise, the supervisee shall be released seven working days after arrest to continue on supervision pending a hearing. If the supervisee is not within the State, the preliminary hearing is as prescribed by G.S. 148-65.1A.

(b1) Bail Following Arrest for Violation of Post-Release Supervision if Releasee Is a Sex Offender. — Notwithstanding subsection (b) of this section, if the releasee has been convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes and is arrested for a violation in accordance with this section, the releasee shall be detained without bond until the preliminary hearing is conducted.

(c) Officers to Conduct Preliminary Hearing. — The preliminary hearing on post-release supervision violation shall be conducted by a judicial official, or by a hearing officer designated by the Commission. A person employed by the Department of Correction shall not serve as a hearing officer at a hearing provided by this section unless that person is a member of the Commission, or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing. — The Department of Correction shall give the supervisee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the supervisee may appear and speak in the supervisee's own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the supervisee violated conditions of supervision, the hearing officer shall summarize the reasons for the determination and the evidence relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the supervisee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e) of this section.

(e) Revocation Hearing. — Before finally revoking post-release supervision, the Commission shall, unless the supervisee waived the hearing or the time limit, provide a hearing within 45 days of the supervisee's reconfinement to determine whether to revoke supervision finally. For purposes of this subsection, the 45-day period begins when the preliminary hearing required by subsection (b) of this section is held or waived, or upon the passage of seven working days after arrest, whichever is sooner. The Commission shall adopt rules governing the hearing. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(b); 1997-237, s. 1; 2000-189, s. 1; 2008-117, s. 20.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been G.S. 15A-1370.7.

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 20, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (b1).

CASE NOTES

Cited in State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

ARTICLE 84B.

Medical Release of Inmates.

§ 15A-1369. Definitions.

For purposes of this Article, the term:

(1) "Commission" means the Post-Release Supervision and Parole Commission.

(2) "Department" means the Department of Correction.

(3) "Geriatric" describes an inmate who is 65 years of age or older and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that he or she does not pose a public safety risk.

(4) "Inmate" means any person sentenced to the custody of the Department of Correction.

(5) "Medical release" means a program enabling the Commission to release inmates who are permanently and totally disabled, terminally ill, or geriatric.

(6) "Medical release plan" means a comprehensive written medical and psychosocial care plan that is specific to the inmate and includes, at a minimum:

a. The proposed course of treatment;

b. The proposed site for treatment and post-treatment care;

c. Documentation that medical providers qualified to provide the medical services identified in the medical release plan are prepared to provide those services; and

d. The financial program in place to cover the cost of this plan for the duration of the medical release, which shall include eligibility for enrollment in commercial insurance, Medicare, or Medicaid or access to other adequate financial resources for the duration of the medical release.

(7) "Permanently and totally disabled" describes an inmate who, as determined by a licensed physician, suffers from permanent and irreversible physical incapacitation as a result of an existing physical or medical condition that was unknown at the time of sentencing or, since the time of sentencing, has progressed to render the inmate permanently and totally disabled, such that the inmate does not pose a public safety risk.

(8) "Terminally ill" describes an inmate who, as determined by a licensed physician, has an incurable condition caused by illness or disease that was unknown at the time of sentencing or, since the time of sentencing, has progressed to render the inmate terminally ill, and that will likely produce death within six months, and that is so debilitating such that the inmate does not pose a public safety risk. (2008-2, s. 1.)

Editor's Note. — Session Laws 2008-2, s. 2, made this Article effective June 10, 2008.

Session Laws 2009-451, s. 19.8(e), provides: "The Department of Correction and the Post-Release Supervision and Parole Commission shall report by March 1 of each year to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety and to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the number of inmates proposed for release, considered for release, and granted release under Chapter 84B of Chapter 15A of the General Statutes, providing for the medical release of inmates who are either permanently and totally disabled, terminally ill, or geriatric."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides:

"Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

§ 15A-1369.1. Authority to release.

The Commission shall establish a medical release program to be administered by the Department. The Commission shall prescribe when and under what conditions an inmate may be released for medical release, consistent with the provisions of G.S. 15A-1369.4. The Commission may adopt rules to implement the medical release program. (2008-2, s. 1.)

§ 15A-1369.2. Eligibility.

(a) Except as otherwise provided in this section, notwithstanding any other provision of law, an inmate is eligible to be considered for medical release if the Department determines that the inmate is:

(1) Diagnosed as permanently and totally disabled, terminally ill, or geriatric under the procedure described in G.S. 15A-1369.3(b)(1); and

(2) Incapacitated to the extent that the inmate does not pose a public safety risk.

(b) Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article. (2008-2, s. 1.)

§ 15A-1369.3. Procedure for medical release.

(a) The Commission shall consider an inmate for medical release upon referral by the Department. The Department may base its referral upon either a request or petition for release filed by the inmate, the inmate's attorney, or the inmate's next of kin or upon a recommendation from within the Department.

(b) The referral shall include an assessment of the inmate's medical and psychosocial condition and the risk the inmate poses to society, as follows:

(1) The Department medical director, or a designee of the director who is a licensed physician, shall review the case of each inmate who meets the eligibility requirements for medical release set forth in G.S. 15A-1369.2. Any physician who examines an inmate being considered for medical release shall prepare a written diagnosis that includes:

a. A description of any and all terminal conditions, physical incapacities, and chronic conditions; and

b. A prognosis concerning the likelihood of recovery from any and all terminal conditions, physical incapacities, and chronic conditions.

(2) The Department shall make an assessment of the risk for violence and recidivism that the inmate poses to society. In order to make this assessment, the Department may consider such factors as the inmate's medical condition, the severity of the offense for which the inmate is incarcerated, the inmate's prison record, and the release plan.

(c) If the Department determines that the inmate meets the criteria for release, the Department shall forward its referral and medical release plan for the inmate to the Commission. The Department shall complete the risk assessment and forward its referral and medical release plan within 45 days of receiving a request, petition, or recommendation for release.

(d) The Commission shall make a determination of whether to grant medical release within 15 days of receiving a referral from the Department for release of a terminally ill inmate and within 20 days of receiving a referral from the Department for release of a permanently and totally disabled inmate or a geriatric inmate. In making the determination, the Commission shall make an independent assessment of the risk for violence and recidivism that the inmate poses to society. The Commission also shall provide the victim or victims of the inmate or the victims' family or families with an opportunity to be heard.

(e) A denial of medical release by the Commission shall not affect an inmate's eligibility for any other form of parole or release under applicable law.

(f) If the Department determines that an inmate should not be considered for release under this Article or the Commission denies medical release under this Article, the inmate may not reapply or be reconsidered unless there is a demonstrated change in the inmate's medical condition. (2008-2, s. 1.)

§ 15A-1369.4. Conditions of medical release.

(a) The Commission shall set reasonable conditions upon an inmate's medical release that shall apply through the date upon which the inmate's sentence would have expired. These conditions shall include:

(1) That the released inmate's care be consistent with the care specified in the medical release plan as approved by the Commission;

(2) That the released inmate shall cooperate with and comply with the prescribed medical release plan and with reasonable requirements of medical providers to whom the released inmate is to be referred to continued treatment;

(3) That the released inmate shall be subject to supervision by the Division of Community Corrections and shall permit officers from the Division to visit the inmate at reasonable times at the inmate's home or elsewhere;

(4) That the released inmate shall comply with any conditions of release set by the Commission; and

(5) That the Commission shall receive periodic assessments from the inmate's treating physician.

(b) The Commission shall promptly order an inmate returned to the custody of the Department to await a revocation hearing if the Commission receives credible information that an inmate has failed to comply with any reasonable condition set upon the inmate's release. If the Commission subsequently revokes an inmate's medical release for failure to comply with conditions of release, the inmate shall resume serving the balance of the sentence with credit given only for the duration of the inmate's medical release served in compliance with all reasonable conditions set forth pursuant to subsection (a) of this section. Revocation of an inmate's medical release for violating a condition of release shall not preclude an inmate's eligibility for any other form of parole or release provided by law but may be used as a factor in determining eligibility for that parole or release. (2008-2, s. 1.)

§ 15A-1369.5. Change in medical status.

(a) If a periodic medical assessment reveals that an inmate released on medical release has improved so that the inmate would not be eligible for medical release if being considered at that time, the Commission shall order the inmate returned to the custody of the Department to await a revocation hearing. In determining whether to revoke medical release, the Commission shall consider the most recent medical assessment of the inmate and a risk assessment of the inmate conducted pursuant to G.S. 15A-1369.3(b)(2). If the Commission revokes the inmate's medical release, the inmate shall resume serving the balance of the sentence with credit given for the duration of the medical release.

(b) Revocation of an inmate's medical release due to a change in the inmate's medical condition shall not preclude an inmate's eligibility for medical release in the future or for any other form of parole or release provided by law. (2008-2, s. 1.)

§ 15A-1370: Reserved for future codification purposes.

Article 85.

Parole.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission prior to the reprinting of this volume.

§ 15A-1370.1. Applicability of Article 85.

This Article is applicable to all prisoners serving sentences of imprisonment for convictions of impaired driving under G.S. 20-138.1. This Article does not apply to a prisoner serving a sentence of life imprisonment without parole. A prisoner serving a sentence of life imprisonment without parole shall not be eligible for parole at any time. (1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 41; 1981, c. 662, s. 3; 1993, c. 538, s. 21; 1994, Ex. Sess., c. 21, s. 2; c. 22, ss. 33, 34; c. 24, s. 14(b).)

Editor's Note. — The section is set out above as amended by Session Laws 1994, Extra Session, c. 21, s. 2, at the direction of the Revisor of Statutes.

CASE NOTES

The Fair Sentencing Act, as codified in former Article 81A of this Chapter, resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the "Fair Sentencing Act," see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Applied in State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004).

§ 15A-1371. Parole eligibility, consideration, and refusal.

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term of imprisonment for a conviction of impaired driving under G.S. 20-138.1 other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes.

(a1) Repealed by Session Laws 1994, Ex. Sess., c. 21, s. 3.

(b)(1), (2) Repealed by Session Laws 1993, c. 538, s. 22.

(3) Whenever the Post-Release Supervision and Parole Commission will be considering for parole a prisoner serving a sentence of life imprisonment the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:

a. The prisoner;

b. The district attorney of the district where the prisoner was convicted;

c. The head of the law enforcement agency that arrested the prisoner and the sheriff of the county where the crime occurred;

d. Any of the victim's immediate family members who have requested in writing to be notified; and

e. Repealed by Session Laws 1993, c. 538, s. 22.

f. As many newspapers of general circulation and other media in the county where the defendant was convicted and if different, in the county where the prisoner was charged, as reasonable.

The Post-Release Supervision and Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, any member of the victim's immediate family who has requested to be notified, and as many newspapers of general circulation and other media in the county or counties designated in sub-subdivision f. of this section as reasonable, written notice of its decision within 10 days of that decision. The Parole Commission shall not, however, include the name of any victim in its notification to the newspapers and other media.

(c) Repealed by Session Laws 1993, c. 538, s. 22.

(d) Criteria. — The Post-Release Supervision and Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Repealed by Session Laws 1993, c. 538, s. 22.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for impaired driving may be released on parole when he completes service of one-third of his maximum sentence unless the Post-Release Supervision and Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Post-Release Supervision and Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Post-Release Supervision and Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this subsection shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, prisoners serving sentences for impaired driving shall be eligible for community service parole, in the discretion of the Post-Release Supervision and Parole Commission.

Community service parole is early parole for the purpose of participation in community service under the supervision of the Division of Community Corrections. A parolee who is paroled under this subsection must perform as a condition of parole community service in an amount and over a period of time to be determined by the Post-Release Supervision and Parole Commission. However, the total amount of community service shall not exceed an amount equal to 32 hours for each month of active service remaining in his minimum sentence. The Post-Release Supervision and Parole Commission may grant early parole under this section without requiring the performance of community service if it determines that such performance is inappropriate to a particular case.

The probation/parole officer and the judicial services coordinator shall develop a program of community service for the parolee. The coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by the Division of Community Corrections. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving an active sentence the term of which exceeds six months; and

(2) Who, in the opinion of the Post-Release Supervision and Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) The fee required by G.S. 143B-262.4 shall be paid by all persons who participate in the Community Service Parole Program.

(j) The Post-Release Supervision and Parole Commission may terminate a prisoner's community service parole before the expiration of the term of imprisonment where doing so will not endanger the public, unduly depreciate the seriousness of the crime, or promote disrespect for the law. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7; 1989, c. 1, ss. 3, 4; 1991, c. 217, s. 3; c. 288, s. 2; 1993,

c. 538, s. 22; 1994, Ex. Sess., c. 21, s. 3; c. 24, s. 14(b); c. 25, ss. 1, 2; 2002-126, s. 29A.1(a); 2006-264, s. 34; 2008-133, s. 1; 2009-372, s. 13(a), (b); 2009-451, s. 19.26(a), (d); 2009-575, s. 16A.)

OFFICIAL COMMENTARY

Subsection (a) encompasses the important provision which gives the judge's minimum term considerably more bite than it has under present law. Unless the minimum term of imprisonment is particularly long, the Parole Commission must respect that minimum and the inmate cannot be paroled before that minimum is served. This subsection does place a limit on the effective minimum, however. If the minimum which the judge imposes is greater than one fifth of the maximum penalty allowed by law, then the inmate is eligible for release when he has served one fifth of that maximum. Notice that the limit is based on the maximum penalty allowed by law and not on the maximum term which the judge actually imposes. The Commission wished to avoid the circumstances which occurs under present law in which the judge manipulates the length of the sentence imposed in order to affect the date for which the defendant is eligible for release on parole. This means that a judge if he wished could sentence a safecracker to a prison term of six to 10 years and the offender could not be released on parole until he had served the full six years, since six years is one fifth of the maximum penalty allowed by law. On the other hand, if a judge sentenced the offender to a term of nine to 10 years, the practical effect would be the same as the earlier example. Since the minimum term exceeded one fifth of the maximum allowed by law, he would continue to be eligible for release after serving six years. The prior parole eligibility standard, one fourth of the minimum sentences, has been retained for those crimes which have a mandatory minimum sentence since these mandatory sentences were enacted with the previous parole statutes in mind.

Subsection (b) does two important things: (1) it requires review of each inmate's case as soon as he is eligible for parole and annually thereafter until he is released. The subsection does not, however, have anything to say about the procedure to be followed in this consideration for parole. The subsection also requires that any time the Parole Commission is considering for release one who has served less than half the maximum term it must notify the district attorney in advance and he, in turn, may require that the consideration be made publicly. This provision was added in an attempt to provide some assurance against the feeling sometimes expressed that parole is granted without adequate public exposure of the facts of the case.

Subsection (c) was discussed in the commentary on G.S. 15A-1351(d). Subsection (d) states the reasons why parole may be denied, but it does not require a written finding or other written statement. The Commission intended that this be an exclusive list of legitimate bases for denying parole.

Subsection (e) grants the offender the same kind of election to refuse release that he has in the case of probation and fine.

Subsection (f) provides another of the significant changes brought by this proposal. It requires a minimum of six months parole for every person serving a term of 18 months or more for a felony. The Commission believed that the prisoner who is unable to obtain parole earlier is the very one who most needs this period of gradual readjustment to freedom.

Subsection (g) attempts to overcome the inertia that makes it almost impossible for persons with short sentences to obtain parole; it reverses the normal burden — the person must be released unless the Parole Commission finds to the contrary. The final sentence of this subsection attempts to establish an automatic term of parole and automatic conditions of parole, in those cases since, by definition, the Parole Commission will not be considering these matters individually.

Editor's Note. — The former introductory language of subsection (b) and subdivisions (b)(1) and (2) were repealed, effective October 1, 1994, for offenses occurring on or after that date, by Session Laws 1993, c. 538, s. 22, as amended by 1994, Ex. Sess., c. 24, s. 14(b). The amendatory language of Session Laws 2008-133, s. 1, effective October 1, 2008, and applicable to parole reviews conducted on and after that date, provides: "G.S. 15A-1371(b), repealed by Section 22 of Chapter 538 of the 1993 Session Laws, but still applicable to sentences based on offenses occurring before October 1, 1994, under Section 56 of that act, reads as rewritten."

Subsection (b) was also amended by Session Laws 1994, Extra Session, c. 25, s. 1, and this amendment remains applicable to offenses committed prior to the effective date of Session Laws 1993, c. 538, s. 22. As amended by Session

Laws 1994, Extra Session, c. 25, s. 1, and by Session Laws 2008-133, s. 1, applicable to offenses occurring before October 1, 1994, and to parole reviews conducted on or after October 1, 2008, subsection (b) reads:

"(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced as a felon for a maximum term of 18 months or longer:

"(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year;

"(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year, except as provided in subdivision (4) of this subsection, or

"(3) Whenever the Parole Commission will be considering for parole a prisoner convicted of first- or second-degree murder, first-degree rape, or first-degree sexual offense, the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:

"a. The prisoner;

"b. The district attorney of the district where the prisoner was convicted;

"c. The head of the law enforcement agency that arrested the prisoner, if the head of the agency has requested in writing that he be notified;

"d. Any of the victim's immediate family members who have requested in writing to be notified;

"e. The victim, in cases of first-degree rape or first-degree sexual offense, if the victim has requested in writing to be notified; and

"f. As many newspapers of general circulation and other media in the county where the prisoner was convicted and if different, in the county where the prisoner was charged, as reasonable.

"The Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, any member of the victim's immediate family who has requested to be notified, and as many newspapers of general circulation and other media in the county or counties designated in sub-subdivision f. of this section [subsection] as reasonable, written notice of its decision within 10 days of that decision. The Parole Commission shall not, however, include the name of any victim in its notification to the newspapers and other media.

"(4) The Commission shall review cases where the prisoner was convicted of first or second degree murder, and in its discretion, give consideration of parole and written notice of its decision once every third year; except that the Commission may give more frequent parole consideration if it finds that exigent circumstances or the interests of justice demand it."

Session Laws 2009-372, s. 19 is a severability clause.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-372, s. 13(a), effective December 1, 2009, and applicable to offenses committed on or after that date, in subsection (h), in the second paragraph, in the first sentence, deleted "a program of" following "participation in" near the middle, and substituted "the Division of Community Corrections" for "a probation/parole officer" at the end, and in the third paragraph, in the first sentence, substituted "judicial services" for "community service" near the beginning, in the second sentence, deleted "community service" preceding "coordinator shall" near the beginning, and in the third sentence, substituted "the Division of Community Corrections" for "a community service coordinator" at the end.

Session Laws 2009-372, s. 13(b), as amended by Session Laws 2009-451, s. 19.26(d), effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote subsection (i).

Session Laws 2009-451, s. 19.26(a), effective September 1, 2009, as amended by Session Laws 2009-575, s. 16A, and applicable to persons ordered to perform community service on or after that date, substituted "two hundred twenty-five dollars ($225.00)" for "two hundred dollars ($200.00)" in the first sentence of subsection (i).

Legal Periodicals. — For survey of 1977 law on prisoners' rights, see 56 N.C.L. Rev. 1100 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Disposition of Defendants Under

Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

CASE NOTES

I. General Consideration.
II. Credit for Time Served.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases cited below were decided under former G.S. 148-58, 148-60, 148-61.1, and 148-62, and prior versions of this section.*

Purpose of Parole. — Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency — under guidance and control of the Board (now Commission). Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Legislature May Establish Parole System. — In the division of governmental authority the legislature has exclusive power to determine the penalogical system of the State. It alone can prescribe the punishment for crime. It may therefore establish a parole system. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

And Administration of Parole System May Be Delegated. — The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Grant or Denial of Parole Power Not a Judicial Function. — The granting, withholding or frustration of the parole power is not and has never been a responsibility of the judicial branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Originally a Function of Executive Branch. — In this State the power to grant and to revoke paroles developed originally as a function of the executive branch of the government. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Department and Commission Determine Right to Parole. — Whether a prisoner is entitled to honor-grade status, work release, or parole involves policy decisions which should be decided by the Department of Correction and the Board of Paroles (now Post-Release Supervision and Parole Commission). These agencies are charged with the duty and are properly given means of discharging it not available to the courts. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Court Proceeding Not Best Method for Determining When to Grant Parole. — Whether to release a prisoner before the completion of his sentence is a question with many facets. It cannot be answered by rules of law. Those who have watched the prisoner during his confinement are better qualified than the courts to say if and when he merits parole. Court proceeding would be a poor substitute for the method now employed. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Due Process Applicable. — protected by the due process clause, since it creates a presumption that parole release will be granted if there are no findings that fall within the stated exceptions. Harwood v. Johnson, 326 N.C. 231, 388 S.E.2d 439, rehearing denied, 326 N.C. 488, 389 S.E.2d 810 (1990).

Conditions of parole are a restraint upon a parolee's liberty not shared by the public generally. He is still under the supervision of the parole authorities and subject to be remanded if he fails to perform or violates the conditions of the parole. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Rigid Guidelines Neither Necessary Nor Desirable. — In the matter of paroles, which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves evaluation of a large number of intangibles, rigid guidelines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Parole Must Be Earned. — While a prisoner takes with him into the prison certain rights which may not be denied him, the legal right to the mitigation of his punishment is not one of them. It is contemplated as a part of his rehabilitation that he earn his right to honor-grade status, work release, or parole. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Parole Not to Be Anticipated in Sentencing. — Release of a prisoner before completion of his sentence cannot and should not be anticipated with exactness by the trial judge as the basis for the imposition of sentences in cases. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Sentencing process may not be ex-

pressly employed to thwart the parole process, the responsibility for which is vested in another branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Merits of Trial and Validity of Judgment May Not Be Raised. — The granting of honor-grade status, work release, and parole is by way of mitigating the terms of the judgment which the court has entered. The legality and propriety of the trial and sentence have already been determined after the prisoner has been heard and his constitutional rights have been accorded him. The merits of the trial and the validity of the judgment may not again be raised before the Department of Correction and the Board of Paroles (now Post-Release Supervision and Parole Commission). Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347 (1972).

Habitual Felon Status Determines Parole Eligibility. — Because an inmate's kidnapping conviction was only part of a 40-year consolidated sentence, his habitual felon status should have determined his parole eligibility, under G.S. 15A-1371. Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

Instruction on Parole Ineligibility in Capital Case. — Due process did not require that the sentencing jury be informed that the defendant charged with first degree murder was parole ineligible, where the jury did not inquire about defendant's parole eligibility and the prosecutors did not argue future dangerousness to the jury; arguing the aggravating circumstances did not amount to arguing future dangerousness. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Right of Appeal Not Affected by Parole. — The fact that a defendant is on parole at the time of his application for certiorari to review an order denying him post-conviction relief does not affect his right to appellate review. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Applied in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981); State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984); Keel v. French, 162 F.3d 263 (4th Cir. 1998); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984); State v. Smith, 323 N.C. 359, 372 S.E.2d 557 (1988); Harwood v. Johnson, 92 N.C. App. 306, 374 S.E.2d 401 (1988); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994); Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999); Frye v. Lee, 89 F. Supp. 2d 693, 2000 U.S. Dist. LEXIS 2915 (W.D.N.C. 2000); Teasley v. Beck, 155 N.C. App. 282, 574 S.E.2d 137, 2002 N.C. App. LEXIS 1600 (2002).

II. CREDIT FOR TIME SERVED.

Double Jeopardy. — The constitutional guarantee against double jeopardy absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

Credit for Time Served Pending Appeal. — Time spent in jail by a prisoner serving a life sentence, between his first conviction and the dismissal of his final appeal must be credited toward his parole eligibility date. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

A prisoner may have the time he spends in jail pursuing appeals and awaiting retrial taken into account in determining when he can be considered for parole. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

The length of time a prisoner serving a life sentence was imprisoned, from the date of his first conviction to the date his sentence began to run following affirmance of his second appeal, must be included in computing the statutory period of 10 years which he must serve before he can be considered for commutation. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

Denial of Credit for Time Pending Appeal Is Multiple Punishment. — Denial of credit to a prisoner for the time he spent in jail from the date of his first conviction until the affirmance of his second appeal is multiple punishment. Such time must be fully credited insofar as possible as "punishment already exacted." Although it cannot be credited against his life sentence, which by its very nature is indefinite, it can be credited toward the 10 years he must wait to be considered for parole. Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971).

§ 15A-1372. Length and effect of parole term.

(a) Term of Parole. — The term of parole for any person released from imprisonment may be no greater than one year.

(b) Repealed by Session Laws 1993, c. 538, s. 23.

(c) Termination of Sentence. — When a parolee completes his period of parole, the sentence or sentences from which he was paroled are terminated.

(d) Repealed by Session Laws 1993, c. 538, s. 23. (1977, c. 711, s. 1; 1981, c. 642; 1989, c. 1, s. 8; 1989 (Reg. Sess., 1990), c. 1031, s. 3; 1991, c. 217, s. 1; 1993, c. 538, s. 23; 1994, Ex. Sess., c. 21, s. 4; c. 24, s. 14(b).)

OFFICIAL COMMENTARY

This section establishes the permissible length of the parole term, which must always be at least one year or the remainder of his term if the remainder of the term is less than a year. Otherwise, the parole term is within the discretion of the Parole Commission as long as it is no greater than the outside limits set forth in this section, which vary according to the length of the maximum prison sentence imposed.

§ 15A-1373. Incidents of parole.

(a) Conditionality of Parole. — Unless terminated sooner as provided in subsection (b), parole remains conditional and subject to revocation.

(b) Early Termination. — The Post-Release Supervision and Parole Commission may terminate a period of parole and discharge the parolee at any time after the expiration of one year of successful parole if warranted by the conduct of the parolee and the ends of justice.

(c) Modification of Conditions. — The Post-Release Supervision and Parole Commission may for good cause shown modify the conditions of parole at any time prior to the expiration or termination of the period for which the parole remains conditional.

(d) Effect of Violation. — If the parolee violates a condition at any time prior to the expiration or termination of the period, the Commission may continue him on the existing parole, with or without modifying the conditions, or, if continuation or modification is not appropriate, may revoke the parole as provided in G.S. 15A-1376 and reimprison the parolee for a term consistent with the following requirements:

(1) The time the parolee was at liberty on parole and in compliance with all terms and conditions of that parole shall be credited on a day-for-day basis against the maximum term of imprisonment imposed by the court under G.S. 15A-1351, except that the parolee shall receive no credit for the last six months of his parole.

(2) The prisoner must be given credit against the term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1376.

(e) Re-parole. — A prisoner who has been reimprisoned following parole may be re-paroled by the Post-Release Supervision and Parole Commission subject to the provisions which govern initial parole. In the event that a defendant serves the final six months of his maximum imprisonment as a result of being recommitted for violation of parole, he may not be required to serve a further period on parole.

(f) Timing of Revocation. — The Post-Release Supervision and Parole Commission may revoke parole for violation of a condition during the period of parole. The Commission also may revoke following the period of parole if:

(1) Before the expiration of the period of parole, the Commission has recorded its intent to conduct a revocation hearing, and

(2) The Commission finds that every reasonable effort has been made to notify the parolee and conduct the hearing earlier. (1977, c. 711, s. 1; 1979, c. 927; 1991, c. 217, s. 2; 1993, c. 538, s. 38; 1994, Ex. Sess., c. 24, s. 14(b).)

OFFICIAL COMMENTARY

This section does not give to the parolee whose parole is revoked credit against the remainder of his sentence when he is reimprisoned for the period of time spent on parole prior to revocation. There is at least a minimum six months period on reimprisonment so that even if the parolee has very little time remaining on his active sentence, he still must serve six months in prison upon revocation. Under subsection (e) the recommitted parolee is still subject to the provisions of automatic parole at the end of his term unless he has served out the entire period of his imprisonment.

Subsection (f) provides for revocation and reimprisonment for a parolee after the period of parole if a parole violation occurred during the period of parole. This provision is aimed at the situation in which the violator is outside the jurisdiction and inaccessible earlier. As a precaution against abuse, the subsection requires that the intention to hold a revocation hearing be recorded prior to the expiration of the period of parole and requires a finding that every reasonable effort was made to conduct the hearing earlier.

CASE NOTES

Double Jeopardy. — Double jeopardy prohibition did not bar a prosecution for failure to comply with sex offender registration, despite the fact that the grounds for this prosecution were the same as used to revoke defendant's parole from a sentence imposed in a separate case. State v. Sparks, 182 N.C. App. 45, 641 S.E.2d 339, 2007 N.C. App. LEXIS 488 (2007).

Cited in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 15A-1374. Conditions of parole.

(a) In General. — The Post-Release Supervision and Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.

(a1) Required Conditions for Certain Offenders. — A person serving a term of imprisonment for an impaired driving offense sentenced pursuant to G.S. 20-179 that:

(1) Has completed any recommended treatment or training program required by G.S. 20-179(p)(3); and

(2) Is not being paroled to a residential treatment program;

shall, as a condition of parole, receive community service parole pursuant to G.S. 15A-1371(h), or be required to comply with subdivision (b)(8a) of this section.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.

(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.

(8a) Remain in one or more specified places for a specified period or periods each day and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(8b) Remain alcohol free, and prove such abstinence through evaluation by a continuous alcohol monitoring system of a type approved by the Department of Correction.

(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.

(10) Promptly notify the parole officer of any change in address or employment.

(11) Submit at reasonable times to warrantless searches by a parole officer of the parolee's person and of the parolee's vehicle and premises while the parolee is present, for purposes reasonably related to the parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful. If the parolee has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, warrantless searches of the parolee's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the parole supervision. Whenever the search consists of testing for the presence of illegal drugs, the parolee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(11b) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the parolee in connection with any judgment rendered by the court.

(11c) In the case of a parolee who was attending a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(12) Satisfy other conditions reasonably related to his rehabilitation.

(b1) Mandatory Satellite-Based Monitoring Required as Condition of Parole for Certain Offenders. — If a parolee is in a category described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(2), the Commission must require as a condition of parole that the parolee submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Supervision Fee. — The Commission must require as a condition of parole that the parolee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a parolee from this condition of parole only if it finds that requiring him to pay the fee will constitute an undue economic burden. The fee must be paid to the clerk of superior court of the county in which the parolee was convicted. The clerk must transmit any money collected pursuant to this subsection to the State to be deposited in the general fund of the State. In no event shall a person released on parole be required to pay more than one supervision fee per month.

(d) Any fees or costs paid by the parolee in order to comply with the imposition of subdivision (8b) of subsection (b) of this section shall be paid to the clerk of court for the county in which the parolee was convicted. Fees or costs collected under this subsection shall be transmitted to the entity providing the continuous alcohol monitoring system. (1977, c. 711, s. 1; 1979, c. 749, s. 11; 1983, c. 562; 1985, c. 474, s. 6; 1987, c. 579, s. 3; c. 830, s. 17; 1989 (Reg. Sess., 1990), c. 1034, s. 2; 1991, c. 54, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 2; 1993, c. 538, s. 39; 1994, Ex. Sess., c. 24, s. 14(b); 2002-126, s. 29A.2(c); 2006-247, s. 15(h); 2006-253, s. 27; 2007-165, ss. 4, 5; 2007-213, s. 8.)

OFFICIAL COMMENTARY

The provisions on conditions of parole are parallel to those on conditions of probation, including the provision on search. The search as a condition of parole may be made only by a parole officer, and must be reasonably related to the parole supervision.

Cross References. — As to the Department of Corrections establishing regulations for continuous alcohol monitoring systems, see G.S. 15A-1343.3.

Editor's Note. — Session Laws 2006-247, s. 15(*l*) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Subdivision (b)(8b) and subsection (d), were added by Session Laws 2007-165, ss. 4 and 5, effective December 1, 2007. Session Laws 2007-165, s. 9, provides in part: "Nothing in this act shall be construed to prohibit a court from either continuing or allowing the use of continuous alcohol monitoring systems as evidence of alcohol abstinence prior to the effective date of Sections 1 through 5 [December 1, 2007]."

CASE NOTES

Restitution May Be Made Condition of Parole. — The Parole Commission (now Post-Release Supervision and Parole Commission) may, but is not required to implement the recommendation of the sentencing court for restitution as a condition of parole. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

As May Reimbursement of State for Counsel Fees. — Under the provisions of this section, the Parole Commission (now Post-Release Supervision and Parole Commission) may, but is not required to, implement the recommendation of the sentencing court and impose as a condition of parole that the prisoner reimburse the State for counsel fees. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially-able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina, like every jurisdiction, has an irrevocable constitutional duty to provide court-appointed counsel to an indigent defendant once he requests it. The developing jurisprudence in this area, however, does not require the State to absorb the expenses of providing such counsel when the defendant has acquired the financial ability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Although the North Carolina Supreme Court has never definitively decided the issue, there is persuasive authority in North Carolina law supporting the State's right to claim the status of an aggrieved party for the expenses associated with providing court-appointed counsel. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Constitutionality of Repayment Programs. — There is no single model to which all State repayment programs must conform. State repayment programs must conform. However, the Supreme Court in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), and James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), has carefully identified the basic features separating a constitutionally acceptable recoupment or restitution program from one that is fatally defective. North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Though far from a paragon of clarity and detail as a complete program, the North Carolina statutes relating to the repayment of attorneys' fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Cited in State v. Bryant, 318 N.C. 632, 350 S.E.2d 358 (1986); Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999).

§ 15A-1375. Commencement of parole; multiple sentences.

A period of parole commences on the day the prisoner is released from imprisonment. Periods of parole run concurrently with any federal or State prison, jail, probation, or parole term to which the defendant is subject during the period. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

A person on parole who is during that time sentenced to a term of imprisonment or to a term of probation or parole continues to satisfy his parole term during the period when he is serving the other sentence.

§ 15A-1376. Arrest and hearing on parole violation.

(a) Arrest for Violation of Parole. — A parolee is subject to arrest by a law-enforcement officer or a parole officer for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Post-Release Supervision and Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or a continuance is requested by the parolee, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released seven working days after his arrest to continue on parole pending a hearing. If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.

(c) Officers to Conduct Hearing. — The preliminary hearing on parole violation must be conducted by a judicial official, or by a hearing officer designated by the Post-Release Supervision and Parole Commission. No person employed by the Department of Correction may serve as a hearing officer at a hearing provided in this section unless he is a member of the Post-Release Supervision and Parole Commission or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Post-Release Supervision and Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The Post-Release Supervision and Parole Commission must adopt rules governing the hearing. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 23-26; 1987, c. 827, s. 1; 1993, c. 538, s. 40; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(a); 2000-189, s. 2.)

OFFICIAL COMMENTARY

Like the parallel provisions on probation, this section carries forward prior law and practice and conforms procedure requirements for those demanded by the United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The parolee's right to counsel is left to the provisions of G.S. 148-62.1. The provision of subsection (c) goes beyond the constitutional requirements and directs that the hearing examiner in any of the required hearings not be a person who holds some other job with the Department of Correction which might be seen as creating a kind of "conflict of interest." The only instance in which an employee of the Department of Correction may be used as the hearing examiner is either if he is a member of the Parole Commission or if his sole job is being hearing examiner.

Subsection (e) turns to North Carolina's Administrative Procedure Act for the hearing prescribed except for those exceptions noted, but does not intend otherwise to affect the 1975 exemption for the Department of Correction.

Editor's Note. — Pursuant to Session Laws 1987, c. 827, s. 1, reference to Chapter 150B has been substituted for reference to Chapter 150A in this section.

Legal Periodicals. — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

CASE NOTES

Cited in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

§ 15A-1377: Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 27.

§§ 15A-1378 through 15A-1380: Reserved for future codification purposes.

ARTICLE 85A.

Parole of Certain Convicted Felons.

§§ 15A-1380.1 through 15A-1380.4: Repealed by Session Laws 1993, c. 538, s. 24.

Editor's Note. — Former sections 15A-1380.3 and 15A-1380.4 had been reserved.

ARTICLE 85B.

Review of Sentences of Life Imprisonment Without Parole.

§ 15A-1380.5: Repealed by Session Laws 1998-212, s. 19.4(q), effective December 1, 1998, and applicable to offenses committed on or after that date.

ARTICLE 86.

Reports of Dispositions of Criminal Cases.

§ 15A-1381. Disposition defined.

As used in this Article, the term "disposition" means any action which results in termination or indeterminate suspension of the prosecution of a criminal charge. A disposition may be any one of the following actions:

(1) A finding of no probable cause pursuant to G.S. 15A-511(c)(2);
(2) An order of dismissal pursuant to G.S. 15A-604;
(3) A finding of no probable cause pursuant to G.S. 15A-612(a)(3);
(4) A return of not a true bill pursuant to G.S. 15A-629;
(5) Repealed by Session Laws 1989, c. 688, s. 4.
(6) Dismissal pursuant to G.S. 15A-931 or 15A-932;
(7) Dismissal pursuant to G.S. 15A-954, 15A-955 or 15A-959;
(8) Finding of a defendant's incapacity to proceed pursuant to G.S. 15A-1002 or dismissal of charges pursuant to G.S. 15A-1008;
(9) Entry of a plea of guilty or no contest pursuant to G.S. 15A-1011, without regard to the sentence imposed upon the plea, and even though prayer for judgment on the plea be continued;
(10) Dismissal pursuant to G.S. 15A-1227;
(11) Return of verdict pursuant to G.S. 15A-1237, without regard to the sentence imposed upon such verdict and even though prayer for judgment on such verdict be continued. (1981, c. 862, s. 1; 1989, c. 688, s. 4.)

§ 15A-1382. Reports of disposition; fingerprints.

(a) When the defendant is fingerprinted pursuant to G.S. 15A-502 prior to the disposition of the case, a report of the disposition of the charges shall be made to the State Bureau of Investigation on a form supplied by the State Bureau of Investigation within 60 days following disposition.

(b) When a defendant is found guilty of any felony, regardless of the class of felony, a report of the disposition of the charges shall be made to the State Bureau of Investigation on a form supplied by the State Bureau of Investigation within 60 days following disposition. If a convicted felon was not fingerprinted pursuant to G.S. 15A-502 prior to the disposition of the case, his fingerprints shall be taken and submitted to the State Bureau of Investigation along with the report of the disposition of the charges on forms supplied by the State Bureau of Investigation. (1981, c. 862, s. 1.)

§ 15A-1382.1. Reports of disposition; domestic violence; sentencing.

(a) When a defendant is found guilty of an offense involving assault, or communicating a threat, the presiding judge shall determine whether the defendant and victim had a personal relationship. If the judge determines that there was a personal relationship between the defendant and the victim, then the judge shall indicate on the form reflecting the judgment that the case involved domestic violence. The clerk of court shall insure that the official record of the defendant's conviction includes the court's determination, so that any inquiry into the defendant's criminal record will reflect that the offense involved domestic violence.

(b) If the presiding judge determines that there was a personal relationship between the defendant and the victim, and a sentence to community punishment is imposed, the judge shall determine whether the defendant shall comply with one or more of the special conditions of probation set forth at G.S. 15A-1343(b1), in addition to any other authorized punishment. Notwithstanding the provisions of G.S. 15A-1340.11(6)c, the court may require the defendant to comply with the provisions of G.S. 15A-1343(b1)(3c).

(c) The following definitions apply to this section:

(1) "An offense involving assault" includes any offense where an assault occurred, whether or not the conviction is for an offense under Article 8 of Chapter 14 of the General Statutes.

(2) "Inquiry" shall include any lawful review of the criminal records of persons convicted of an offense in this State, whether by law enforcement personnel or by private individuals.

(3) "Personal relationship" is as defined in G.S. 50B-1(b). (2004-186, s. 11.1.)

Editor's Note. — The definitions in subsection (c) have been set out in alphabetical order at the direction of the Revisor of Statutes.

§ 15A-1383. Plans for implementation of Article; punishment for failure to comply; modification of plan.

(a) On January 1, 1982, or on the first day of the month following the date on which any superior court district becomes effective under G.S. 7A-41, each senior resident superior court judge shall file a plan with the Director of the State Bureau of Investigation for the implementation of the provisions of this Article. The plan shall be entered as an order of the court on that date. In drawing up the plan, the senior resident superior court judge may consult with any public official having authority within his district or set of districts as defined in G.S. 7A-41.1(a) and with any other persons as he may deem appropriate. Upon the request of the senior resident superior court judge, the State Bureau of Investigation shall provide such technical assistance in the preparation of the plan as the judge desires.

(b) A person who is charged by the plan with a duty to make reports who fails to make such reports as required by the plan is punishable for civil contempt under Article 2 of Chapter 5A of the General Statutes.

(c) When the senior resident superior court judge modifies, alters or amends a plan under this Article, the order making such modification, alteration or amendment shall be filed with the Director of the State Bureau of Investigation within 10 days of its entry.

(d) Plans prepared under this Article are not "rules" within the meaning of Chapter 150B of the General Statutes or within the meaning of Article 6C of Chapter 120 of the General Statutes. (1981, c. 862, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 70; 1989, c. 770, s. 4.)

Editor's Note. — Article 6C of Chapter 120, referred to in subsection (d) of this section, is repealed. As to review of administrative rules, see now G.S. 143B-30.1 et seq.

§§ 15A-1384 through 15A-1390: Reserved for future codification purposes.

ARTICLE 87.

§§ 15A-1391 through 15A-1400: Reserved for future codification purposes.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

Relief from errors committed in criminal trials and proceedings and other post-trial relief may be sought by:

(1) Motion for appropriate relief, as provided in Article 89.

(1a) Motion for innocence claim inquiry as provided in Article 92 of Chapter 15A of the General Statutes.

(2) Appeal and trial de novo in misdemeanor cases, as provided in Article 90.

(3) Appeal, as provided in Article 91. (1977, c. 711, s. 1; 2006-184, s. 2.)

Effect of Amendments. — Session Laws 2006-184, s. 2, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added subsection (1a).

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

CASE NOTES

A motion for appropriate relief is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Cited in State v. White, 74 N.C. App. 504, 328 S.E.2d 902 (1985); Skipper v. French, 130 F.3d 603 (4th Cir. 1997); State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000); Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); Daniels v. Lee, 316 F.3d 477, 2003 U.S. App. LEXIS 333 (4th Cir. 2003); State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007).

§§ 15A-1402 through 15A-1410: Reserved for future codification purposes.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

OFFICIAL COMMENTARY

The motion for appropriate relief provided in this Article provides a single, unified procedure for raising at the trial level errors which are asserted to have been made during the trial. The Article provides a "motion in the cause" which may be used to seek any of the relief formerly available by motions in arrest of judgment, motions to set aside the verdict, motions for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions or procedures.

Under this procedure no significance will attach to the name given a motion made at the end of the trial or after the trial, but rather the essential tasks will be to point out the error which is asserted to have been committed and to ask for relief appropriate to correct that error. To this end this Article lists errors which may be raised by motions made in the trial court, sets out the time limits for seeking particular types of relief by motion, and enumerates relief available.

One objective is the elimination of formal lists of motions to be recited at the end of the trial and to move more directly to the problem and its solution. This statute, designed to make the practice simple and eliminate traps for the unwary, appears more complicated in statutory statement than our former codifications. The reason is obvious. Where we may have provided before, for example, for a "motion for a new trial," with a very simple statement in the statute, it was necessary to look to case law, other statutes, and in some instances the rules of civil procedure, for a more complete exposition of what those terms meant. This Article is designed to substantially reduce that search and bring most of these ideas together in one place.

It should be noted that the "post trial motions" Article was drawn with an eye to the "Appeals" Article which follows in Article 91. An attempt was made to maximize the capability of correcting errors at trial level in order to avoid the necessity of appeal. On the other hand, when an error has been pointed out in the trial by appropriate objection, there is no requirement for making formal motions after trial solely for the purpose of preserving the right to appeal.

As the phrase in the title, "and Other Post Trial Relief," indicates, this "motion in the cause" also may be used for post-trial functions other than the correction of errors. For instance, a defendant who has served his sentence to confinement could, pursuant to G.S. 15A-1415(d)(9) utilize this procedure to assert his right to release.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1411. Motion for appropriate relief.

(a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420.

(b) A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding.

(c) The relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions is available by motion for appropriate relief. The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus.

(d) A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission does not constitute a motion for appropriate relief and does not impact rights or relief provided for in this Article. (1977, c. 711, s. 1; 2006-184, s. 4.)

OFFICIAL COMMENTARY

This section is designed to make clear that the simple motion in the original proceeding provided for here is available for assertion of the right to relief which formerly could have been provided by any of a variety of procedures, as prescribed in subsection (c). Of course it would be impossible to eliminate the writ of habeas corpus as the means of seeking relief where that writ is applicable. However, there should be substantial overlap in some areas and the system here, because of its simplicity, is likely to be the easier method of presenting an issue in many cases.

Pilot Program to Determine Effectiveness of Utilizing Videoconference Technology to Conduct Non-Trial Court Proceeding Involving Persons in Custody. — Session Laws 2009-270, ss. 1-4, provide: "SECTION 1. The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

"SECTION 2. Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

"SECTION 3. The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

"SECTION 4. The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies."

Effect of Amendments. — Session Laws 2006-184, s. 4, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added subsection (d).

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

For article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

For article, "'I'm Innocent': Addressing Freestanding Claims of Actual Innocence in State and Federal Courts," 25 N.C. Cent. L.J. 197 (2003).

For note, "All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission," see 56 Duke L.J. 1345 (2007).

CASE NOTES

The Fair Sentencing Act, as codified in former Article 81A of this Chapter, resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the "Fair Sentencing Act," see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Exhaustion of Remedies Provided by State. — North Carolina's institution of a new system of post-conviction review reaffirms its desire to review and correct possible criminal trial errors. The federal court welcomes such a manifest spirit and will require all state habeas corpus petitioners to avail themselves of G.S. 15A-1411 to 15A-1422, or demonstrate that they would not be allowed to pursue their claims in these proceedings, before deeming the exhaustion requirement met. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Article Provides for Adjudication of Constitutional Claims. — The proper procedure which provides defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is found in this Article. State v. Neeley, 57 N.C. App. 211, 290 S.E.2d 727, rev'd on other grounds, 307 N.C. 247, 297 S.E.2d 389 (1982).

Definition. — A motion for appropriate relief is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

When Motion in Arrest of Judgment Proper. — A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment. State v. McGaha, 306 N.C. 699, 295 S.E.2d 449 (1982).

Motion in Arrest of Judgment May Be First Made on Appeal. — A motion in arrest of judgment is directed to some fatal defect appearing on the fact of the record. Such a motion may be made for the first time on appeal in the Supreme Court. State v. McGaha, 306 N.C. 699, 295 S.E.2d 449 (1982).

Legal effect of arresting judgment is to vacate the verdict and sentence. The State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Judgment must be arrested when indictment fails to charge essential element of the offense. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Motion to Set Aside Verdict Is Addressed to Court's Discretion. — A motion to set aside the verdict for the reason that it is against the greater weight of the evidence is addressed to the discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. State v. Gilley, 306 N.C. 125, 291 S.E.2d 645 (1982); State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982); State v. Powell, 74 N.C.

App. 584, 328 S.E.2d 613 (1985).

Motion to set aside the verdict is directed to the sound discretion of the trial judge. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Court's Authority To Strike Guilty Plea. — Neither the statutory nor the case law empowers the trial court with the absolute discretion to strike a guilty plea once it has been unconditionally accepted and entered. Thus, a trial court's discretion to strike a guilty plea and set a case for trial derives, if at all, from its comparable authority to overturn a jury verdict and order a new trial. State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

State Court's Misapplication of Federal Law Principle. — State death row prisoner was improperly denied a habeas corpus evidentiary hearing by a federal district court on the issue of whether a trial juror had lied about being closely related to a co-defendant who testified for the state; the doctrine of implied bias, a recognized federal law principle, was misapplied by a state post-conviction court that heard the prisoner's motion for appropriate relief. Conaway v. Polk, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment of collateral attack on such a plea, which would be by a motion for appropriate relief. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Prerequisites for a new trial on the grounds of newly discovered evidence are: (1) that the witness or witnesses will give the newly discovered evidence; (2) that such newly discovered evidence is probably true; (3) that it is competent, material and relevant; (4) that due diligence was used and proper means were employed to procure the testimony at the trial; (5) that the newly discovered evidence is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; and (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Motion for a new trial based on misconduct affecting a jury's deliberation is addressed to the sound discretion of the trial judge, and unless his ruling is clearly erroneous or an abuse of discretion, it will not be disturbed. The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge. State v. Bailey, 307 N.C. 110, 296 S.E.2d 287 (1982).

Entitlement to a New Trial. — In order for a defendant to be entitled to a new trial due to the improper closing argument of the district attorney, the district attorney's statements must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003).

Defendant's statutory sexual offense conviction was reversed and he was granted a new trial because the sealed portion of a department of social services file subpoenaed by defendant provided an alternative explanation for the victim's abuse; the file showed that: (1) the victim's brother had a history of violence, (2) the mother had left the victim alone with the brother, (3) the victim had lied in the past in meetings with a social worker, (4) the mother believed that she might have caused one of the victim's injuries, and (5) the mother believed that it was possible that the brother had sexually abused the victim. State v. Johnson, 165 N.C. App. 854, 599 S.E.2d 599, 2004 N.C. App. LEXIS 1518 (2004).

Because the cumulative nature of the trial judge's remarks to defense counsel regarding his speech pattern, along with a fine imposed for counsel's use of the word "okay," set a tone of fear in the trial and tainted the atmosphere of the same, prejudicing defendant's rights, defendant was entitled to a new trial. State v. Wright, 172 N.C. App. 464, 616 S.E.2d 366, 2005 N.C. App. LEXIS 1797 (2005).

Defendant's conviction for possession of a firearm by a felon was vacated because the prior conviction upon which it was based was for a misdemeanor, not a felony. State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

Defendant was granted a new trial because the trial court committed plain error by instructing the jury as to the burden of proof on a voluntary manslaughter charge when it charged the jury correctly as to the burden of proof and then incorrectly shifted the burden to defendant; the trial court further compounded the problem by providing the jury with a written document that contained the same misstatement as to the burden of proof. State v. Hunt, — N.C. App. —, 664 S.E.2d 662, 2008 N.C. App. LEXIS 1511 (2008).

Defendant Not Entitled to New Trial. — Defendant was not entitled to a new trial due to the State's improper closing argument which was sufficiently close to making an association between defendant and a wild animal to lead to such an inference, including a statement that "he who hunts with the pack is responsible for the kill," multiple references to hunting on the African plain when defendant was an African-American, and references to an accomplice as an "alpha male" and to defendant as a follower in the pack, as: (1) the State did not misstate the evidence or the law in making its argument;

(2) the trial court instructed the jury that closing arguments were not evidence; (3) there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged; and (4) although improper, the State's comments did not deny defendant due process. State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003).

Defendant was not entitled to a new trial due to the State's closing argument that "if you are going to try the devil, you have to go to hell to get your witnesses" as: (1) the North Carolina Supreme Court, as well as the appellate court, have held that practically the same exact statement made during the State's closing argument was not reversible error; and (2)despite the fact that in some contexts such a statement by a district attorney may be inappropriate, given the overwhelming evidence of defendant's guilt, defendant failed to show how the district attorney's statement constituted prejudicial error meriting a new trial. State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003).

Defendant was not entitled to a new trial because the trial court allowed the state to reopen the case and suggested to the state that it needed to make a motion to reopen the case as the trial court merely settled a legal dispute outside of the presence of the jury; the judge did not depart from his neutral role as a judicial officer by discussing the law with the attorneys or by permitting the state to reopen its case. State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

Denial of Motion Improper. — The court erred in summarily entering its order denying defendant's motion for appropriate relief, without conducting an evidentiary hearing to address the issues of fact surrounding counsel's alleged conflict of interest. State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (1997).

No Rehearing in Criminal Matters. — Petitioner inmate's habeas petition was untimely under 28 U.S.C.S. § 2244(d)(1) because N.C. R. App. P. 32's 20-day period did not apply to the order of the highest state court denying certiorari, and that order ended the state post-conviction process and the tolling provisions of 28 U.S.C.S. § 2244(d)(2); further, N.C. R. App. 31(a) did not apply to criminal proceedings and, under G.S. 15A-1411(b), a post-conviction motion was a motion in the original cause and not a new proceeding, thus, N.C. R. App. P. 31(g) applied and the inmate had no right to file a motion for rehearing in the state court. Rouse v. Lee, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 25353 (M.D.N.C. Jan. 17, 2001).

"Cold Record" Insufficient for Review. — Claims of ineffective assistance of counsel were dismissed without prejudice because the merits of defendant's claims, if any, could not be determined from the "cold record" and required further evidentiary development. State v. Pulley, 180 N.C. App. 54, 636 S.E.2d 231, 2006 N.C. App. LEXIS 2242 (2006).

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Potts, 334 N.C. 575, 433 S.E.2d 736 (1993); State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (1994).

Cited in Smith v. Dixon, 14 F.3d 956 (4th Cir.); State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980); Creech v. Sparkman, 523 F. Supp. 1157 (E.D.N.C. 1981); Quinerly v. Cherry, 527 F. Supp. 1059 (E.D.N.C. 1981); Emanuel v. Osborne, 538 F. Supp. 279 (E.D.N.C. 1982); State v. Kinch, 314 N.C. 99, 331 S.E.2d 665 (1985); Rook v. Rice, 783 F.2d 401 (4th Cir. 1986); Bush v. Stephenson, 669 F. Supp. 1322 (E.D.N.C. 1986); State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987); State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); Noland v. Dixon, 808 F. Supp. 485 (W.D.N.C. 1992); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993); State v. Johnson, 126 N.C. App. 271, 485 S.E.2d 315 (1997); State v. Small, 131 N.C. App. 488, 508 S.E.2d 799 (1998); State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761, 2005 N.C. LEXIS 204 (2005); Call v. Polk, 454 F. Supp. 2d 475, 2006 U.S. Dist. LEXIS 68738 (W.D.N.C. 2006); State v. Ford, — N.C. App. —, 672 S.E.2d 689, 2009 N.C. App. LEXIS 113 (2009); State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

§ 15A-1412. Provisions of Article procedural.

The provision in this Article for the right to seek relief by motion for appropriate relief is procedural and is not determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section makes clear that this Article creates a procedural device by which asserted errors can be raised. That necessitates, at some points, the listing of errors which may be asserted at certain times. A casual reading might create the false impression that providing the procedural device for litigating the question in some way implies that there is a right to relief simply by reason of the error's assertion. Of course, that is not true and the question of whether there was some error, and if so, whether it warrants the relief sought, are questions to be determined on the merits, utilizing the procedural device provided here.

CASE NOTES

Preservation of Claim. — Defendant failed to preserve defendant's Sixth Amendment claim of ineffective assistance of counsel as: (1) defendant never raised the claim in defendant's written motion for appropriate relief (MAR), even though defendant was permitted to raise the argument at any time after the verdict under G.S. 15A-1415; (2) by making a Sixth Amendment argument during the hearing, defense counsel essentially was attempting to amend the MAR to include the constitutional argument; (3) there was no evidence that after the post-conviction hearing, defendant moved to amend the MAR in writing under G.S. 15A-1420(a)(3) and G.S. 15A-951(c) either to conform it to evidence adduced at the hearing or to raise claims based on such evidence under G.S. 15A-1415(g); and (4) defendant's Sixth Amendment claim could not be considered a new MAR under G.S. 15A-1412. State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007).

§ 15A-1413. Trial judges empowered to act.

(a) A motion for appropriate relief made pursuant to G.S. 15A-1415 may be heard and determined in the trial division by any judge who is empowered to act in criminal matters in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, in which the judgment was entered.

(b) The judge who presided at the trial is empowered to act upon a motion for appropriate relief made pursuant to G.S. 15A-1414. He may act even though he is in another district or even though his commission has expired.

(c) When a motion for appropriate relief may be made before a judge who did not hear the case, he may, if it is practicable to do so, refer all or a part of the matter for decision to the judge who heard the case. (1977, c. 711, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 71.)

OFFICIAL COMMENTARY

Motions made at the end of trial pursuant to G.S. 15A-1414 will be heard by the judge who presided. As has been true in *coram nobis,* post-conviction proceedings and habeas corpus, matters which may be raised some time after the trial must in some instances be heard by a different judge, and appropriate authority is granted for that judge to act. However, it frequently will be preferable for the judge who heard the case to hear the motion because of the possibility of eliminating lengthy familiarization proceedings and papers. This section provides as fully as possible for that practice.

CASE NOTES

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Cited in State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

(a) After the verdict but not more than 10 days after entry of judgment, the defendant by motion may seek appropriate relief for any error committed during or prior to the trial.

(b) Unless included in G.S. 15A-1415, all errors, including but not limited to the following, must be asserted within 10 days after entry of judgment:

(1) Any error of law, including the following:

a. The court erroneously failed to dismiss the charge prior to trial pursuant to G.S. 15A-954.

b. The court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence.

c. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury, whether or not a motion so asserting was made before verdict.

d. The court erroneously instructed the jury.

(2) The verdict is contrary to the weight of the evidence.

(3) For any other cause the defendant did not receive a fair and impartial trial.

(4) The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing. This motion must be addressed to the sentencing judge.

(c) The motion may be made and acted upon in the trial court whether or not notice of appeal has been given. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, s. 6.)

OFFICIAL COMMENTARY

As subsection (a) indicates, during the period beginning with the verdict and ending 10 days after the entry of the judgment, the defendant may utilize this motion procedure to seek relief from any error committed prior to or during the trial. Thus there is no limitation as to errors which may be asserted during that period of time. The listing of possible errors, in subsection (b), is designed as a helpful checklist but not in any sense as a limitation.

As subdivision (b)(1) indicates, the procedure may be used to correct errors of law. As subdivisions (b)(2) and (b)(3) indicate, the trial court's discretionary authority is preserved in this revision.

G.S. 15A-1415 lists the errors which may be asserted by motion for appropriate relief after the expiration of the 10-day period. Of course they may also be raised before the expiration of the 10-day period, pursuant to this section.

Giving notice of appeal does not divest the jurisdiction of the trial court to act on a motion. G.S. 15A-1448, relating to appeals, provides that even though notice of appeal is given, the case is not sent forward until a later time, after any additional matters have been disposed of at the trial level. (It is possible that the disposition of the motion could make it desirable to withdraw the appeal.) See the more complete discussion in the Commentary at G.S. 15A-1448.

Cross References. — As to new trial in civil cases, see G.S. 1A-1, Rule 59.

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former G.S. 15-174.*

Any contradictions and discrepancies in the evidence are matters for the jury. State v. Stanley, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

Discretion of Court. — Disposition of post-trial motions under this section and G.S. 15A-1415 is within the discretion of the trial court and the refusal to grant them is not error absent a showing of abuse of that discretion. State v. Watkins, 45 N.C. App. 661, 263 S.E.2d 846, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Batts, 303 N.C. 155, 277 S.E.2d 385 (1981).

A motion under subdivision (b)(2) is addressed to the discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion. State v. Stanley, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985); State v.

Ruiz, 77 N.C. App. 425, 335 S.E.2d 32 (1985), cert. denied, 315 N.C. 395, 338 S.E.2d 885 (1986).

As a post-trial motion, the disposition of a motion for appropriate relief is subject to the sentencing judge's discretion and will not be overturned absent a showing of abuse of discretion. State v. Arnette, 85 N.C. App. 492, 355 S.E.2d 498 (1987).

Upon a determination that the original sentence in a Driving With Revoked License case was not supported by the evidence, the district court judge clearly had the authority to vacate the sentence pursuant to subdivision (b)(4) of this section and to resentence the defendant pursuant to G.S. 15A-1417(c). State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

Refusal to Set Aside Verdict Within Court's Discretion. — A motion to set aside the verdict is a post-trial motion pursuant to this section, the disposition of which is within the discretion of the trial court. Therefore, refusal to grant a motion to set aside the verdict is not error absent a showing of abuse of that discretion. State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), discretionary review denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582, aff'd, State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

After his murder conviction, defendant had no right to appropriate relief under G.S. 15A-1414 and G.S. 15A-1420, despite his claim that the trial judge committed reversible error by restoring peremptory challenges to both the State and to defendant after dismissing an entire group of prospective jurors for misconduct. Defendant filed a motion to strike the entire venire when it was learned that they had been discussing among themselves how they could become disqualified to serve, and pursuant to G.S. 15A-1443(c), a defendant was not prejudiced by the granting of relief that he sought or by error that resulted from his own conduct. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Trial Court Properly Denied Motion to Set Aside Verdict Under Subdivision (b)(2). — See State v. Bates, 313 N.C. 580, 330 S.E.2d 200 (1985).

Denial of Motion for Continuance. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Defendant who, himself, injects incompetent evidence into the trial, may not urge its admission as ground for a new trial. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Incorrect Charge to Jury. — A new trial is necessary where the court charges the jury correctly at one point and incorrectly at another, particularly when the incorrect portion of the charge is contained in the application of the law to the facts. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

New trial must result when ambiguity in the charge affords an opportunity for the injury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Verdict Required Element of Subsection (a). — Trial court did not have authority to grant criminal defendant's motion to dismiss felony child abuse charges pursuant to G.S. 15A-1414(a), which was contained in defendant's motion for appropriate relief, as that statute required that the motion be made after a jury had reached a verdict and the jury in defendant's first trial did not reach a verdict. State v. Allen, 144 N.C. App. 386, 548 S.E.2d 554, 2001 N.C. App. LEXIS 437 (2001).

Defendant Must Show Prejudice. — New trials are not given, even in capital cases, where there is no reasonable basis for supposing that, but for the error, a different result would have been reached. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Notice of Appeal. — Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief. State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Motion Properly Denied. — Evidence that defendant fired several shots in the direction of three individuals, in a small trailer occupied by six persons, and that he admitted shooting one of the individuals, was sufficient to support his conviction of the second degree murder of that individual under G.S. 14-17. Therefore, defendant's post-trial motion for appropriate relief under G.S. 15A-1414 on the basis of insufficient evidence was properly denied. State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

Applied in State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979); State v. Bean, 66 N.C. App. 86, 310 S.E.2d 421 (1984); State v. Essick, 67 N.C. App. 697, 314 S.E.2d 268 (1984); State v. Howard, 70 N.C. App. 487, 320 S.E.2d 17 (1984); State v. Acklin, 71 N.C. App. 261, 321 S.E.2d 532 (1984); State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985); State v. Greene, 74 N.C. App. 21, 328 S.E.2d 1 (1985); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994); State v. Cummings, 361 N.C.

438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Cited in State v. Johnson, 34 N.C. App. 328, 238 S.E.2d 313 (1977); Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Fennell, 51 N.C. App. 460, 276 S.E.2d 499 (1981); State v. White, 54 N.C. App. 451, 283 S.E.2d 571 (1981); State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981); State v. Carter, 284 S.E.2d 733 (1981); State v. Mack, 57 N.C. App. 163, 290 S.E.2d 741 (1982); State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982); State v. Allen, 57 N.C. App. 256, 291 S.E.2d 341 (1982); State v. Malloy, 60 N.C. App. 218, 298 S.E.2d 735 (1983); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593 (1985); State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001); State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

(a) At any time after verdict, a noncapital defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section. In a capital case, a postconviction motion for appropriate relief shall be filed within 120 days from the latest of the following:

(1) The court's judgment has been filed, but the defendant failed to perfect a timely appeal;

(2) The mandate issued by a court of the appellate division on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;

(3) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;

(4) Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;

(5) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the defendant's conviction and sentence undisturbed; or

(6) The appointment of postconviction counsel for an indigent capital defendant.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Repealed by Session Laws 1995 (Regular Session, 1996), c. 719, s. 1, effective June 21, 1996.

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served.

(c) Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery.

(d) For good cause shown, the defendant may be granted an extension of time to file the motion for appropriate relief. The presumptive length of an extension of time under this subsection is up to 30 days, but can be longer if the court finds extraordinary circumstances.

(e) Where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

(f) In the case of a defendant who is represented by counsel in postconviction proceedings in superior court, the defendant's prior trial or appellate counsel shall make available to the defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

(g) The defendant may file amendments to a motion for appropriate relief at least 30 days prior to the commencement of a hearing on the merits of the claims asserted in the motion or at any time before the date for the hearing has been set, whichever is later. Where the defendant has filed an amendment to a motion for appropriate relief, the State shall, upon request, be granted a continuance of 30 days before the date of hearing. After such hearing has begun, the defendant may file amendments only to conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence.

(1977, c. 711, s. 1; 1981, c. 179, s. 7; 1993, c. 538, s. 25; 1994, Ex. Sess., c. 24, s. 14(b); 1995 (Reg. Sess., 1996), c. 719, s. 1; 2009-517, s. 2.)

OFFICIAL COMMENTARY

After the 10 days provided in G.S. 15A-1414 have passed, use of the motion for appropriate relief to assert errors committed during or before the trial is limited to those listed in this section. (Of course these grounds may be asserted prior to the expiration of the 10-day period as well as after.)

The question faced by the Commission at this point was the identification of those errors in a trial which are so basic that one should be able to go back into the courts at any time, even many years after conviction, and seek relief. The resolution of this question requires the balancing of concepts of basic fairness with the desire for finality in criminal cases. The grounds stated here incorporate traditional notions of matters which may be asserted at a later time, together with several new items. It should also be taken into account with the latter consideration that additional finality has been added in G.S. 15A-1419 by making it clear that there is but one chance to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis.

The constitutional grounds have become familiar under the state post-conviction statutes (G.S. 15-217 et seq.). Familiar as well are the jurisdictional grounds and the fact that it is necessary in certain instances to make retroactive applications of changes in the law. (As mentioned above, this statute provides a procedural device to be used when other decisions or statutes impose the requirement of retroactivity, it does not create such a requirement.)

The provision in G.S. 15A-1415(b)(6) making it possible to raise the question of newly discovered evidence without time limitation constitutes a change. G.S. 15-174 has provided that new trials will be granted in criminal cases under the same rules and regulations as new trials in civil cases. That clearly makes it possible to make a motion for new trial within 10 days after entry of judgment on the grounds of newly discovered evidence as is provided in the Rules of Civil Procedure in G.S. 1A-1, Rule 59(4). Less clear is the applicability of Rule 60 permitting relief from a final judgment within one year on the basis of newly discovered evidence. The Commission concluded that the better route was always to permit a hearing on the question and rely on a strict statement of the rule and the idea of "one chance to be heard" described above as fairer limitations than an arbitrary time limitation in criminal cases. Different considerations make the fixed time desirable in civil cases.

The "Motion for appropriate relief and other post trial relief" is not limited to the correction of error. It is a device which may be used for any additional matters which relate to the original case. That is reflected in the authorization to use this motion to raise the question of whether or not a sentence has been served or probation has been unlawfully revoked.

Cross References. — As to finality of decisions of the Court of Appeals on motions for appropriate relief, see G.S. 7A-28.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 719, s. 8, provides: "The deadline for filing a motion for appropriate relief in Section 1 applies to cases in which the trial court judgment is entered after October 1, 1996."

Effect of Amendments. — Session Laws 2009-517, s. 2, effective December 1, 2009, and applicable to all motions for appropriate relief made on or after that date, in subsection (f), deleted "capital" preceding "defendant" and "defendant's" throughout, and substituted "who is represented by counsel in postconviction proceedings in superior court" for "who has been convicted of a capital offense and sentenced to death" in the first sentence.

Legal Periodicals. — For article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

For note, "Prosecutor's Duty to Disclose Evidence," see 15 N.C. Cent. L.J. 128 (1984).

For note on North Carolina's new approach to recanted testimony, see 11 Campbell L. Rev. 57 (1988).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former law.*

Intent of General Assembly. — There is an intent on the part of the General Assembly to expedite the post-conviction process in capital cases while ensuring thorough and complete review. State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

The apparent legislative intent of subsection (f) is to expedite the post-conviction process in capital cases while ensuring thorough and complete review. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Former subdivision (b)(6) of this section codified substantially the rule previously developed by case law for the granting of a new trial for newly discovered evidence. State v. Powell, 321 N.C. 364, 364 S.E.2d 332, cert. denied, 488 U.S. 830, 109 S. Ct. 83, 102 L. Ed. 2d 60 (1988).

Granting of New Trial Is in Discretion of Trial Court. — The granting of a new trial in a criminal case on the ground of newly discovered evidence rests in the sound discretion of the trial court. State v. Blalock, 13 N.C. App. 711, 187 S.E.2d 404 (1972); State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316, cert. denied, 285 N.C. 667, 207 S.E.2d 760 (1974); State v. Hammock, 25 N.C. App. 97, 212 S.E.2d 180, cert. denied, 287 N.C. 262, 214 S.E.2d 435; 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859, cert. denied, 297 N.C. 456, 256 S.E.2d 809 (1979); State v. Watkins, 45 N.C. App. 661, 263 S.E.2d 846, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Sprinkle, 46 N.C. App. 802, 266 S.E.2d 375, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985); State v. Hoots, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

The State has the right to immediately appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence. State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991).

And is not subject to review absent a showing of an abuse of discretion. State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316, cert. denied, 285 N.C. 667, 207 S.E.2d 760 (1974); State v. Hammock, 25 N.C. App. 97, 212 S.E.2d 180, cert. denied, 287 N.C. 262, 214 S.E.2d 435; 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859, cert. denied, 297 N.C. 456, 256 S.E.2d 809 (1979); State v. Watkins, 45 N.C. App. 661, 263 S.E.2d 846, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Sprinkle, 46 N.C. App. 802, 266 S.E.2d 375, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Hoots, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of an abuse of discretion. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Defendant had no right to appeal from a motion for appropriate relief brought pursuant to subdivision (b)(3) when the time for appeal had expired and no appeal was pending. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

Insufficient Materials to Justify Ruling Required Remand of Motion for Appropriate Relief. — Defendant's motion for summary disposition of his motion for appropriate relief was denied, and the motion for appropriate relief was remanded to the trial court, where the materials before the appellate court were insufficient to justify a ruling. State v. Thornton, 158 N.C. App. 645, 582 S.E.2d 308, 2003 N.C. App. LEXIS 1277 (2003).

Findings of Trial Judge Are Binding on Review. — On review of orders entered pursuant to this section and G.S. 15A-1420, the findings of fact of the trial judge are binding upon the petitioner if they were supported by evidence, even if the evidence is conflicting, and notwithstanding defendant's testimony at the hearing to the contrary. State v. Stevens, 305 N.C. 712, 291 S.E.2d 585 (1982).

Where a case had been appealed from the superior court to the Court of Appeals, the superior court had no authority to consider defendant's motion under this section for appropriate relief. Under G.S. 15A-1418, such motion should have been made in the appellate division. State v. Brock, 46 N.C. App. 120, 264 S.E.2d 390 (1980).

Once the defendant entered notice of appeal to Supreme Court, the superior court no longer had jurisdiction and could not consider the defendant's motion for appropriate relief based on alleged ineffective assistance of counsel. State v. Ginyard, 334 N.C. 155, 431 S.E.2d 11 (1993).

Where a judgment of the Supreme Court has been certified to the clerk of the superior court, the case is in the latter court for execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. State v. Casey, 201 N.C. 620, 161 S.E. 81 (1931).

Exhaustion of Remedies Provided by State. — Claims asserted in federal court under 28 U.S.C. § 2254 alleging that the state prisoner was denied the effective assistance of counsel, denied defense witnesses, not advised of the proper procedure for filing an appeal or the applicable time limitations and denied the right to appeal, were cognizable under this section and were required to be presented to a state court in order to meet federal exhaustion requirements. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Establishing Cause for Failing to Raise Claims on Appeal. — Claims asserted in federal court under 28 U.S.C. § 2254 alleging that the state prisoner was convicted on perjured evidence through the state's witnesses, was not given his right to allocution, and was not given a presentence hearing were cognizable under this section if the petitioner could establish good cause for failing to have raised them on appeal, and were required to be presented to a state court in order to meet federal exhaustion requirements. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Section Permits Review of Unappealed Error. — Not only are collateral attacks proper under this section but there now exists the possibility that an unappealed error can be reviewed by the state courts when good cause is shown. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Showing Required for New Trial Based on Newly Discovered Evidence. — In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Parson, 298 N.C. 765, 259 S.E.2d 867 (1979); State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859, cert. denied, 297 N.C. 456, 256 S.E.2d 809 (1979); State v. Sprinkle, 46 N.C. App. 802, 266 S.E.2d 375, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Clark, 65 N.C. App. 286, 308 S.E.2d 913 (1983), cert. denied, 310 N.C. 627, 315 S.E.2d 693 (1984); State v. Stanley, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985); State v. Hoots, 76 N.C. App. 616, 334 S.E.2d 74 (1985); State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987); State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

Evidentiary Hearing Not Necessary. — State's argument that the trial court erred by not conducting an evidentiary hearing before it ruled on defendant's motion for a new trial was not preserved for appeal, the record supported the trial court's finding that there was new evidence warranting a new trial for defendant who was convicted of murder, robbery with a dangerous weapon, and discharging a weapon into occupied property. State v. Stukes, 153 N.C. App. 770, 571 S.E.2d 241, 2002 N.C. App. LEXIS 1277 (2002).

New Evidence Must Not Merely Contradict or Discredit Testimony. — In order for a court to grant a motion for a new trial it must appear by affidavit that, among other things, the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Newly Discovered Evidence Not Credible. — Trial court properly denied defendant's motion for appropriate relief where newly discovered evidence was a confession, was found inconsistent with the facts, and was by an individual who later stated that he only made the statement as a result of threats by police officers to have his girlfriend evicted and have social services take away her child. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689, 1999 N.C. App. LEXIS 1295 (1999), cert. denied, 351 N.C. 477, 543 S.E.2d 500 (2000).

Trial court properly denied defendant's motion for appropriate relief where newly discovered evidence was a witness's recantation of his trial testimony and was probably false. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689, 1999 N.C. App. LEXIS 1295 (1999), cert. denied, 351 N.C. 477, 543 S.E.2d 500 (2000).

Merely Cumulative or Deliberately Withheld Evidence. — A motion for new trial for newly discovered evidence will not be granted even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving. State v. Lilliston, 141 N.C. 857, 54 S.E. 427 (1906).

Nondisclosed information is material only if there is a reasonable probability that, had evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in outcome. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Files belonging to the Attorney General's office were excluded from discovery to which the defendant was otherwise entitled under this section where the Attorney General did not prosecute or participate in the actual prosecution. State v. Sexton, 352 N.C. 336, 532 S.E.2d 179, 2000 N.C. LEXIS 529 (2000).

Newly Discovered Evidence Did Not Warrant New Trial. — While affidavit of witness changed her account of defendant's involvement in a finance office robbery, it merely served to impeach and contradict earlier testimony by two other victims and was not of "such a nature that a different result will probably be reached at a new trial," given the strength of the two eyewitness identifications. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689, 1999 N.C. App. LEXIS 1295 (1999), cert. denied, 351 N.C. 477, 543 S.E.2d 500 (2000).

Defendant failed to show that newly discovered evidence warranted a new trial where the evidence consisted of cellmate's testimony regarding an accomplice's plan to commit perjury, offered to contradict prior testimony; a detective's affidavit relating to the post-conviction investigation, found immaterial or irrelevant; and the affidavits of experts in eyewitness identification and forensic psychiatry, offered to discredit a former witness. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689, 1999 N.C. App. LEXIS 1295 (1999), cert. denied, 351 N.C. 477, 543 S.E.2d 500 (2000).

Showing Required for New Trial Based on Recanted Testimony. — The rule for granting a new trial for newly discovered evidence is not the same as the rule for granting a new trial for recanted testimony. A defendant may be allowed a new trial on the basis of recanted testimony if: (1) The court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

Failure of State to Comply with Discovery. — Where the defendant in a prosecution for arson had filed a request for voluntary discovery of the report of any laboratory test, the prosecutor had agreed to comply and had, in part, complied, but apparently through oversight the prosecutor failed to make a report available when it came into his possession, the defendant was not lacking in due diligence within the meaning of former subdivision (b)(6) of this section in failing to make a motion to compel discovery. There was nothing to put the defendant on notice that the prosecutor had failed or refused to comply with his request. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Defendant Entitled to Discovery. — Defendant whose motion for appropriate relief was denied on May 21, 1996, was nevertheless entitled to discovery under this section, since trial court resurrected the defendant's motion by allowing him until June 30, 1996, to respond to the State's motion for summary denial of defendant's motion to vacate. State v. Basden, 350 N.C. 579, 515 S.E.2d 220 (1999), cert. denied, 531 U.S. 982, 121 S. Ct. 435, 148 L. Ed. 2d (2000).

Discovery Motion Filed over Three Years after Initial Motion. — The defendant was entitled to postconviction discovery on his motion filed over three years after his initial filing of a motion for appropriate relief because his initial motion was still pending on June 21, 1996, the date that this section became effective. State v. Sexton, 352 N.C. 336, 532 S.E.2d 179, 2000 N.C. LEXIS 529 (2000).

Withholding of Work Product. — The statute contains no express provision for withholding work product. State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

Federal Collateral Review Not Foreclosed. — The state supreme court's grant of the defendant's petition for certiorari for the limited purpose of entering an order treating an appended motion for appropriate relief as a motion for relief filed with the supreme court, and then denying such motion, was a decision on the merits, and thus federal collateral review of the federal claims was not foreclosed. Skipper v. French, 130 F.3d 603 (4th Cir. 1997).

Collateral Attack on Guilty Plea. — An adjudication by a trial judge that a plea of guilty was voluntarily made did not bar a criminal defendant from collaterally attacking that plea in a post-conviction hearing. Edmondson v. State, 33 N.C. App. 746, 236 S.E.2d 397 (1977), overruled on other grounds, State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

Failure to Inquire into Reservations After Guilty Plea. — A trial court's failure to inquire into defendant's reservations after the trial court accepted his guilty pleas was subject to being contested on grounds found in either subdivision (b)(3) or (b)(8) of this section. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Where evidence was discovered after the suppression hearing but prior to sentencing, the evidence was not "unknown or unavailable to the defendant at the time of the trial" (i.e., the sentencing hearing); therefore, defendant failed to satisfy this ground for appropriate relief. State v. Smothers, 108 N.C. App. 315, 423 S.E.2d 824 (1992).

Defendant Held Not Entitled to New Trial. — A confession to a murder by a person who was drunk and depressed at the time of his confession and who later recanted the confession did not entitle defendant to a new trial; the person who confessed was confused and unknowledgeable as to the facts of the murder. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Defendant Held Entitled to New Trial. — Defendant was entitled to appropriate relief under G.S. 15A-1415(b)(3) because defendant's constitutional right to an impartial jury was violated as a magistrate served on defendant's jury while having personal knowledge of defendant's prior drug charges and after having direct pretrial involvement with the charges for which the magistrate participated in deciding defendant's guilt or innocence. State v. Neal, — N.C. App. —, 674 S.E.2d 713, 2009 N.C. App. LEXIS 373 (2009).

Applicability of Subsection (e). — This section did not supersede and effectively overrule State v. Taylor, 327 N.C. 147, 393 S.E.2d 801, and thereby set out a specific, concrete set of discovery rules applicable to materials privileged between defendant and his trial counsel.

Discovery under this subsection is not per se limited to merely "oral and written communications," and determining the extent of discovery—the inclusion of work product, for example—under this subsection is the job of the court, not the privilege of the trial counsel who is accused of ineffective assistance of counsel. State v. Buckner, 351 N.C. 401, 527 S.E.2d 307, 2000 N.C. LEXIS 234 (2000).

Applicability of Subsection (f). — Subsection (f) applies only to the post-conviction process and only to defendants who have been convicted of a capital crime and sentenced to death. State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

Subsection (f) provides for broader discovery for a capital defendant's counsel in the post-conviction review process than previously existed, specifically including the discovery of the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

Case law applying the work-product privilege to pretrial discovery and statutes governing pretrial discovery in criminal cases do not control the interpretation of subsection (f). State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

Subsection (f) requires the State to make available to counsel for a capital defendant in post-conviction proceedings the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant, subject only to the specific withholding mechanism contained within that statute and specific prohibitions against disclosure contained in other law. State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998).

Subsection (f) did not apply to a defendant who was convicted of a capital offense, sentenced to death, and had his post-conviction motion for appropriate relief denied prior to the effective date of subsection (f). State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999), aff'd, 350 N.C. 400, 514 S.E.2d 724 (1999).

Subsection (f) of this section, which became effective on June 21, 1996, and provides broader post-conviction discovery in capital cases, did not apply to defendant's case, which was filed before the effective date of the act, because the North Carolina Supreme Court held in State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999), that subsection (f) did not apply retroactively. Self v. Johnson, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21346 (E.D.N.C. Dec. 10, 1999).

Trial court properly denied defendant's G.S. 15A-1415(f) motions for discovery after a remand in his direct appeal for a Batson hearing. By its plain language, G.S. 15A-1415 applied only to proceedings surrounding a postconviction motion for appropriate relief. State v. Barden, 362 N.C. 277, 658 S.E.2d 654, 2008 N.C. LEXIS 336 (2008).

Time Requirements of Subsection (f). — To be entitled to postconviction discovery under subsection (f) of this section, a capital defendant, not otherwise eligible under State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999), must file a written motion for discovery within 120 days of the triggering occurrence under G.S. 15A-1415(a); because the purpose of the statute is to assist capital defendants in investigating, preparing, or presenting all potential claims in a single motion for appropriate relief (MAR), it logically follows that any requests for postconviction discovery must necessarily be made within the same time period statutorily prescribed for filing the underlying MAR. State v. Williams, 351 N.C. 465, 526 S.E.2d 655, 2000 N.C. LEXIS 242 (2000).

Failure to Preserve Issue for Review. — Defendant, who argued that the indictments against him alleged insufficient time periods for the offenses with which he was charged, did not assert that the indictments failed to allege an essential element of each offense and he failed to either move for a bill of particulars or for appropriate relief. The reviewing court found that the indictments provided a person of ordinary intelligence a reasonable opportunity to know what the alleged conduct was prohibited, and defendant failed to preserve the issue for review. State v. Anderson, 177 N.C. App. 54, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

Defendant failed to preserve defendant's Sixth Amendment claim of ineffective assistance of counsel as: (1) defendant never raised the claim in defendant's written motion for appropriate relief (MAR), even though defendant was permitted to raise the argument at any time after the verdict under G.S. 15A-1415; (2) by making a Sixth Amendment argument during the hearing, defense counsel essentially was attempting to amend the MAR to include the constitutional argument; (3) there was no evidence that after the post-conviction hearing, defendant moved to amend the MAR in writing under G.S. 15A-1420(a)(3) and G.S. 15A-951(c) either to conform it to evidence adduced at the hearing or to raise claims based on such evidence under G.S. 15A-1415(g); and (4) defendant's Sixth Amendment claim could not be considered a new MAR under G.S. 15A-1412. State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007).

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); State v. Honeycutt, 46 N.C. App. 588, 265 S.E.2d 438 (1980); State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Clark, 307 N.C. 120, 296 S.E.2d 296 (1982); State v. Bush, 307 N.C.

152, 297 S.E.2d 563 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Barrett, 307 N.C. 126, 302 S.E.2d 632 (1982); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); State v. Kinch, 314 N.C. 99, 331 S.E.2d 665 (1985); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Waters, 122 N.C. App. 504, 470 S.E.2d 545 (1996); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); Daniels v. Lee, 316 F.3d 477, 2003 U.S. App. LEXIS 333 (4th Cir. 2003); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005); Stephens v. Branker, 570 F.3d 198, 2009 U.S. App. LEXIS 14158 (4th Cir. 2009).

Cited in Smith v. Dixon, 14 F.3d 956 (4th Cir.); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Brock, 46 N.C. App. 120, 264 S.E.2d 390 (1980); State v. Saults, 299 N.C. 319, 261 S.E.2d 839 (1980); Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981); Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981); State v. Fennell, 51 N.C. App. 460, 276 S.E.2d 499 (1981); State v. Mack, 57 N.C. App. 163, 290 S.E.2d 741 (1982); State v. Butcher, 57 N.C. App. 698, 292 S.E.2d 149 (1982); State v. Hurst, 304 N.C. 709, 285 S.E.2d 808 (1982); State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983); State v. Garner, 67 N.C. App. 761, 313 S.E.2d 927 (1984); State v. Jefferson, 68 N.C. App. 725, 315 S.E.2d 744 (1984); State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986); State v. Martin, 318 N.C. 648, 350 S.E.2d 63 (1986); State v. Nickerson, 320 N.C. 603, 359 S.E.2d 760 (1987); State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876 (1988); State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681 (1989); State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993); Smith v. Dixon, 996 F.2d 667 (4th Cir. 1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994); State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994); State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995); State v. Ware, 125 N.C. App. 695, 482 S.E.2d 14 (1997); Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997); Keel v. French, 162 F.3d 263 (4th Cir. 1998); Boyd v. French, 147 F.3d 319 (4th Cir. 1998); State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998); Moseley v. French, 6 F. Supp. 2d 474 (M.D.N.C. 1998); State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999); State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); Fisher v. Lee, 215 F.3d 438, 2000 U.S. App. LEXIS 14167 (4th Cir. 2000); State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000); Bell v. Jarvis, 236 F.3d 149, 2000 U.S. App. LEXIS 33947 (4th Cir. 2000); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5; Allen v. Lee, 366 F.3d 319, 2004 U.S. App. LEXIS 8349 (4th Cir. 2004); State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005); State v. Chivers, 180 N.C. App. 275, 636 S.E.2d 590, 2006 N.C. App. LEXIS 2330 (2006); Golphin v. Branker, 519 F.3d 168, 2008 U.S. App. LEXIS 5033 (4th Cir. 2008); State v. Murrell, 362 N.C. 375, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008); Moseley v. Branker, 545 F.3d 265, 2008 U.S. App. LEXIS 22689 (4th Cir. 2008); State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

§ 15A-1416. Motion by the State for appropriate relief.

(a) After the verdict but not more than 10 days after entry of judgment, the State by motion may seek appropriate relief for any error which it may assert upon appeal.

(b) At any time after verdict the State may make a motion for appropriate relief for:

(1) The imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted.

(2) The initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment; and Article 84, Fines, with regard to the modification of sentences. The procedural provisions of those Articles are controlling. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

Subsection (a) gives the State the right to raise by motion for appropriate relief matters which it is entitled to assert upon appeal. Compare G.S. 15A-1445 relating to the State's right to appeal.

Subsection (b) reflects the fact that the motion for appropriate relief is available for any additional steps which are needed in a case. Thus the State is here authorized to utilize this procedure without limitation as to time, to seek imposition of sentence when prayer for judgment has been continued or when provision has been made in Article 81 for modification of sentences.

CASE NOTES

The imposition of an excessive sentence is not error from which the state may appeal within the meaning of subsection (a) of this section. State v. Ransom, 74 N.C. App. 716, 329 S.E.2d 673 (1985), aff'd, 80 N.C. App. 711, 343 S.E.2d 232 (1986).

State had no statutory right to make motion to set aside judgment on basis of newly discovered evidence. But, because the trial court could have set aside the judgment on its own authority, allowing the State's motion was harmless error. State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Letter from the Department of Correction, alerting the trial court of its erroneously consolidated sentence and resulting in a less-favorable resentencing, was not a motion for appropriate relief and, therefore, did not need to be filed within the statutory period of 10 days. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Applied in State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999).

Cited in State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000); State v. Lea, 156 N.C. App. 178, 576 S.E.2d 131, 2003 N.C. App. LEXIS 82 (2003).

§ 15A-1417. Relief available.

(a) The following relief is available when the court grants a motion for appropriate relief:

(1) New trial on all or any of the charges.
(2) Dismissal of all or any of the charges.
(3) The relief sought by the State pursuant to G.S. 15A-1416.
(3a) For claims of factual innocence, referral to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes.
(4) Any other appropriate relief.

(b) When relief is granted in the trial court and the offense is divided into degrees or necessarily includes lesser offenses, and the court is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense necessarily included in the one charged, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.

(c) If resentencing is required, the trial division may enter an appropriate sentence. If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence. (1977, c. 711, s. 1; 2006-184, s. 3.)

OFFICIAL COMMENTARY

As the general commentary at the beginning of this Article indicates, the emphasis is to be placed upon identifying the error sought to be corrected and the relief which is appropriate. Thus it will no longer be necessary to make a "motion for a new trial" in order to assert one ground for relief and to make a "motion in arrest of judgment" to assert another ground for relief. Using the name of a type of relief as the name of the motion, which in turn identifies the errors which may be asserted, imposes unnecessary complications and limitations. Here one motion, stating what is wrong and asking for the relief desired, will suffice.

The provisions in subsection (b) contemplate that there may be circumstances in which the trial court is of the opinion that the evidence was not sufficient to support the verdict, but would sustain a lower degree or a lesser included offense. The court could, of course, simply grant a new trial in accordance with G.S. 15A-1414(b)(2) and G.S. 15A-1417(a)(1), but it is possible that the necessity of a new trial may be avoided if a finding of the lesser degree or offense can be made on the facts already passed upon by the jury. The defendant, of course, would be prejudiced if the finding, submitted to the jury on the basis of the greater offense, were made sufficient in and of itself. Thus consent of the defendant is required, by a plea of guilty to the lesser included offense. Since it is so treated the consent of the State is required. Subsection (c) grants the authority to appropriately modify the sentence when "appropriate relief" requires it.

Effect of Amendments. — Session Laws 2006-184, s. 3, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added subdivision (a)(3a).

Legal Periodicals. — For article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Construction With Other Laws. — G.S. 15A-1417, which was enacted in 1977 and allows a trial court to fashion any other appropriate relief, must be read in pari materia with the more recently enacted G.S. 15A-2005 and G.S. 15A-2006; therefore, because the one-year window for post-conviction determinations of mental retardation under G.S. 15A-2006 has expired, and because G.S. 15A-2005 allows only for pretrial and sentencing determinations of mental retardation, superior courts are without jurisdiction to adjudicate criminal defendants mentally retarded via a motion for appropriate relief proceeding. State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761, 2005 N.C. LEXIS 204 (2005).

Authority of Court. — Upon a determination that the original sentence in a Driving With Revoked License case was not supported by the evidence, the district court judge clearly had the authority to vacate the sentence pursuant to G.S. 15A-1414(b)(4) and to resentence the defendant pursuant to subsection (c) of this section. State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

Since the superior court was authorized by G.S. 15A-1417 to enter an appropriate sentence upon granting defendant's motion for appropriate relief, and since G.S. 148-4 provided that any sentencing order bound defendant to commitment with the North Carolina Department of Corrections under the terms of that appropriate sentence, the superior court's authority to order the Department to change its records to reflect entry of the appropriate sentence was unaffected by defendant's decision to file a motion for appropriate relief rather than a civil suit naming the Department as a party defendant; the Department could not refuse the superior court's order to change defendant's records to reflect concurrent instead of consecutive sentences simply because the sentencing order was entered following defendant's motion for appropriate relief. State v. Ellis, 167 N.C. App. 276, 605 S.E.2d 168, 2004 N.C. App. LEXIS 2161 (2004), rev'd 361 N.C. 200, 639 S.E.2d 425 (2007) (remanded to allow defendant to withdraw his guilty plea).

No Authority to Grant Appropriate Relief Benefitting State. — The court, upon motion by the State, exceeded its authority in striking a guilty plea and setting the case for trial. The court did not have the authority to grant "appropriate relief," pursuant to G.S. 15A-1420(d), which benefitted the State. State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Resentencing Where No Error of Law Appears. — A trial court upon a motion for appropriate relief does not have authority to resentence a criminal defendant for discretionary reasons after the expiration of the session of court in which he was originally sentenced where no error of law appears upon the face of the judgment. State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340, appeal dismissed, 300 N.C. 376, 267 S.E.2d 687, cert. denied, 449 U.S. 883, 101 S. Ct. 235, 66 L. Ed. 2d 107 (1980).

Resentencing Inappropriate Outside Presence of Defendant. — After granting defendant's motion for appropriate relief, which correctly alleged that a prior trial judge had improperly corrected his sentence outside of defendant's presence when it was discovered that the original sentence violated the Structured Sentencing Act, the trial judge properly resentenced defendant to the same amount of time. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Resentencing Where Prior Sentence Invalid. — Where defendant was resentenced after trial court discovered that its prior consolidated sentence was illegal, the court retained jurisdiction, even though the term of court had expired, and the judgment was valid under this section. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Applied in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Clark, 307 N.C. 120, 296 S.E.2d 296 (1982); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

§ 15A-1418. Motion for appropriate relief in the appellate division.

(a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.

(b) When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

(c) The order of remand must provide that the time periods for perfecting or proceeding with the appeal are tolled, and direct that the order of the trial division with regard to the motion be transmitted to the appellate division so that it may proceed with the appeal or enter an appropriate order terminating it. (1977, c. 711, s. 1; 2006-184, s. 5.)

OFFICIAL COMMENTARY

G.S. 15A-1415 contemplates that a number of items may be the subject of a motion for appropriate relief after the 10-day period following entry of judgment has elapsed. Examples would include rights arising by reason of later constitutional decisions in the Courts or the discovery of new evidence which meets the requirements of G.S. 15A-1415(b)(6). Since "legal" grounds for relief can as well be decided by the appellate court as the trial court, it is appropriate to authorize the making of the motion in the appellate division. (This is contrary to prior practice. See State v. Nance, 253 N.C. 424, 117 S.E.2d 3 (1960).) It is possible that some factual matters could be decided as well in the appellate division, but frequently they would require that the trial court hold an additional evidentiary hearing. Thus the appellate division is also given authority to remand the case to the trial division for a hearing. It is possible that the hearing could determine the disposition of the case and eliminate the necessity for going forward with the review.

It should be noted that in G.S. 15A-1446 a number of items which formerly could be raised in the appellate court by "motion" now are simply listed as matters which can be raised on appeal even though they have not been brought to the attention of the trial court. For example, the insufficiency of the pleading presently may be raised in the appellate division by motion in arrest of judgment, without having been brought to the attention of the trial court. This revision would permit it to be asserted upon appeal, thus eliminating one procedural step. The existence of that authority to assert matters on appeal will mean that this section will be used primarily in asserting matters which have developed since the trial, rather than as a device for raising in the appellate court matters which were not brought to the attention of the trial judge.

Effect of Amendments. — Session Laws 2006-184, s. 5, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, in the first sentence of subsection (b), deleted "or" preceding "whether it" and added "or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina

Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes" at the end.

CASE NOTES

Remand Required. — Where the materials before the appellate court were insufficient to justify a ruling, the motion for appropriate relief had to be remanded to the trial court for the taking of evidence and a determination of the motion. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Defendant's motion for summary disposition of his motion for appropriate relief was denied, and the motion for appropriate relief was remanded to the trial court, where the materials before the appellate court were insufficient to justify a ruling. State v. Thornton, 158 N.C. App. 645, 582 S.E.2d 308, 2003 N.C. App. LEXIS 1277 (2003).

Defendant's motion for appropriate relief was remanded to the trial court for an evidentiary hearing as the appellate court could not determine the veracity of a mother's testimony, nor could it discern whether there was a reasonable possibility that a different result would have been reached at trial had the mother's testimony been different or non-existent. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Motion Dismissed. — Motion for appropriate relief based on failure to register as a convicted sex offender was dismissed because the evidence was insufficient to enable the court to render a decision. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Defendant's amended motion for appropriate relief did not amend the original motion for appropriate relief and alleged new grounds for relief based on ineffective assistance of counsel; the amended motion was untimely and was dismissed, without prejudice to defendant to file a new motion for appropriate relief in the trial court. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Jurisdiction. — Superior court lacked jurisdiction to hear defendant's motion for appropriate relief, under G.S. 15A-1418, which motion was filed during defendant's appeal of his capital murder conviction and death sentence, because the procedures established in G.S. 15A-2005 were the only avenues by which defendant could have been adjudicated mentally retarded by the superior court. State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761, 2005 N.C. LEXIS 204 (2005).

Appellate court had no jurisdiction because defendant had no appeal as of right, and had not petitioned for a writ of certiorari; therefore, his motion for appropriate relief filed with the appellate court was dismissed. State v. Waters, 122 N.C. App. 504, 470 S.E.2d 545 (1996).

Failure to Submit Aggravating Circumstance to Jury. — Motion for appropriate relief based on the alleged erroneous aggravation of defendant's sentence was granted where the trial court unilaterally found an aggravating circumstance without submitting that issue to the jury. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Appellate Court Proper Venue. — Summary denial of defendant's motion for appropriate relief (MAR) was vacated as a timely-filed appeal was pending when the MAR was filed, so the trial court lacked jurisdiction to rule on the MAR; the proper venue for filing the MAR would have been in the appellate court. State v. Williams, 177 N.C. App. 725, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

Issues Preserved for Review. — Because defendant filed defendant's brief after filing the Motion for Appropriate Relief and incorporated by reference in the brief each of the three stated grounds for relief set forth in the Motion, and because defendant was evidently acting upon a good faith misunderstanding of the law, defendant, under those particular circumstances, did adequately raise on appeal each of the grounds underlying the motion in the brief. State v. Murrell, 362 N.C. 375, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

By not challenging for cause a magistrate as a juror during the jury selection process and by failing to object to the magistrate serving as a juror at any point during the trial, defendant failed to preserve an argument that the magistrate's participation violated defendant's constitutional rights. However, defendant filed a motion for appropriate relief with the appellate court, which was accompanied by affidavits and copies of defendant's previous warrants signed by the magistrate, so that the appellate court found that it could determine defendant's motion for appropriate relief based on the materials before the court. State v. Neal, — N.C. App. —, 674 S.E.2d 713, 2009 N.C. App. LEXIS 373 (2009).

Applied in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1979); State v. Burney, 301 N.C. 223, 277 S.E.2d 690 (1980); State v. Jeffers, 48

N.C. App. 663, 269 S.E.2d 731 (1980); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Wood, 306 N.C. 510, 294 S.E.2d 310 (1982); State v. Clark, 307 N.C. 120, 296 S.E.2d 296 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983); State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876 (1988); State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993); State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689, 1999 N.C. App. LEXIS 1295 (1999); State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

Cited in Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978); State v. Hurst, 304 N.C. 709, 285 S.E.2d 808 (1982); State v. Johnson, 309 N.C. 459, 306 S.E.2d 770 (1983); State v. Jones, 317 N.C. 487, 346 S.E.2d 657 (1986); State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990); State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997); State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003); State v. Howell, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005); State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007); State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

§ 15A-1419. When motion for appropriate relief denied.

(a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

(b) The court shall deny the motion under any of the circumstances specified in this section, unless the defendant can demonstrate:

(1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or

(2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice.

(c) For the purposes of subsection (b) of this section, good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:

(1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;

(2) The result of the recognition of a new federal or State right which is retroactively applicable; or

(3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause, nor may a claim of ineffective assistance of prior postconviction counsel constitute good cause.

(d) For the purposes of subsection (b) of this section, actual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error.

(e) For the purposes of subsection (b) of this section, a fundamental miscarriage of justice only results if:

(1) The defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or

(2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by the provisions of subsection (a) of this section or G.S. 15A-1415(c), may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty. (1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, s. 2.)

OFFICIAL COMMENTARY

As indicated in the commentary to G.S. 15A-1415, one of the interests in the balance in determining what motions may be made long after the trial is the interest in finality of criminal judgments. The balancing by the Commission included liberality in permitting matters to be raised at times subsequent to the trial, restricted by provisions that once a matter has been litigated or there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. Thus this section provides, in short, that if a matter has been determined on the merits upon an appeal, or upon a post-trial motion or proceeding, there is no right to litigate the matter again in an additional motion for appropriate relief. Similarly, if there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.

There are two exceptions to the rule with regard to the opportunity to present a matter on a previous motion for appropriate relief. The first is the rather obvious one of deprivation of the right to counsel. The other exception relates to a motion made within 10 days after the entry of judgment. The latter exception permits counsel who has moved in open court for a new trial or other relief to come back within 10 days and make additional motions for appropriate relief in the trial court, without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion.

Subsection (b) contains the customary provision for the court, in its direction, to grant relief even though the right to relief is barred under the provisions of subsection (a).

Sections similar in import to these are found in New York Criminal Procedure Law in §§ 440.10 and 440.20.

CASE NOTES

Retroactive Application of 1996 Amendment. — The retroactive application of the 1996 version of this section, making the procedural bars mandatory rather than discretionary, did not violate the ex post facto clause since such amendment did not alter the definition of the crime of first degree murder, of which the defendant was convicted, and did not change his available defenses to the crime of murder or otherwise increase the punishment for which he is eligible as a result of that conviction. Rose v. Lee, 252 F.3d 676, 2001 U.S. App. LEXIS 10698 (4th Cir. 2001), cert. denied, 534 U.S. 941, 122 S. Ct. 318, 151 L. Ed. 2d 237 (2001).

Rule of Lenity. — For purposes of applying the rule of lenity, G.S. 15A-1419 was not ambiguous, and even if it were, any ambiguity did not potentially increase or even relate to penalties. State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007).

Extent of Federal Review. — The federal court will not review claims that defendant could have, but did not, raise on direct appeal. Green v. French, 978 F. Supp. 242 (E.D.N.C. 1997), aff'd, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525 U.S. 1090, 119 S. Ct. 844, 142 L. Ed. 2d 698 (1999).

A federal court is not precluded from reviewing federal claims on the basis that the state supreme court has already ruled on the substantive merits; such a reading of subdivision (a)(2) would effectively eviscerate federal habeas review of state cases. Green v. French, 978 F. Supp. 242 (E.D.N.C. 1997), aff'd, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525 U.S. 1090, 119 S. Ct. 844, 142 L. Ed. 2d 698 (1999).

Construction with Other Law. — The court properly rejected the defendant's challenge to the jury instruction on the basis of the adequate and independent state procedural rule set forth in this section and not because it was statutorily obliged to do so by G.S. 15A-2000(d)(2). Fisher v. Lee, 215 F.3d 438, 2000 U.S. App. LEXIS 14167 (4th Cir. 2000), cert. denied, 531 U.S. 1095, 121 S. Ct. 822, 148 L. Ed. 2d 706 (2001).

Subdivision (a)(2) is an appropriate legal standard on which to base a procedural default. Ward v. French, 989 F. Supp. 752 (E.D.N.C. 1997), aff'd, 165 F.3d 22 (4th Cir. 1998), cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 809 (1999).

The Fourth Circuit has held that this section is a valid procedural bar, thus legitimizing its application as an independent and adequate state law ground for denying federal habeas relief. Ward v. French, 989 F. Supp. 752 (E.D.N.C. 1997), aff'd, 165 F.3d 22 (4th Cir. 1998), cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 809 (1999).

Denial of Relief Where Claim Not Raised on Previous Appeal. — Where petitioner on previous appeal did not raise claim of mistaken identification, this section authorizes the denial of relief in a subsequent appeal barring not only state collateral review, but federal review as well. Quinerly v. Cherry, 527 F. Supp. 1059 (E.D.N.C. 1981), appeal dismissed, 681 F.2d 815 (4th Cir. 1982); Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, 513 U.S. 1105, 115 S. Ct. 785, 130 L. Ed. 2d 678 (1995).

The defendant's motion for appropriate relief (MAR) challenging the State's use of the short form indictment on constitutional grounds was denied because the defendant was in a position on a previous appeal to raise the issues in the MAR but failed to do so. State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000), cert. denied, 352 N.C. 596, 545 S.E.2d 218 (2000).

To avoid procedural default under G.S. 15A-1419(a)(3), defendants must raise those ineffective assistance of counsel claims on direct review that are apparent from the record. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Ineffective Assistance of Counsel. — Defendant's conviction of robbery with a firearm, G.S. 14-87, and possession of a handgun by a felon, G.S. 14-415.1, was affirmed; defendant did not receive ineffective assistance of counsel pursuant to the test in G.S. 15A-1443(a), as counsel did not err in failing to object to the identification of defendant or to the introduction of a videotape of the robbery, based on a legitimate trial strategy, and pursuant to G.S. 15A-1419(a)(3), the trial court could determine two of defendant's claims of ineffective assistance based on the record. State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354, 2003 N.C. App. LEXIS 1495 (2003).

Federal Habeas Corpus Petition Not a Substitute for State Review Provisions. — Subsection (b) of this section was not intended to provide a state procedure for review of claims involving retroactive applications of law which were not raised on appeal and, it is not the province of federal court on a petition for habeas corpus to reinterpret the state procedural statute; accordingly, petitioner who failed to raise burden of proof issue on motion for appropriate relief in state court could not assert such claim on petition for habeas corpus. Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981), appeal dismissed, 679 F.2d 892 (4th Cir. 1982).

Inmate's petition for habeas corpus was denied on the basis of the existence of an adequate and independent state law ground of decision in the form of his procedural default through the filing of multiple successive petitions as stated by Superior Court order. Ashe v. Styles, 39 F.3d 80 (4th Cir. 1994), cert. denied, 516 U.S. 1162, 116 S. Ct. 1051, 134 L. Ed. 2d 196 (1996).

Under G.S. 15A-1419(a)(3), defendant, who was convicted of first-degree murder, burglary, kidnapping, conspiracy to commit kidnapping, and conspiracy to commit murder, and who was sentenced to death for the first-degree murder conviction, procedurally defaulted his claim of ineffective assistance, which was based on his counsel's concession of guilt to kidnapping and rape without his consent; defendant was in a position to bring this claim on direct appeal because the trial record contained all the relevant facts regarding this matter, but defendant failed to do so, and G.S. 15A-1419(a)(2) provided an adequate and independent state law ground for the decision and required the state courts to determine if this claim could have been brought on direct review. Lawrence v.

Branker, 517 F.3d 700, 2008 U.S. App. LEXIS 3761 (4th Cir. 2008).

Ineffective assistance of counsel claims, coupled with an alleged failure to adequately inform petitioner of his appeal right, may show "good cause" within the meaning of subsection (b) of this section. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

In a prosecution for murder and related crimes, defendant raised the issue of ineffective assistance of counsel, even though he acknowledged he could not, on direct appeal, prove this claim from a cold record, because he had to raise the claim on direct appeal, under G.S.15A-1419(a)(3), to preserve it for collateral review. State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319, 2005 N.C. App. LEXIS 1776 (2005).

Ineffective assistance claims are not categorically different from other kinds of claims that can be barred under this section; the North Carolina courts are required to examine each claim to determine whether the particular claim at issue could have been brought on direct review. McCarver v. Lee, 221 F.3d 583, 2000 U.S. App. LEXIS 12222 (4th Cir. 2000), cert. denied, 531 U.S. 1089, 121 S. Ct. 809, 148 L. Ed. 2d 694 (2001).

Denial Under Subsection (a) Mandatory. — Although subsection (a) is phrased in permissive language, a review of the statute as a whole makes plain that it is a mandatory provision. Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, 513 U.S. 1105, 115 S. Ct. 785, 130 L. Ed. 2d 678 (1995).

Applicability of State Procedural Bar to Federal Habeas Review. — In order for a state procedural ground, such as in subsection (a), to provide an adequate basis for decision on a petitioner's motion for appropriate relief, thereby foreclosing federal habeas review of an issue, the state procedural bar must be applied "consistently or regularly." Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, 513 U.S. 1105, 115 S. Ct. 785, 130 L. Ed. 2d 678 (1995).

District court's holding that petitioner's claim regarding an instruction on jury unanimity for mitigating circumstances was procedurally barred was reversed because state courts did not consistently apply the bar to claims raised by defendants. Brown v. Lee, 319 F.3d 162, 2003 U.S. App. LEXIS 2740 (4th Cir. 2003).

Where petitioner was not allowed upon remand to assert additional claims in a state court post-conviction proceeding because the state court found the claims to be procedurally barred, the federal district court, in a proceeding under 28 U.S.C.S. § 2254, reviewed the proposed additional claims on the merits and determined that they did not set forth any grounds for relief. Kandies v. Lee, 252 F. Supp. 2d 252, 2003 U.S. Dist. LEXIS 4536 (M.D.N.C. 2003), aff'd sub nom. Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004).

Denial of habeas relief was affirmed where, inter alia, an inmate's claim of ineffective assistance of counsel due to the presentation of expert mental health evidence was procedurally defaulted. Perkins v. Lee, — F.3d —, 2003 U.S. App. LEXIS 14840 (4th Cir. July 25, 2003), cert. denied, 541 U.S. 940, 124 S. Ct. 1660, 158 L. Ed. 2d 363 (2004).

Subdivision (a)(3) of G.S. 15A-1419 is an independent and adequate basis for procedural default of a claim of ineffective assistance of counsel. Cole v. Branker, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 69904 (E.D.N.C. Sept. 20, 2007).

Superior court decision appeared to rest primarily on, or be interwoven with, the resolution of the petitioner's federal claims and did not clearly and expressly rely on independent and adequate state grounds, and thus petitioner's first amendment claim was not procedurally defaulted. Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997).

Claims Lacked Merit and Relief Denied. — Arguments in defendant's motion for appropriate relief failed because they lacked merit; among other things, an allegedly perjured statement made by a witness for the State was in fact true and a jury instruction on accomplice testimony was not required. State v. Murrell, 362 N.C. 375, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

Applied in State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391 (1980); Richardson v. Turner, 716 F.2d 1059 (4th Cir. 1983); McDougall v. Rice, 685 F. Supp. 532 (W.D.N.C. 1988); State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689, 1999 N.C. App. LEXIS 1295 (1999); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004); State v. McNeill, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006); Blackwell v. Cavanaugh, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 28349 (W.D.N.C. Nov. 9, 2005); Stephens v. Branker, 570 F.3d 198, 2009 U.S. App. LEXIS 14158 (4th Cir. 2009).

Cited in Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978); Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979); Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980); Creech v. Sparkman, 523 F. Supp. 1157 (E.D.N.C. 1981); Williams v. Gupton, 627 F. Supp. 669 (W.D.N.C. 1986); Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990); State v. Smothers, 108 N.C. App. 315, 423 S.E.2d 824 (1992); Keel v. French, 162 F.3d 263 (4th Cir. 1998); Sexton v. French, 163 F.3d 874

(4th Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998); Williams v. French, 146 F.3d 203 (4th Cir. 1998); Self v. Johnson, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21346 (E.D.N.C. Dec. 10, 1999); State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999); Bacon v. Lee, 225 F.3d 470, 2000 U.S. App. LEXIS 22231 (4th Cir. 2000); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000); Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); Basden v. Lee, 290 F.3d 602, 2002 U.S. App. LEXIS 8634 (4th Cir. 2002); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); Carpenter v. Harkleroad, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38067 (W.D.N.C. Dec. 19, 2005); Worthey v. York, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37263 (W.D.N.C. Sept. 13, 2005).

§ 15A-1420. Motion for appropriate relief; procedure.

(a) Form, Service, Filing.

(1) A motion for appropriate relief must:

a. Be made in writing unless it is made:

1. In open court;
2. Before the judge who presided at trial;
3. Before the end of the session if made in superior court; and
4. Within 10 days after entry of judgment;

b. State the grounds for the motion;

c. Set forth the relief sought;

c1. If the motion for appropriate relief is being made in superior court and is being made by an attorney, the attorney must certify in writing that there is a sound legal basis for the motion and that it is being made in good faith; and that the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion; and further, that the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought in the motion does not require that the trial transcript be read in its entirety. In the event that the trial transcript is unavailable, instead of certifying that the attorney has read the trial transcript, the attorney shall set forth in writing what efforts were undertaken to locate the transcript; and

d. Be timely filed.

(2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When the written motion is made more than 10 days after entry of judgment, service of the motion and a notice of hearing must be made not less than five working days prior to the date of the hearing. When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.

(3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).

(4) An oral or written motion for appropriate relief may not be granted in district court without the signature of the district attorney, indicating that the State has had an opportunity to consent or object to the motion. However, the court may grant a motion for appropriate relief without the district attorney's signature 10 business days after the district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c).

(5) An oral or written motion for appropriate relief made in superior court and made by an attorney may not be granted by the court unless the attorney has complied with the requirements of sub-subdivision c1. of subdivision (1) of this subsection.

(b) Supporting Affidavits.

(1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

(2) The opposing party may file affidavits or other documentary evidence.

(b1) Filing Motion With Clerk; Review of Motion by Judge.

(1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.

(2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket. The clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district. In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer. In capital cases, the judge shall review the motion and enter an order directing the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for hearing without unnecessary delay.

(c) Hearings, Showing of Prejudice; Findings.

(1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.

(2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.

(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.

(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.

(5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

(6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.

(7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of

the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

(d) Action on Court's Own Motion. — At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion. The court must cause appropriate notice to be given to the parties. (1965, c. 352, s. 1; 1973, c. 47, s. 2; 1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, ss. 3, 4; 2006-253, s. 30; 2009-517, s. 1.)

OFFICIAL COMMENTARY

This Article provides for motions for appropriate relief which may be made on two essentially different occasions. There are the immediate motions made while the case is still fresh and the trial judge is still available, and the later motion which may require a substantially greater use of supporting documents or other evidence. This procedural section provides for the formalities of making the oral motion and the written motion, notice, and hearing. It should be noted that the subsections provide for two types of hearings. One is the hearing based upon affidavits, transcripts, or the like, plus matters within the judge's knowledge, to comply with the parties' entitlement to a hearing on questions of law and fact. The other is an evidentiary hearing. G.S. 15A-1420(c)(3) provides that if the only question is a question of law then the matter is to be disposed of without an evidentiary hearing. On the other hand, subdivision (4) makes it clear that if it is necessary to take evidence the court must hold an evidentiary hearing at which the defendant has the right to be present and to be represented by counsel, and the judge must make findings of fact. Obviously, it is unlikely that such an evidentiary hearing would be necessary on the immediate post-trial motion, made within 10 days as provided by G.S. 15A-1414, and that is reflected in subdivision (c)(2).

Pursuant to subsections (c)(5) and (6) the moving party has the burden of proof, by a preponderance of evidence, with regard to facts essential to support the motion. The defendant must show the existence of the ground and prejudice must appear. The definition of prejudice is cross-referenced to G.S. 15A-1443, in the Appeal Article, where the State rule on prejudice and the federal constitutional error rule are set out.

The provisions of subsection (c)(7) require that when the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make conclusions of law and a statement of reason for its determination. These requirements are imposed in order that properly made determinations in the State court will not fail in the federal courts because of the lack of a record indicating that there has been a full and fair hearing on the merits on these grounds. See Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 and Title 28, U.S. Code, § 2254. Compare also New York Criminal Procedure Law, § 440.30.

Effect of Amendments. — Session Laws 2009-517, s. 1, effective December 1, 2009, and applicable to all motions for appropriate relief made on or after that date, added subdivisions (a)(1)c1. and (a)(5); and made related stylistic changes.

CASE NOTES

Minutes Should Be Corrected and Judgments Vacated in County Where They Are Kept. — In the county of conviction are to be found the records of the trial which the prisoner attacks, as well as the court officials and other persons likely to have any knowledge of the truth or falsity of the prisoner's allegations that he suffered a substantial denial of his constitutional rights. If entries in the minutes are to be corrected or judgments vacated, manifestly this should be done in the county where they are required to be kept. State v. Merritt, 264 N.C. 716, 142 S.E.2d 687 (1965).

No Authority to Grant Appropriate Relief Benefitting State. — The court, upon motion by the State, exceeded its authority in striking a guilty plea and setting the case for trial. The court did not have the authority to grant "appropriate relief," pursuant to subsection (d), which benefitted the State. State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

No Grounds for Federal Habeas Relief. — Petitioner had not stated grounds for federal habeas corpus relief under 28 U.S.C.S. § 2254 when petitioner alleged that counsel was ineffective during the state collateral proceeding under G.S. 15A-1420, when the state court determined after remand that a hearing was not warranted, and when the state court did not allow petitioner upon remand to amend the motion to assert additional claims. Kandies v. Lee, 252 F. Supp. 2d 252, 2003 U.S. Dist. LEXIS 4536 (M.D.N.C. 2003), aff'd sub nom. Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004).

Inmate argued that he requested an evidentiary hearing in connection with each of his two motions for appropriate relief (MAR), and that on each occasion his request was denied; the judge determined that even if the inmates factual disputes were considered, he still was not able to raise meritorious issues, and therefore no hearing was required. Call v. Polk, 454 F. Supp. 2d 475, 2006 U.S. Dist. LEXIS 68738 (W.D.N.C. 2006).

In an evidentiary hearing for appropriate relief, where the judge sits without a jury, the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion. The court must make findings of fact in support of its ruling. State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

In hearings before a judge sitting without a jury adherence to the rudimentary rules of evidence is desirable even in preliminary voir dire hearings. Such adherence invites confidence in the trial judge's findings. State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983).

Evidentiary Hearing Needed. — The court erred in summarily entering its order denying defendant's motion for appropriate relief, without conducting an evidentiary hearing to address the issues of fact surrounding both counsel's alleged conflict of interest and the validity of the plea agreement. State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (1997).

An evidentiary hearing was required to determine if the state had sent to the trial court a proposed order denying defendant's original motion for appropriate relief without providing defendant or his counsel with a copy. State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (1998).

Because former G.S. 14-2 treated defendant's life sentence as an 80-year sentence for all purposes, the trial court erred in denying defendant's G.S. 15A-1420 motion for appropriate relief; accordingly, the matter was remanded for a hearing to determine how many sentence reduction credits defendant was eligible to receive and how those credits were to be applied. State v. Bowden, — N.C. App. —, 668 S.E.2d 107, 2008 N.C. App. LEXIS 2005 (2008).

Trial Judge's Findings of Fact Are Binding on Review. — On review of orders entered pursuant to G.S. 15A-1415 and this section, the findings of fact of the trial judge are binding upon the petitioner if they were supported by evidence, even if the evidence is conflicting, and notwithstanding defendant's testimony at the hearing to the contrary. State v. Stevens, 305 N.C. 712, 291 S.E.2d 585 (1982).

The findings made by the trial court are binding if they are supported by any competent evidence, and the trial court's ruling on facts so supported may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law. State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

Remand for New Trial on Court's Motion. — Regardless of whether the defendant, twice charged with Driving While Impaired (DWI) and once with Driving While License Revoked, moved for appropriate relief or the district court judge granted such relief on his own motion, a trial court may set aside properly a guilty verdict, but it was improper for the trial court to thereafter enter a verdict of not guilty; the case should have been remanded for a new trial on the second DWI charge. State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

Amendments by Motion of Court. — Where judgments were facially invalid because both listed habitual felon as a substantive offense, as habitual felon status standing alone will not support a criminal sentence, the trial court had jurisdiction under subsection (d) to amend both judgments on its own motion. Accordingly, the trial court did not err in amending the judgment in the cases consolidated. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

Motion Asserting Constitutional Violations. — The mere fact that some of the grounds set forth by defendant in his motion for relief were based upon asserted violations of his rights under the United States Constitution did not automatically entitle him to a hearing or to present evidence. State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (1998).

There was insufficient evidence to show the asserted ground for relief as defendant maintained in his motion for appropriate relief under G.S. 15A-1420. That two jurors had prayed together outside the jury room in his death penalty case was not shown to have been misconduct defendant did not present documentary evidence, as G.S. 15A-1420(b) required, that those jurors had discussed the case while they prayed, and their prayers did not constitute "deliberation" outside of the jury room, such that would have violated defendant's right to have a jury of 12 jurors under N.C. Const. art. I, § 24. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Defendant failed to preserve defendant's Sixth Amendment claim of ineffective assistance of counsel as: (1) defendant never raised the claim in defendant's written motion for appropriate relief (MAR), even though defendant was permitted to raise the argument at any time after the verdict under G.S. 15A-1415; (2) by making a Sixth Amendment argument during the hearing, defense counsel essentially was attempting to amend the MAR to include the constitutional argument; (3) there was no evidence that after the post-conviction hearing, defendant moved to amend the MAR in writing under G.S. 15A-1420(a)(3) and G.S. 15A-951(c) either to conform it to evidence adduced at the hearing or to raise claims based on such evidence under G.S. 15A-1415(g); and (4) defendant's Sixth Amendment claim could not be considered a new MAR under G.S. 15A-1412. State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007).

The defendant's motion under this section was properly denied where the evidence showed that the twelve-year-old daughter of his girlfriend had recanted after being repeatedly questioned by family and friends because she was embarrassed and did not want to have to testify on the sexual matters again. State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000), cert. denied, 352 N.C. 678, 545 S.E.2d 434 (2000), cert. denied, 531 U.S. 1177, 121 S. Ct. 1153, 148 L. Ed. 2d 1015 (2001).

Defendant's Motion Under This Section Was Properly Denied. — After his murder conviction, defendant had no right to appropriate relief under G.S. 15A-1414 and G.S. 15A-1420, despite his claim that the trial judge committed reversible error by restoring peremptory challenges to both the State and to defendant after dismissing an entire group of prospective jurors for misconduct. Defendant filed a motion to strike the entire venire when it was learned that they had been discussing among themselves how they could become disqualified to serve, and pursuant to G.S. 15A-1443(c), a defendant was not prejudiced by the granting of relief that he sought or by error that resulted from his own conduct. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Evidentiary Hearing Not Needed. — Defendant was not entitled to a hearing on a motion for appropriate relief where the motion failed to show that he was denied the effective assistance of counsel, or that newly discovered evidence would change the result of the trial. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Denial of habeas relief was affirmed where, inter alia, an inmate's claim of ineffective assistance of counsel due to the presentation of expert mental health evidence was procedurally defaulted; the inmate failed to establish that he was entitled to an evidentiary hearing where the state trial court's finding of no juror misconduct was supported by the evidence. Perkins v. Lee, — F.3d —, 2003 U.S. App. LEXIS 14840 (4th Cir. July 25, 2003), cert. denied, 541 U.S. 940, 124 S. Ct. 1660, 158 L. Ed. 2d 363 (2004).

Appellate Court Granted Relief On Its Own Motion. — Where a larceny defendant's petition for writ of certiorari was properly before the court, the court chose on its own motion to consider defendant's assignment of error relating to his conviction by guilty plea on charges of breaking and entering, larceny, and possession of stolen goods. State v. Carter, 167 N.C. App. 582, 605 S.E.2d 676, 2004 N.C. App. LEXIS 2338 (2004).

Applied in State v. Mitchell, 298 N.C. 549, 259 S.E.2d 2254 (1979); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980); State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 594 (1980); State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982); State v. Parker, 61 N.C. App. 94, 300 S.E.2d 451 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); State v. Blandford, 66 N.C. App. 348, 311 S.E.2d 338 (1984); State v. Essick, 67 N.C. App. 697, 314 S.E.2d 268 (1984); State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989); State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415; State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267 (1993); Conaway v. Polk, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006); McNeill v. Branker, 601 F. Supp. 2d 694, 2009 U.S. Dist. LEXIS 11568 (E.D.N.C. 2009).

Cited in State v. Roberts, 41 N.C. App. 187, 254 S.E.2d 216 (1979); State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981); State v. Loye, 56 N.C. App. 501, 289 S.E.2d 860 (1982); State v. Martin, 318 N.C. 648, 350 S.E.2d 63 (1986); State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876 (1988); State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Serzan, 119 N.C. App. 557, 459 S.E.2d 297 (1995); State v. Ware, 125 N.C. App. 695, 482 S.E.2d 14 (1997); Ward v. French, 989 F. Supp. 752 (E.D.N.C. 1997); State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998); State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999); State v. Hardison, 143 N.C. App. 114, 545 S.E.2d 233, 2001 N.C. App. LEXIS 222 (2001); Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5; State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006);

State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

§ 15A-1421. Indigent defendants.

The provisions of Chapter 7A of the General Statutes with regard to the appointment of counsel for indigent defendants are applicable to proceedings under this Article. The court also may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings. (1977, c. 711, s. 1.)

Legal Periodicals. — For note discussing failure to communicate and effective assistance of counsel in light of State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981), see 13 N.C. Cent. L.J. 101 (1981).

CASE NOTES

Cited in State v. Potts, 334 N.C. 575, 433 S.E.2d 736 (1993).

§ 15A-1422. Review upon appeal.

(a) The making of a motion for appropriate relief is not a prerequisite for asserting an error upon appeal.

(b) The grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review only in an appeal regularly taken.

(c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:

(1) If the time for appeal from the conviction has not expired, by appeal.

(2) If an appeal is pending when the ruling is entered, in that appeal.

(3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

(d) There is no right to appeal from the denial of a motion for appropriate relief when the movant is entitled to a trial de novo upon appeal.

(e) When an error asserted upon appeal has also been the subject of a motion for appropriate relief, denial of the motion has no effect on the right to assert error upon appeal.

(f) Decisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise. (1977, c. 711, s. 1; 1981, c. 470, s. 3.)

OFFICIAL COMMENTARY

Subsection (a). The motions which may be made pursuant to G.S. 15A-1414 incorporate the trial judge's "supervisory" right to order a new trial or other relief on the basis of unfairness to the defendant in the trial, and his authority to correct legal errors, both present in "new trials" under the prior law. (G.S. 15-174 and Rules of Civil Procedure, G.S. 1A-1, Rule 59.) Under this section, if an error has been committed during the trial, appellate review is related directly to the error and is not dependent upon the reassertion of the error after trial by means of a post-verdict motion.

This section also reflects the somewhat different situation which exists with regard to motions made pursuant to G.S. 15A-1415. That section provides for matters which may be asserted, even for the first time, beyond the 10-day period after entry of judgment, as well as before the expiration of that time. Thus, if those matters are raised in sufficient time to be reviewed in connection with an appeal, the statute permits the alleged error in denial of relief to be asserted in the appeal. If the ruling on the motion is made after the time for appeal has expired and there is no appeal pending, review is discretionary, by means of petition for a writ of certiorari.

Subsection (d) provides the obvious rule that although post-trial motions may be made in the district court, there is no need for appellate review of those motions if the movant is entitled to a trial de novo upon appeal.

The provisions of Chapter 7A have in G.S. 7A-27, 7A-28 and 7A-31(a) limited review of post-conviction proceedings to review in the Court of Appeals, by certiorari. With the change in procedure here, and the limitations created to prevent repetitive motions, the limitation of the review to the Court of Appeals has been eliminated by concurrent amendments to the sections cited.

CASE NOTES

North Carolina Supreme court review of collateral attacks is by way of certiorari and not direct appeal. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

Rules Regarding Certiorari Similar to Supreme Court's. — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

Jurisdiction of North Carolina Supreme Court. — Statute could not have restricted the Supreme Court of North Carolina's constitutional authority under N.C. Const., Art. IV, § 12(1) to exercise jurisdiction to review upon appeal any decision of the courts below, and as such, the Supreme Court of North Carolina did not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and did so to consider questions that were not properly presented according to its rules; this exercise of supervisory authority was particularly appropriate when prompt and definitive resolution of an issue was necessary to ensure the uniform administration of North Carolina's criminal statutes. State v. Ellis, 361 N.C. 200, 639 S.E.2d 425, 2007 N.C. LEXIS 38 (2007).

Writ of Certiorari Limited. — While G.S. 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, the appellate court is limited to issuing a writ of certiorari in appropriate circumstances to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief, N.C. R. App. P. 21(a)(1). State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Defendant did not have a right of appeal from a judgment entered upon his guilty plea when his assertions on appeal were not issues from which defendant had an appeal of right as enumerated by G.S. 15A-1444; although G.S. 15A-1444(e) permitted a defendant to petition for a writ of certiorari, pursuant to N.C. R. App. P. 21(a)(1), the court of appeals was limited to issuing a writ of certiorari, and because defendant had not failed to take timely action, was not appealing from an interlocutory order, and was not seeking review pursuant to G.S. 15A-1422(c)(3), the court of appeals was without authority to issue a writ of certiorari. State v. Rinehart, — N.C. App. —, 673 S.E.2d 769, 2009 N.C. App. LEXIS 244 (2009).

Failure to File Timely Notice of Appeal. — Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief, State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Review After Time for Taking Appeal Expires. — Where defendant filed motion for relief long after the time for taking appeal had expired, he could obtain appellate review of the court's ruling only by a petition for a writ of certiorari. State v. Isom, 119 N.C. App. 225, 458 S.E.2d 420 (1995).

Appeal Following Remand. — Where Court of Appeals decided defendant's underlying appeal then remanded the motion for appropriate relief to the trial court, the order of the trial court on the motion for appropriate relief would be subject to review by writ of certiorari. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Since the case addressed immediately important aspects of Blakely's application to North Carolina sentencing law, the North Carolina Supreme Court's general supervisory authority permitted its review of the sentencing matter after a lower appellate court remanded the matter to the trial court. State v. Blackwell, 359 N.C. 814, 618 S.E.2d 213, 2005 N.C. LEXIS 846 (2005).

Supreme Court of North Carolina found that it could hear an appeal from a decision of the Court of Appeals of North Carolina that a defendant be resentenced because G.S. 7A-30(2) provided the state with an appeal of right as there was a dissent in the Court of Appeals; further, nothing in G.S. 15A-1422 prohibited the court from addressing the issues presented in defendant's brief to the Court of Appeals. State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Discretion of Trial Court. — A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal in the absence of abuse of discretion. State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982).

Defendant's motion for appropriate relief was reviewable where the appellate court's order simply reversed the lower court's judgment, and did not review the decision by the lower court to grant the defendant's motion, and therefore did not constitute a final decision. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Defendant's appeal from an order denying his petition for writ of error coram nobis treated as petition for writ of certiorari. See State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Defendant's Testimony Contradicted Proffered Instruction. — The trial court's failure to instruct the jury on defendant's law-abidingness and not using drugs was not prejudicial to defendant where defendant's own testimony contradicted testimony of witness that defendant was law-abiding and there was very strong evidence of defendant's guilt. State v. Moreno, 98 N.C. App. 642, 391 S.E.2d 860 (1990).

Defendant had no right to appeal from a motion for appropriate relief brought pursuant to G.S. 15A-1415(b)(3) when the time for appeal had expired and no appeal was pending. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

State's Right to Appeal From Order Granting Appropriate Relief. — When, after defendant was convicted of possession of cocaine and having attained the status of being an habitual felon, the trial court, sua sponte, granted a motion for appropriate relief, vacating the habitual felon conviction, and reducing defendant's sentence, finding the sentence violated defendant's rights under the Eighth and Fourteenth Amendments, the State's right to appeal, as it was not appealing a judgment entered on the jury's verdicts, was controlled by G.S. 15A-1422, and, under G.S. 15A-1422(b), it had to have a right to appeal the underlying judgment in an appeal regularly taken, but it did not have such a right because, while the trial court might have effectively dismissed defendant's habitual felon charge or imposed an unauthorized prison term, given his habitual felon status, it did not have a right to appeal the underlying judgment, as that judgment did not dismiss a charge against defendant or impose an unauthorized prison term. State v. Starkey, 177 N.C. App. 264, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

Applied in State v. Roberts, 41 N.C. App. 187, 254 S.E.2d 216 (1979); State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980); Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982); State v. Barrett, 307 N.C. 126, 302 S.E.2d 632 (1982); State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985); State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005).

Cited in State v. McCoy, 304 N.C. 363, 283 S.E.2d 788 (1981); Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981); Emanuel v. Osborne, 538 F. Supp. 279 (E.D.N.C. 1982); State v. Garner, 67 N.C. App. 761, 313 S.E.2d 927 (1984); State v. Howard, 70 N.C. App. 487, 320 S.E.2d 17 (1984); State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986); State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993); State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995); State v. Dammons, 128 N.C. App. 16, 493 S.E.2d 480 (1997); State v. Johnson, 126 N.C. App. 271, 485 S.E.2d 315 (1997); State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000); Allen v. Mitchell, 276 F.3d 183, 2001 U.S. App. LEXIS 27233 (4th Cir. 2001); In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002); State v. Dickson, 151 N.C. App. 136, 564 S.E.2d 640, 2002 N.C. App. LEXIS 654 (2002); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. Nance, 155 N.C. App. 773, 574 S.E.2d 692, 2003 N.C. App. LEXIS 21 (2003); State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761, 2005 N.C. LEXIS 204 (2005); Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., 185 N.C. App. 1, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

§§ 15A-1423 through 15A-1430: Reserved for future codification purposes.

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

(a) A defendant convicted before a magistrate may appeal for trial de novo before a district court judge without a jury.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law. Upon the docketing in the superior court of an appeal from a judgment imposed pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement shall be the same as was had by the district court prior to the plea arrangement.

(c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.

(d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:

(1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the district court district as defined in G.S. 7A-133, in the case of appeals from district court.

The magistrate or district court judge must review the case and fix conditions of pretrial release as appropriate. If a defendant has paid a fine or costs and then appeals, the amount paid must be remitted to the defendant, but the judge, clerk or magistrate to whom notice of appeal is given may order the remission delayed pending the determination of the appeal.

(e) Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order.

(f) Repealed by Session Laws 2005-339, s. 1, effective August 26, 2005.

(f1) Appeal pursuant to this section stays the execution of all portions of the judgment, including all of the following:

(1) Payment of costs.

(2) Payment of a fine.

(3) Probation or special probation.

(4) Active punishment.

Pursuant to subsection (e) of this section, however, the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility, pending the trial de novo in superior court.

(g) The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal was taken, for execution of the judgment.

(h) The defendant may withdraw his appeal after the calendaring of the case for trial de novo only by consent of the court, and with the attachment of costs of that court, unless the costs or any part of the costs are remitted by the court. The case may then be remanded by order of the court to the court from which the appeal was taken for execution of the judgment with any additional court costs that attached and that have not been remitted. (1977, c. 711, s. 1; 1979, c. 758, p. 2; 1979, 2nd Sess., c. 1328, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 72; 1991, c. 63, s. 1; 2005-339, s. 1.)

OFFICIAL COMMENTARY

This section codifies the appeal from the magistrate to the district court judge for trial de novo and appeal from the district court judge to the superior court for trial de novo, and also deals with a problem which has recurred with some frequency. That problem has been presented by the defendant, not represented by counsel, who pays his fine and then wishes to appeal. When he secures counsel, he finds that he has lost his right to appeal by complying with the sentence. That is not true under this revision. It should be noted that although provision is made for remitting of a fine or costs, that may be delayed pending the determination of the appeal.

It also is made clear that the cut-off point for the right to withdraw an appeal is the time of calendaring of the case for trial de novo. If an appeal is taken to the superior court, the costs of that division will attach at the end of 10 days in accordance with G.S. 7A-304(b). Since remand to the original trial court is automatic when the appeal is withdrawn prior to calendaring of the appeal case for trial de novo, no condition may be imposed on such a remand.

Editor's Note. — Subsection (f1), added by Session Laws 2005-339, s. 1, effective August 26, 2005, is applicable to appeals noticed on or after that date.

Legal Periodicals. — For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

For article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

For note, "Constitutional Law — Enhanced Sentencing Under North Carolina's DWI Statute: Making Due Process Disappear — Field v. Sheriff of Wake County, N.C.," see 23 Wake Forest L. Rev. 517 (1988).

CASE NOTES

Jurisdiction Lacking. — The Superior court did not have jurisdiction to find defendant guilty of speeding offense where the State took a voluntary dismissal on that charge at the district court. State v. Phillips, 127 N.C. App. 391, 489 S.E.2d 890 (1997).

Date of Conviction. — When a defendant withdraws his appeal to the superior court, pursuant to either subsection (g) or (h), and the case is remanded to the district court for execution of the district court judgment, it is as though the appeal had not been taken and the defendant's conviction of the offense occurred upon the date of the entry of judgment in the district court. State v. Wilkins, 128 N.C. App. 315, 494 S.E.2d 611 (1998).

Entry of Judgment. — Defendant's purported appeal was untimely where it was not made within 10 days of the original judgment in which the defendant was found guilty of attempted simple assault, simple assault and communicating threats; the district court's intervening correction of various errors on the sentencing form did not constitute a new judgment from which to start counting the ten days. State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999).

Defendant Entitled to Arraignment on Appeal for Trial De Novo In Superior Court. — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S.15A-943(b), which defendant adequately invoked; as the superior court was not the court of original jurisdiction, the prosecutor never submitted a bill of indictment for defendant nor was defendant indicted, so there was no 21-day period from which defendant needed to file a written request for. A trial de novo in the superior court was a new trial from the beginning to the end, disregarding completely the plea below, and, therefore, since defendant's plea from the district court was completely disregarded, defendant was entitled to an arraignment in superior court. State v. Vereen, 177 N.C. App. 233, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

Probation Did Not Start While Appeal Was Pending. — Despite a specific reference to probation in G.S. 15A-1451, and the absence of a corresponding reference to probation in G.S. 15A-1431, G.S. 15A-1431(e) provided that a defendant remained on pretrial release during an appeal from district court to superior court, so he or she was not also on probation; defendant's probation, imposed by a district court, did not start where defendant appealed to superior court, did not begin until he withdrew that appeal, and thus, a later violation report was timely filed. State v. Smith, 359 N.C. 618, 614 S.E.2d 279, 2005 N.C. LEXIS 635 (2005).

Cited in State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982); Field v. Sheriff of Wake County, 831 F.2d 530 (4th Cir. 1987); Ashton v. City of Concord, 337 F. Supp. 2d 735, 2004 U.S. Dist. LEXIS 19217 (M.D.N.C. 2004).

§ 15A-1432. Appeals by State from district court judge.

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

(2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(b) When the State appeals pursuant to subsection (a) the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

(c) The motion may be heard by any judge of superior court having authority for the trial of criminal cases in the district. The State and the defendant are entitled to file briefs and are entitled to adequate time for their preparation, consonant with the expeditious handling of the appeal.

(d) If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error, it must reinstate the charges and remand the matter to district court for further proceedings. The defendant may appeal this order to the appellate division as in the case of other orders of the superior court, including by an interlocutory appeal if the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter.

(e) If the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay. (1977, c. 711, s. 1; 1987, c. 398.)

OFFICIAL COMMENTARY

Although G.S. 15-179 had provided the right of the State to appeal to the superior court, procedure had never been provided. This section creates a simplified motion practice for the State's appeal in such circumstances. The right of the State to appeal is defined in the same manner as in G.S. 15A-1445. See the commentary to that section.

CASE NOTES

Applicability. — This section only applies to instances where the superior court reverses a dismissal of criminal charges by the district court. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

While the State was otherwise allowed to appeal a district court's dismissal of a criminal charge to the trial court pursuant to G.S. 15A-1432(a)(1), the district court's dismissal of defendant's DWI charge for insufficient evidence as a matter of law barred further proceedings.

The Double Jeopardy Clause of the United States Constitution dictated that once the finding was made that the evidence could not as a matter of law support a conviction, the State could not continue to prosecute even if the finding was patently wrong in the law. State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

Trial court could not determine that it did not have jurisdiction to hear the appeal of the district court's granting of defendant's motion to suppress evidence. After considering an appeal pursuant to G.S. 20-38.7(a), the trial court was required to enter an order remanding the matter to the district court with instructions to grant or deny defendant's NG.S. 20-38.6 motion to suppress, especially since (1) G.S. 20-38.7(a) did not have a 10-day time limit for appeal; and (2) the State's notice of appeal otherwise met the G.S. 15A-1432(b) requirements for appealing a matter from the district court to the trial court. State v. Palmer, — N.C. App. —, 676 S.E.2d 559, 2009 N.C. App. LEXIS 823 (May 19, 2009).

Right to Appeal. — State had no statutory right of appeal from a superior court's interlocutory order because the General Assembly's reference to "any further appeal" in G.S. 20-38.7(a) did not give the State a right of appeal to the appellate division pursuant to G.S. 15A-1432(e) after the State appealed from district court to superior court pursuant to G.S. 20-38.7(a). State v. Fowler, — N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

Appeal Treated as Petition for Mandamus. — State's attempted appeal of district court's action in setting aside guilty verdicts entered by it five months previously and entering verdicts of not guilty would be treated as a petition for a writ of mandamus pursuant to G.S. 7A-32(c) and N.C.R.A.P., Rule 22. State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

Notice of appeal was inadequate to meet the requirements of subsection (b) because the basis for the appeal was not specified. The State had the responsibility to file the notice of appeal in the proper manner. Reliance on defendant's counsel to prepare proper notice did not suffice. State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830, appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

Failure to Meet Requirements Resulted in Dismissal. — The defendant's appeal did not fall within a statutory exception for interlocutory criminal appeals where nothing in the record before the Court showed that "defendant, or his attorney, certified to the superior court . . . that the appeal was not [being] taken for the purpose of delay . . . ." and where the superior court's order did not reflect that it found defendant's cause "appropriately justiciable in the appellate division as an interlocutory matter." State v. Nichols, 140 N.C. App. 597, 537 S.E.2d 825, 2000 N.C. App. LEXIS 1241 (2000).

Jurisdiction Not Lost by Deviation from Technical Requirements. — Trial court did not lose jurisdiction to hear the State's motion for appeal where the State deviated from the technical requirements of G.S. 15A-1432 by captioning the appeal improperly. State v. Hinchman, — N.C. App. —, 666 S.E.2d 199, 2008 N.C. App. LEXIS 1667 (2008).

Name of Document Irrelevant. — Defendant's contention that the superior court was without jurisdiction to hear the State's appeal to that court since the State filed and served a document entitled "Notice of Appeal" instead of a "motion" as required by subsection (b) was without merit. State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997).

Lack of Findings and Conclusions from District Court Not Fatal. — As the district court is not a court of record, and the superior court's review is de novo, the State's failure to request that the district court make findings of fact and conclusions of law in order to preserve the record on appeal is not fatal. State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997).

Jeopardy Not Attached. — Where evidence was never accepted by the district court for an adjudication of the defendant's guilt, but the district court entertained defendants' pretrial motions to dismiss based upon prosecutorial misconduct, jeopardy did not attach. State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997).

Reinstatement of Charges Was Error. — Although a trial court was directed pursuant to G.S. 15A-1432(d) to reinstate a criminal charge and remand a case where dismissal of the charge was in error, the trial court could not do so where the dismissal occurred, as in defendant's DWI case, due to insufficient evidence as a matter of law. In that case, the Double Jeopardy Clause of the United States Constitution barred the State from further prosecution, even if the finding of insufficiency of the evidence involved an error patently wrong in the law. State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545, 2008 N.C. App. LEXIS 688 (2008).

Applied in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982); State v. Rose, 312 N.C. 441, 323 S.E.2d 339 (1984); State v. Huntley, 105 N.C. App. 709, 414 S.E.2d 380 (1992).

Cited in State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979); State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986); In re Harper, 118 N.C. App. 698, 456 S.E.2d 878 (1995); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995); State v. Phillips, 127 N.C. App. 391, 489 S.E.2d 890 (1997); State v.

Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005).

§§ 15A-1433 through 15A-1440: Reserved for future codification purposes.

ARTICLE 91.

Appeal to Appellate Division.

OFFICIAL COMMENTARY

Present provisions of Chapter 15 of the General Statutes, in Article 18, relating to criminal appeals, are very limited. In addition to those limited provisions other sources for rules governing criminal appeals include the Rules of the Appellate Division, and provisions of Chapter 7A of the General Statutes with regard to jurisdiction of the courts.

The attempt here is to bring together the items appropriately left to the criminal statutes relating to criminal appeals. There is one modification of Chapter 7A. This act does not infringe upon those areas which are appropriately within the rule-making power of the appellate division.

Editor's Note. — The "Official Commentary" under this Article derives from those appearing in the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly, as revised by the Commission.

§ 15A-1441. Correction of errors by appellate division.

Errors of law may be corrected upon appellate review as provided in this Article, except that review of capital cases shall be given priority on direct appeal and in State postconviction proceedings. (1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, s. 6.)

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

CASE NOTES

I. General Consideration.
II. Penalty for Exercise of Right to Appeal.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited below were decided under former law.

The Fair Sentencing Act, as codified in former Article 81A of this Chapter, resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Under the Fair Sentencing Act, the trial judge is required to make a record of aggravating and mitigating factors; this gives the reviewing court a means by which to decide whether the sentence is supported by sufficient evidence and whether the judge abused his discretion in weighing aggravating and mitigating factors. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990).

For case discussing the historical background, policies, purposes, and implemen-

tation of the "Fair Sentencing Act," see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Right to appeal is wholly statutory. State v. Blades, 209 N.C. 56, 182 S.E. 714 (1935).

Appeal as Substitute for Common-Law Writs. — At common law there was no appeal from the decision of any of the courts, high or low, and these decisions could only be reviewed by writ of error or writ of false judgment. In North Carolina appeals are used as a substitute for those writs. State v. Bailey, 65 N.C. 426 (1871); State v. Webb, 155 N.C. 426, 70 S.E. 1064 (1911).

Rules governing appeals are mandatory, not directory. State v. Lewis, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

Appeal Lies Only from Final Judgment. — The right to appeal is wholly statutory, and a defendant may appeal only from a conviction or from some judgment that is final in its nature. Thus an appeal from the denial of defendant's plea in abatement will be dismissed as being an appeal from an interlocutory judgment. State v. Blades, 209 N.C. 56, 182 S.E. 714 (1935).

A defendant is entitled to appeal only from conviction in the superior court or some final judgment thereof, and an appeal from an order of the superior court remanding the case to the recorder's court will be dismissed. State v. Rooks, 207 N.C. 275, 176 S.E. 752 (1934).

The statute does not provide for an appeal in criminal cases except from a final judgment. Hence, upon the indictment of members of the armed forces of the United States by State authorities, an appeal from an adverse ruling on objection to jurisdiction is premature. State v. Inman, 224 N.C. 531, 31 S.E.2d 641 (1944), cert. denied, 323 U.S. 805, 65 S. Ct. 563, 89 L. Ed. 642 (1945).

This right of appeal is a substantial right. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970); State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

Authority of Court from Which Appeal Taken. — After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by the statute. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

Cited in State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002).

II. PENALTY FOR EXERCISE OF RIGHT TO APPEAL.

Exercise of Right Should Not Prejudice Defendant. — While the trial judge has the discretionary power to change the sentence during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentence, since defendant's exercise of his right to appeal under this section should not prejudice him in any manner. State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942); State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

The trial judge may not impose a penalty on the exercise of the right to appeal. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

If an appeal is allowed, it is not to be supposed that any penalty is attached thereto or imposed as a result thereof. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

And Sentence May Not Be Suspended on Conditions Conflicting with Such Right. — The execution of a sentence in a criminal action may not be suspended on conditions that conflict with the defendant's right of appeal. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Where defendant could not meet the conditions upon which execution of the judgment was suspended if he exercised his right to appeal, under this section, the judgment on this count is erroneous, and the cause remanded for proper judgment thereon. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

It is an unwarranted interference with defendant's right of appeal where the trial court, upon learning of defendant's intention to appeal, strikes defendant's suspended sentences and imposes active sentences. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Increase in Sentence. — A trial judge may increase the sentence given a defendant only where the record does not sustain the suggestion that the defendant was being penalized for announcing his intention to appeal. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

It is incumbent upon the trial judge to correct a sentence which is less than the statutory minimum in such a manner as to preclude any inference that the greater sentence was given as a penalty for exercising the right of appeal. Such an inference has a chilling effect on the exercise of the right to appeal and cannot be tolerated. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

Defendant Held Entitled to Lesser Sentence. — Where a defendant was convicted and sentenced to 45 days in jail, and the minimum statutory sentence was six months, and the sentence was increased to six months only after the defendant had notified the court of his intention to appeal, the trial judge was held to have allowed the inference that the greater sentence was imposed as a penalty for exercising the right of appeal, and the defendant was entitled to the lesser sentence. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

§ 15A-1442. Grounds for correction of error by appellate division.

The following constitute grounds for correction of errors by the appellate division.

(1) Lack of Jurisdiction. —
  a. The trial court lacked jurisdiction over the offense.
  b. The trial court did not have jurisdiction over the person of the defendant.

(2) Error in the Criminal Pleading. — Failure to charge a crime, in that:
  a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or
  b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

(3) Insufficiency of the Evidence. — The evidence was insufficient as a matter of law.

(4) Errors in Procedure. —
  a. There has been a denial of pretrial motions or relief to which the defendant is entitled, so as to affect the defendant's preparation or presentation of his defense, to his prejudice.
  b. There has been a denial of a trial motion or relief to which the defendant is entitled, to his prejudice.
  c. There has been error in the admission or exclusion of evidence, to the prejudice of the defendant.
  d. There has been error in the judge's instructions to the jury, to the prejudice of the defendant.
  e. There has been a denial of a post-trial motion or relief to which the defendant is entitled, to his prejudice. This provision is subject to the provisions of G.S. 15A-1422.

(5) Constitutionally Invalid Procedure or Statute; Prosecution for Constitutionally Protected Conduct. —
  a. The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.
  b. The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
  c. The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(5a) Insufficient Basis for Sentence. — The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing.

(5b) Violation of Sentencing Structure. — The sentence imposed:
  a. Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
  b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
  c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class or offense and prior record or conviction level.

(6) Other Errors of Law. — Any other error of law was committed by the trial court to the prejudice of the defendant. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1979, (2nd Sess.) c. 1316, s. 47; 1981, c. 63, s. 1; 1981, c. 179, s. 14; 1993, c. 538, s. 26; 1994, Ex. Sess., c. 24, s. 14(b).)

OFFICIAL COMMENTARY

As indicated in the general commentary, this section undertakes to catalogue various errors which may be asserted upon appeal. The listing of these categories of errors which may be asserted on appeal does not of course imply that the mere assertion of such an error implies entitlement to relief. It should be borne in mind that the appealing party must also meet the requirement of preserving his right to view when some particular step is required (see G.S. 15A-1446) and must of course show prejudice in accordance with G.S. 15A-1443. This section should be read in conjunction with the sections relating to the correction of errors by post-trial motions, particularly G.S. 15A-1414 and G.S. 15A-1415. This act undertakes to provide a substantial correlation between the possibility of correction of error at the trial level and at the appellate level.

Legal Periodicals. — For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Theory upon which a case is tried must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions. A defendant is not permitted to defend at trial upon one theory and, upon an adverse verdict, call upon the appellate court to grant relief on the ground that the presiding judge should have intervened and guided his defense to another theory. State v. Meadows, 306 N.C. 683, 295 S.E.2d 394 (1982), overruled on other grounds, 307 N.C. 628, 300 S.E.2d 351 (1983).

Guilty Plea Resulting from Ineffective Assistance of Counsel. — Where defendant alleges that ineffective assistance of counsel caused him to enter his guilty plea, an issue of constitutional rights arises, and the fact that defendant signed an agreement form does not bar his right to seek post-conviction relief. State v. Loye, 56 N.C. App. 501, 289 S.E.2d 860, appeal dismissed, 306 N.C. 748, 295 S.E.2d 483 (1982).

Instructions May Be Corrected Only When Prejudicial. — An error in the judge's instructions to the jury must be to the prejudice of defendant in order to warrant corrective relief by the appellate division. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981).

Prejudice from Delay in Preparation of Trial Transcript not Shown. — Defendant failed to show prejudice resulting from a six-year delay in the preparation of a trial transcript; a review of the record did not divulge any evidence to support defendant's allegation of experiencing "maximum anxiety," and defendant failed to provide any evidence that the delay prevented any possibility of meaningful appellate review. State v. Berryman, 360 N.C. 209, 624 S.E.2d 350, 2006 N.C. LEXIS 8 (2006).

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted on the incorrect part. State v. Meadows, 306 N.C. 683, 295 S.E.2d 394 (1982), overruled on other grounds, 307 N.C. 628, 300 S.E.2d 351 (1983).

Erroneous Instruction on Lesser Offense. — Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief. State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

Error in Allowing Exhibits to Go to Jury Room. — Violations of G.S. 15A-1233(b), in allowing exhibits to go into the jury room over defendant's objection, are corrected by the appellate division only when they prejudice the defendants and such prejudice obtains only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises; the burden of showing such prejudice is upon the defendant. State v. Taylor, 56 N.C. App. 113, 287 S.E.2d 129 (1982).

No Error Where Defendant Made No Showing That Ruling Affected Defense. — Although it was arguably error to deny defendant's motion to produce results of analyses of a state's witness' handwriting, nevertheless, there was no error where defendant made no showing that the trial court's ruling affected the preparation or presentation of his defense to his prejudice. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Admission of Hearsay Statements not Prejudicial. — Even assuming the State presented no evidence to support admission of hearsay statements under either the present sense impression or excited utterance exceptions, and the admission of the hearsay statements was an abuse of discretion, there was no prejudicial error under G.S. 15A-1442(4)(c) as other evidence established that defendant was armed while on a bus. A witness testified that the witness saw an imprint of a gun in defendant's pocket while on the bus. State v. Bass, 190 N.C. App. 339, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008), appeal dismissed, cert. denied, 362 N.C. 683, 670 S.E.2d 566 (2008).

Correction of Sentence. — Section 15A-1442(5b) authorizes the correction of a sentence where a conviction which was used to enhance the sentence was later reversed on appeal. State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001).

Applied in State v. Jeffries, 55 N.C. App. 269, 285 S.E.2d 307 (1982); State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982); State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982); State v. Dalton, 96 N.C. App. 65, 384 S.E.2d 573 (1989); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

Cited in State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); State v. Quilliams, 55 N.C. App. 349, 285 S.E.2d 617 (1982); State v. Hageman, 56 N.C. App. 274, 289 S.E.2d 89 (1982); State v. Roberts, 82 N.C. App. 733, 348 S.E.2d 151 (1986); State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876 (1988); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002).

§ 15A-1443. Existence and showing of prejudice.

(a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

(c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides in subsection (a) a codification of existing definitions of prejudice in North Carolina. See State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966). Subsection (b) reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as set out in the case of Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Subsection (c) is a statutory codification of the "invited error rule." Compare 28 U.S.C. § 2111.

Legal Periodicals. — For survey of 1980 criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For note discussing the ineffective assistance of counsel resulting from conflicts between a court-appointed counsel and an indigent defendant, see 18 Wake Forest L. Rev. 83 (1982).

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For article, "An analysis of the new North Carolina evidence code," see 20 Wake Forest L. Rev. 1 (1984).

For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

CASE NOTES

- I. General Consideration.
- II. Prejudicial Error.
- III. Harmless Error.
- IV. Rights under Federal Constitution.

I. GENERAL CONSIDERATION.

Test for "Plain Error" Compared. — The test for "plain error" places a much heavier burden upon the defendant than that imposed by this section upon defendants who have preserved their rights by timely objection. State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Hartman, 90 N.C. 379, 368 S.E.2d 396 (1988).

Where defendant took issue with that portion of the trial court's final instructions in which the jury was charged that testimony regarding prior, similar offenses by defendant could be considered to show defendant's motive for murder, his intent to commit murder, and his scienter regarding the consequences of his attack, because defendant failed to object to this alleged error, appellate review is guided by the "plain error" analysis, whereby the burden on defendant to show prejudice is even greater than that imposed by this section. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Before an error by the trial court amounts to "plain error," we must be convinced that absent the error the jury probably would have reached a different verdict; therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by this section upon defendants who have preserved their rights by timely objection. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, 513 U.S. 1198, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

Defendant Must Address the Issue of Prejudice. — Defendant failed to show prejudice under this section where he correctly alleged that the trial court erred in instructing the jury on flight in his burglary trial but never addressed the effect of the error on the jury's verdict. State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569, 2000 N.C. App. LEXIS 800 (2000).

Motion to Suppress Did Not Confer Jurisdiction. — Order denying defendant's motion to suppress evidence was void because the trial court was without jurisdiction to entertain and rule upon the motion as defendant had neither been indicted or waived indictment at the time of the hearing and defendant's conduct in filing a motion to suppress did not validate the void order. State v. Wolfe, 158 N.C. App. 539, 581 S.E.2d 117, 2003 N.C. App. LEXIS 1182 (2003).

Decisions Affected by McKoy v. North Carolina. — On appeal, the State must demonstrate a McKoy error (McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), holding unanimity requirement for mitigating factors at sentencing unconstitutional) was harmless beyond a reasonable doubt because the error is of constitutional dimension. State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990), cert. denied, 489 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991).

Unless the State demonstrates that a McKoy error was harmless beyond a reasonable doubt, defendant must have a new sentencing proceeding. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Because McKoy error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369, is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

A prerequisite to the courts' engaging in a plain error analysis is the determination that the instruction complained of constitutes error at all. Where the challenged instruction was not error, a plain error analysis was not required. State v. Johnson, 320 N.C. 746, 360 S.E.2d 676 (1987).

Failure to Rule Formally on Objection to Evidence. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

When a motion to continue is based on a

constitutional right, the trial court's ruling becomes a question of law and, upon appeal, it is subject to review by examination of the particular circumstances as presented by the record, and the denial of a motion to continue, regardless of its nature, is grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced as a result of the error. If the error amounts to a constitutional violation, there is prejudice requiring a new trial unless the State satisfies the court that the error is harmless beyond a reasonable doubt. State v. Gardner, 322 N.C. 591, 369 S.E.2d 593 (1988).

Standard of Review. — Whether the motion for appropriate relief is made by a party or by the court itself, the standard of review for the failure to give a requested instruction which results in a violation of the defendant's constitutional rights remains the same under subsection (b); such an error is deemed prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267, cert. denied, 334 N.C. 437, 433 S.E.2d 183 (1993).

When defendant, who was convicted of common law robbery, said it was constitutional error to deny defendant's request for an instruction on the lesser included offense of misdemeanor larceny, the alleged error was not reviewed under G.S. 15A-1443(b) because defendant made no constitutional argument at trial and could not assert such an argument on appeal, so the alleged error was reviewed under G.S. 15A-1443(a). State v. Porter, — N.C. App. —, 679 S.E.2d 167, 2009 N.C. App. LEXIS 1060 (July 7, 2009).

Prejudice Not Found. — Defendant failed to establish plain error where defendant did not show that the jury would have reached a different verdict but for the admission of evidence that mentioned, in passing, defendant's assertion of his right to remain silent and to counsel. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

There was no error in the trial court's admission of testimony from the brother of defendant's sexual assault victim as to the victim's state of mind when she was talking to the police about the incident that resulted in the charges against defendant, as defendant failed to show that such testimony had any effect on the outcome of the trial or that there was a reasonable possibility that, without such admission, the outcome of the trial would have been different, pursuant to G.S. 15A-1443(a). State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

When defendants moved to dismiss charges at the close of all the evidence, a trial court's reservation of a ruling on defendants' motions, which was contrary to G.S. 15A-1227(c), requiring the court to rule immediately, did not create reversible error or violate defendants' rights under U.S. Const., Amends. V and XIV, or N.C. Const., Art. I, § 19, because no prejudice was shown, as required by G.S. 15A-1443; it was more likely that the trial court would have denied the motions had the court not deferred the court's ruling, and the evidence was sufficient to withstand the motions to dismiss. State v. Hernandez, 188 N.C. App. 193, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

Even if a trial court erred in sustaining the State's hearsay objection to a question posed to a detective during defendant's trial on an assault with a deadly weapon charge, the error would not require reversal of defendant's conviction because defendant could not show prejudice; the overwhelming evidence against defendant, which included his own admission of guilt, defeated any claim for a new trial based on trial error. State v. Hairston, 190 N.C. App. 620, 661 S.E.2d 39, 2008 N.C. App. LEXIS 1015 (2008).

State's closing arguments improperly urged a jury to use other crimes evidence for a forbidden purpose and needlessly digressed when it speculated that defendant was casing out a robbery victim; the remarks were gratuitous and served no useful purpose but were not improper where there was evidence that defendant planned a robbery and that he disappeared at a time close to a fire. Even assuming arguendo that the remarks were improper, they were made in passing and were not a major focus of the State's closing argument; thus defendant did not demonstrate prejudice that would have resulted in a different result at trial, as contemplated by G.S. 15A-1443(a). State v. Chappelle, — N.C. App. —, 667 S.E.2d 327, 2008 N.C. App. LEXIS 1809 (2008), appeal dismissed, review denied, 362 N.C. 684, 670 S.E.2d 568 (2008).

Error Not Shown. — Trial court did not err in admitting evidence that law enforcement officers identified defendant in a shooting case by defendant's nickname, because the evidence was not admitted to show the truth of the matter asserted and, thus, did not violate defendant's Confrontation Clause rights; rather, defendant did not show that error occurred in admitting the evidence because that evidence was introduced to show why defendant became the focus of the shooting investigation. State v. Tate, 187 N.C. App. 593, 653 S.E.2d 892, 2007 N.C. App. LEXIS 2553 (2007).

Review of Alleged Error Limited. — Where defendant failed to object to jury instruction at trial, Supreme Court's review of alleged error was limited on appeal to review for plain error. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Where Defendant Failed to Object to

Testimony Relating to Exercise of Fifth Amendment Rights, Review Limited to Plain Error. — Where a trial court admits testimony relating to a defendant's exercise of his right to remain silent and to request counsel, such an error requires the defendant be granted a new trial unless it can be shown the error was harmless beyond a reasonable doubt; however, where defense counsel fails to object to this testimony at trial, appellate review is limited to plain error. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Ineffective Assistance of Counsel. — Defendant's conviction of robbery with a firearm, G.S. 14-87, and possession of a handgun by a felon, G.S. 14-415.1, was affirmed; defendant did not receive ineffective assistance of counsel pursuant to the test in G.S. 15A-1443(a), as counsel did not err in failing to object to the identification of defendant, or to the introduction of a videotape of the robbery, based on a legitimate trial strategy, and pursuant to G.S. 15A-1419(a)(3), the trial court could determine two of defendant's claims of ineffective assistance based on the record. State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354, 2003 N.C. App. LEXIS 1495 (2003).

Defendant Was Not Prejudiced by Granting of Relief. — After his murder conviction, defendant had no right to appropriate relief under G.S. 15A-1414 and G.S. 15A-1420, despite his claim that the trial judge committed reversible error by restoring peremptory challenges to both the State and to defendant after dismissing an entire group of prospective jurors for misconduct. Defendant filed a motion to strike the entire venire when it was learned that they had been discussing among themselves how they could become disqualified to serve, and pursuant to G.S. 15A-1443(c), a defendant was not prejudiced by the granting of relief that he sought or by error that resulted from his own conduct. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Applied in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Correll, 38 N.C. App. 451, 248 S.E.2d 451 (1978); State v. McQueen, 39 N.C. App. 64, 249 S.E.2d 464 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Sledge, 297 N.C. 227, 254 S.E.2d 579 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Colvin, 297 N.C. 691, 256 S.E.2d 689 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Boone, 299 N.C. 681, 263 S.E.2d 758 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Weimer, 300 N.C. 642, 268 S.E.2d 216 (1980); State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1980); State v. Bell, 48 N.C. App. 356, 269 S.E.2d 201 (1980); State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980); State v. Odom, 49 N.C. App. 278, 271 S.E.2d 98 (1980); State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981); State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981); State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981); State v. Culpepper, 302 N.C. 179, 273 S.E.2d 686 (1981); State v. Miller, 302 N.C. 572, 276 S.E.2d 417 (1981); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981); State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981); State v. Powell, 51 N.C. App. 224, 275 S.E.2d 528 (1981); State v. Herring, 55 N.C. App. 230, 284 S.E.2d 764 (1981); State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. Wood, 306 N.C. 510, 294 S.E.2d 310 (1982); State v. Powell, 306 N.C. 718, 295 S.E.2d 413 (1982); State v. Sparks, 307 N.C. 71, 296 S.E.2d 451 (1982); State v. Chamberlain, 307 N.C. 130, 297 S.E.2d 540 (1982); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982); State v. Tate, 307 N.C. 242, 297 S.E.2d 581 (1982); State v. Taylor, 56 N.C. App. 113, 287 S.E.2d 129 (1982); State v. Woods, 56 N.C. App. 193, 287 S.E.2d 431 (1982); State v. Harrison, 56 N.C. App. 368, 289 S.E.2d 50 (1982); State v. Tate, 57 N.C. App. 350, 291 S.E.2d 326 (1982); State v. Grant, 57 N.C. App. 589, 291 S.E.2d 913 (1982); State v. Allison, 57 N.C. App. 635, 292 S.E.2d 288 (1982); State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982); State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982); State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982); State v. Allison, 307 N.C. 411, 298 S.E.2d 365 (1983); State v. Strickland, 307 N.C. 274, 298 S.E.2d 645 (1983); State v. Cabey, 307 N.C. 496, 299 S.E.2d 194 (1983); State v. Courtright, 60 N.C. App. 247, 298 S.E.2d 740 (1983); State v. Miller, 61 N.C. App. 1, 300 S.E.2d 431 (1983); State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983); State v. Moore, 309 N.C. 102, 305 S.E.2d 542 (1983); State v. Cope, 309 N.C. 47, 305 S.E.2d 676 (1983); State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983); State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983); State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Smith, 310 N.C. 108, 310 S.E.2d 320 (1984); State v. Stanley, 310 N.C. 353, 312 S.E.2d 482 (1984); State v. Colbert, 65 N.C. App. 762, 310

S.E.2d 145 (1984); State v. Godwin, 67 N.C. App. 731, 314 S.E.2d 265 (1984); State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984); State v. Toomer, 311 N.C. 183, 316 S.E.2d 66 (1984); State v. Colbert, 311 N.C. 283, 316 S.E.2d 79 (1984); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Foust, 311 N.C. 351, 317 S.E.2d 385 (1984); State v. Lewis, 68 N.C. App. 575, 315 S.E.2d 766 (1984); State v. Miller, 69 N.C. App. 392, 317 S.E.2d 84 (1984); State v. Lassiter, 70 N.C. App. 731, 321 S.E.2d 175 (1984); State v. Joines, 312 N.C. 490, 322 S.E.2d 758 (1984); State v. Greenlee, 72 N.C. App. 269, 324 S.E.2d 48 (1985); State v. Hyman, 312 N.C. 601, 324 S.E.2d 264 (1985); State v. McCray, 312 N.C. 519, 324 S.E.2d 606 (1985); State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Johnson, 72 N.C. App. 512, 325 S.E.2d 253 (1985); State v. Oliver, 73 N.C. App. 118, 325 S.E.2d 682 (1985); State v. Horton, 73 N.C. App. 107, 326 S.E.2d 54 (1985); State v. Myers, 73 N.C. App. 650, 327 S.E.2d 276 (1985); State v. Durham, 74 N.C. App. 121, 327 S.E.2d 312 (1985); State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985); State v. Burgess, 76 N.C. App. 534, 333 S.E.2d 563 (1985); State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985); State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985); State v. Hensley, 77 N.C. App. 192, 334 S.E.2d 783 (1985); State v. White, 77 N.C. App. 45, 334 S.E.2d 786 (1985); State v. Watkins, 77 N.C. App. 325, 335 S.E.2d 232 (1985); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986); State v. Satterfield, 316 N.C. 55, 340 S.E.2d 52 (1986); State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986); State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986); State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986); State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986); State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986); State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986); State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986); State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986); State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986); State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Scott, 318 N.C. 237, 347 S.E.2d 414 (1986); State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986); State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986); State v. Daye, 83 N.C. App. 444, 350 S.E.2d 514 (1986); State v. Springer, 83 N.C. App. 657, 351 S.E.2d 120 (1986); State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986); State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986); State v. Kimbrell, 84 N.C. App. 59, 351 S.E.2d 801 (1987); State v. Worthington, 84 N.C. App. 150, 352 S.E.2d 695 (1987); State v. Clark, 319 N.C. 215, 353 S.E.2d 205 (1987); State v. Clemmons, 319 N.C. 192, 353 S.E.2d 209 (1987); State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332 (1987); State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987); State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987); State v. Hicks, 86 N.C. App. 39, 356 S.E.2d 595 (1987); State v. Sullivan, 86 N.C. App. 316, 357 S.E.2d 414 (1987); State v. Hager, 320 N.C. 77, 357 S.E.2d 615 (1987); State v. Austin, 320 N.C. 276, 357 S.E.2d 641 (1987); State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987); State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987); State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987); State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987); State v. Mack, 87 N.C. 24, 359 S.E.2d 485 (1987); State v. Nickerson, 320 N.C. 603, 359 S.E.2d 760 (1987); State v. McLaughlin, 320 N.C. 564, 359 S.E.2d 768 (1987); State v. Meeks, 320 N.C. 615, 360 S.E.2d 79 (1987); State v. Knight, 87 N.C. App. 125, 360 S.E.2d 125 (1987); State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987); State v. Burgess, 320 N.C. 784, 360 S.E.2d 686 (1987); State v. Kimbrell, 320 N.C. 762, 360 S.E.2d 691 (1987); State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316 (1988); State v. Squire, 321 N.C. 541, 364 S.E.2d 354 (1988); State v. Browning, 321 N.C. 535, 364 S.E.2d 376 (1988); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988); State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988); State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988); State v. Rhinehart, 322 N.C. 53, 366 S.E.2d 429 (1988); State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988); State v. Burton, 322 N.C. 447, 368 S.E.2d 630 (1988); State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988); State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988); State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988); State v. Smith, 323 N.C. 359, 372 S.E.2d 557 (1988); State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988); State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Clark, 344 N.C. 146, 377 S.E.2d 54 (1989); State v. Ball, 324 N.C. 233, 377 S.E.2d 70 (1989); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. McDowell, 93 N.C. 289, 378 S.E.2d 48 (1989); State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); State v. Reynolds, 93 N.C. App. 552, 378 S.E.2d 557 (1989); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989); State v. Groves, 324 N.C. 360, 378 S.E.2d 763 (1989); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Hanible, 94 N.C. App. 204, 379 S.E.2d 696 (1989); State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d

453 (1989); State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989); State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989); State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136 (1990); State v. Von Cunningham, 97 N.C. App. 631, 389 S.E.2d 286 (1990); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990); State v. Noble, 326 N.C. 581, 391 S.E.2d 168 (1990); State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990); State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990); State v. Richardson, 100 N.C. App. 240, 395 S.E.2d 143 (1990); State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990); State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991); State v. Stevenson, 328 N.C. 542, 402 S.E.2d 396 (1991); State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991); State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990); State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991); State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991); State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991); State v. Gross, 104 N.C. App. 97, 408 S.E.2d 531 (1991); State v. Angel, 330 N.C. 85, 408 S.E.2d 724 (1991); State v. McLaughlin, 330 N.C. 66, 408 S.E.2d 732 (1991); State v. Miller, 330 N.C. 56, 408 S.E.2d 846 (1991); State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991); State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991); State v. Wallace, 104 N.C. App. 498, 410 S.E.2d 226 (1991); State v. Marshall, 105 N.C. App. 518, 414 S.E.2d 95 (1992); State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262 (1992); State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992); State v. Sluka, 107 N.C. App. 200, 419 S.E.2d 200 (1992); State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992); State v. Brown, 332 N.C. 262, 420 S.E.2d 147 (1992); State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992); State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475 (1992); State v. Keel, 333 N.C. 52, 423 S.E.2d 458 (1992); State v. Pope, 333 N.C. 106, 423 S.E.2d 740 (1992); State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992); State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141 (1993); State v. Syriani, 333 N.C. 350, 428 S.E.2d 118; State v. Summey, 109 N.C. App. 518, 428 S.E.2d 245 (1993); State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993); State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (1993); State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993); State v. Tucker, 111 N.C. App. 907, 433 S.E.2d 476, 1993 N.C. App. LEXIS 928 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Ramseur, 112 N.C. App. 429, 435 S.E.2d 837 (1993); State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76; State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994); State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994); State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994); State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994); State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (1994); State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (1995); State v. Davis, 340 N.C. 1, 455 S.E.2d 627; State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995); State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995); State v. Kirkland, 119 N.C. App. 185, 457 S.E.2d 766 (1995); State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995); State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995); State v. Serzan, 119 N.C. App. 557, 459 S.E.2d 297 (1995); State v. Ratliff, 341 N.C. 610, 461 S.E.2d 325 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (1996); State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996); State v. Lynch, 343 N.C. 483, 471 S.E.2d 376 (1996); State v. Brewington, 343 N.C. 448, 471 S.E.2d 398 (1996); State v. Kirkpatrick, 123 N.C. App. 86, 472 S.E.2d 371 (1996); State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996); State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996); State v. York, 347 N.C. 79, 489 S.E.2d 380 (1997); State v. Helms, 127 N.C. App. 375, 490 S.E.2d 565 (1997); State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997); State v. Moore, 131 N.C. App. 65, 505 S.E.2d 172 (1998); State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999); State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999); Hill v. Hill, 142 N.C. App. 524, 545 S.E.2d 442, 2001 N.C. App. LEXIS 185 (2001); State v. Skipper, 146 N.C. App. 532, 553 S.E.2d 690, 2001 N.C. App. LEXIS 984 (2001); State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777, 1999 N.C. App. LEXIS 1235 (1999); State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000); State v. Elliott, 137 N.C. App. 282, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000); State v. Diehl, 137 N.C. App. 541, 528 S.E.2d 613, 2000 N.C. App. LEXIS 412 (2000); State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000); State v. Harshaw, 138 N.C. App. 657, 532 S.E.2d 224, 2000 N.C. App. LEXIS 776 (2000); State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896, 2000 N.C. App. LEXIS 794 (2000); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000); State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000

N.C. LEXIS 753 (2000); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000); State v. Stephenson, 144 N.C. App. 465, 551 S.E.2d 858, 2001 N.C. App. LEXIS 535 (2001); State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179, 2001 N.C. LEXIS 672 (2001); State v. Wardrett, 145 N.C. App. 409, 551 S.E.2d 214, 2001 N.C. App. LEXIS 651 (2001); State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001); State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001); State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002); State v. Grover, 142 N.C. App. 411, 543 S.E.2d 179, 2001 N.C. App. LEXIS 149 (2001); State v. Washington, 142 N.C. App. 657, 544 S.E.2d 249, 2001 N.C. App. LEXIS 174 (2001); State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002); In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002); State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003); State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003); State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004); State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004); State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (2005); State v. McMillian, 169 N.C. App. 160, 609 S.E.2d 265, 2005 N.C. App. LEXIS 544 (2005); State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005); State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006); State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006); State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006); State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007); State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007); State v. Hope, 189 N.C. App. 309, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (2008); State v. Lawrence, 191 N.C. App. 422, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008); State v. Boston, 191 N.C. App. 637, 663 S.E.2d 886, 2008 N.C. App. LEXIS 1487 (2008).

Cited in State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981); State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981); State v. Bizzell, 53 N.C. App. 450, 281 S.E.2d 57 (1981); State v. Sanders, 303 N.C. 608, 281 S.E.2d 7 (1981); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); State v. Martin, 52 N.C. App. 373, 278 S.E.2d 305 (1981); State v. Rose, 53 N.C. App. 608, 281 S.E.2d 404 (1981); State v. Shaw, 53 N.C. App. 772, 281 S.E.2d 702 (1981); State v. Kinard, 54 N.C. App. 443, 283 S.E.2d 540 (1981); State v. Williams, 59 N.C. App. 15, 295 S.E.2d 493 (1982); State v. Jackson, 56 N.C. App. 607, 289 S.E.2d 631 (1982); State v. Jarvis, 56 N.C. App. 678, 290 S.E.2d 228 (1982); State v. Powell, 306 N.C. 718, 295 S.E.2d 413 (1982); State v. Cass, 55 N.C. App. 291, 285 S.E.2d 337 (1982); State v. Quilliams, 55 N.C. App. 349, 285 S.E.2d 617 (1982); State v. Brackett, 55 N.C. App. 410, 285 S.E.2d 852 (1982); State v. Hageman, 56 N.C. App. 274, 289 S.E.2d 89 (1982); State v. Loye, 56 N.C. App. 501, 289 S.E.2d 860 (1982); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983); State v. Pate, 62 N.C. App. 137, 302 S.E.2d 286 (1983); State v. Tedder, 62 N.C. App. 12, 302 S.E.2d 318 (1983); State v. Thomas, 62 N.C. App. 304, 302 S.E.2d 816 (1983); State v. Whisenant, 308 N.C. 791, 303 S.E.2d 784 (1983); State v. Rothwell, 308 N.C. 782, 303 S.E.2d 798 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984); State v. Stills, 310 N.C. 410, 312 S.E.2d 443 (1984); State v. Dula, 67 N.C. App. 748, 313 S.E.2d 899 (1984); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984); State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222 (1984); State v. Willis, 67 N.C. App. 320, 313 S.E.2d 173 (1984); State v. Wilson, 311 N.C. 117, 316 S.E.2d 46 (1984); State v. Walden, 311 N.C. 667, 319 S.E.2d 577 (1984); State v. Whitley, 311 N.C. 656, 319 S.E.2d 584 (1984); State v. Clark, 314 N.C. 638, 336 S.E.2d 83 (1985); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985); State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986); State v. Harper, 82 N.C. App. 398, 346 S.E.2d 223 (1986); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Hooper, 79 N.C. App. 93, 339 S.E.2d 70 (1986); State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986); State v. Riddick, 315 N.C. 749, 340

S.E.2d 55 (1986); State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986); State v. Woods, 316 N.C. 344, 341 S.E.2d 545 (1986); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Stevenson, 81 N.C. App. 409, 344 S.E.2d 334 (1986); State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); State v. Mason, 317 N.C. 283, 345 S.E.2d 195 (1986); State v. Mitchell, 317 N.C. 661, 346 S.E.2d 458 (1986); State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. McKoy, 317 N.C. 519, 347 S.E.2d 374 (1986); State v. Joplin, 318 N.C. 126, 347 S.E.2d 421 (1986); State v. Roberts, 82 N.C. App. 733, 348 S.E.2d 151 (1986); State v. Lilley, 318 N.C. 390, 348 S.E.2d 788 (1986); State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986); State v. Williams, 319 N.C. 73, 352 S.E.2d 428 (1987); State v. Stanton, 319 N.C. 180, 353 S.E.2d 385 (1987); State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987); State v. Payne, 320 N.C. 138, 357 S.E.2d 612 (1987); State v. Austin, 320 N.C. 276, 357 S.E.2d 641 (1987); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987); State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987); State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987); State v. McLaughlin, 321 N.C. 267, 362 S.E.2d 280 (1987); State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550 (1988); State v. Reid, 322 N.C. 309, 367 S.E.2d 672 (1988); State v. Ross, 322 N.C. 261, 367 S.E.2d 889 (1988); State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989); State v. Vaughn, 324 N.C. 301, 377 S.E.2d 738 (1989); State v. Knight, 93 N.C. App. 460, 378 S.E.2d 424 (1989); State v. Rivers, 324 N.C. 573, 380 S.E.2d 359 (1989); State v. Bridges, 325 N.C. 529, 385 S.E.2d 337 (1989); State v. Arnold, 98 N.C. App. 518, 392 S.E.2d 140 (1990); State v. Seaberry, 97 N.C. App. 203, 388 S.E.2d 184 (1990); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990); State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990); State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991); State v. Lloyd, 329 N.C. 662, 407 S.E.2d 218 (1991); State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991); State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991); State v. McPhail, 329 N.C. 636, 406 S.E.2d 591 (1991); State v. Artis, 329 N.C. 679, 406 S.E.2d 827 (1991); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); State v. Cotton, 329 N.C. 764, 407 S.E.2d 514 (1991); State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992); State v. Suddreth, 105 N.C. App. 122, 412 S.E.2d 126 (1992); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992); State v. Meyer, 330 N.C. 738, 412 S.E.2d 339 (1992); State v. Jones, 105 N.C. App. 576, 414 S.E.2d 360 (1992); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992); State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Jeffries, 333 N.C. 501, 428 S.E.2d 150 (1993); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Davis, 110 N.C. App. 272, 429 S.E.2d 403 (1993); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Smith, 112 N.C. App. 512, 436 S.E.2d 160 (1993); State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993); State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376 (1993); State v. Gish, 111 N.C. App. 165, 431 S.E.2d 856 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Sierra, 335 N.C. 753, 440 S.E.2d 791 (1994); State v. Green, 336 N.C. 142, 443 S.E.2d 14; State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994); State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (1994); State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994); State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994); State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994); State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994); State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995); State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Myers, 118 N.C. App. 452, 455 S.E.2d 492 (1995); State v. Johnson, 341 N.C. 104, 459 S.E.2d 246 (1995); State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (1995); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. Frazier, 121 N.C. App. 1, 464 S.E.2d 490 (1995); State v. Bartlett, 121 N.C. App. 521, 466 S.E.2d 302 (1996); State v. Dale, 343 N.C. 71, 468 S.E.2d 39 (1996); State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996); State v. Weaver, 123 N.C. App. 276, 473 S.E.2d 362 (1996); State v. Johnston, 344 N.C. 596, 476

S.E.2d 289 (1996); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997); State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997); State v. Evans, 346 N.C. 221, 485 S.E.2d 271 (1997); State v. Martin, 126 N.C. App. 426, 485 S.E.2d 352 (1997); State v. Tyler, 346 N.C. 187, 485 S.E.2d 599 (1997); State v. Lea, 126 N.C. App. 440, 485 S.E.2d 874 (1997); State v. Downey, 127 N.C. App. 167, 487 S.E.2d 831 (1997); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997); State v. Allen, 127 N.C. App. 182, 488 S.E.2d 294 (1997); State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997); State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997); State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997); State v. Mickey, 347 N.C. App. 508, 495 S.E.2d 669 (1998); State v. Clark, 128 N.C. App. 722, 496 S.E.2d 604 (1998); State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998); State v. Gregory, 348 N.C. 203, 499 S.E.2d 753 (1998); State v. Chance, 130 N.C. App. 107, 502 S.E.2d 22 (1998); State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998); State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Bright, 131 N.C. App. 57, 505 S.E.2d 317 (1998); State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998); State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998); State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999); State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001); State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201, 2001 N.C. App. LEXIS 138 (2001); State v. Mason, 144 N.C. App. 20, 550 S.E.2d 10, 2001 N.C. App. LEXIS 339 (2001); State v. Allen, 353 N.C. 511, 546 S.E.2d 372, 2001 N.C. LEXIS 528 (2001); State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002); State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002); State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002); State v. Taylor, 154 N.C. App. 366, 572 S.E.2d 237, 2002 N.C. App. LEXIS 1463 (2002); State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745, 2002 N.C. App. LEXIS 1179 (2002); State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003); State v. Dawkins, 162 N.C. App. 231, 590 S.E.2d 324, 2004 N.C. App. LEXIS 116 (2004); State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004); State v. Morton, 166 N.C. App. 477, 601 S.E.2d 873, 2004 N.C. App. LEXIS 1739 (2004); State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005); State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005); State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006); State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522, 2006 N.C. App. LEXIS 1398 (2006); State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006); State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006); State v. Locklear, 180 N.C. App. 115, 636 S.E.2d 284, 2006 N.C. App. LEXIS 2248 (2006); State v. Polke, 361 N.C. 65, 638 S.E.2d 189, 2006 N.C. LEXIS 1297 (2006); State v. Hayes, 183 N.C. App. 602, 644 S.E.2d 655, 2007 N.C. App. LEXIS 1160 (2007); State v. Caple, 185 N.C. App. 721, 650 S.E.2d 8, 2007 N.C. App. LEXIS 1935 (2007); State v. Parker, 187 N.C. App. 131, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007); State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008); State v. Lee, 189 N.C. App. 474, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (2008); State v. Beatty, 189 N.C. App. 464, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (2008); State v. Worrell, 190 N.C. App. 387, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008); State v. Spencer, — N.C. App. —, 664 S.E.2d 601, 2008 N.C. App. LEXIS 1533 (2008); State v. Milligan, — N.C. App. —, 666 S.E.2d 183, 2008 N.C. App. LEXIS 1654 (2008).

II. PREJUDICIAL ERROR.

Test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction, not whether the appellate court is able to conclude beyond a reasonable doubt that the evidence was harmless to the rights of a defendant. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

The test under this section is whether there is a reasonable possibility that a different result would have been reached at trial had the error not been committed. State v. Brown, 101 N.C. App. 71, 398 S.E.2d 905 (1990).

In defendant's trial on a charge of first degree murder, the trial court erred by denying defendant's motion for a continuance so she could find an expert to analyze the State's expert's conclusion that there was blood splatter on defendant's clothes which suggested that defendant was present when a victim was struck, and the appellate court ordered a new trial because the State did not carry its burden of showing that the trial court's ruling was harmless beyond a reasonable doubt. State v. Barlowe, 157 N.C. App. 249, 578 S.E.2d 660, 2003 N.C. App. LEXIS 536 (2003).

In order to show prejudicial error, an appellant must show that there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988); State v. Patterson, 103 N.C. App. 195, 405 S.E.2d 200, aff'd, 332 N.C. 409, 420 S.E.2d 98 (1992).

An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed. State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991).

When Errors Relating to Constitutional Rights Prejudicial. — Where there is an alleged violation of a defendant's constitutional rights, the State has the burden of showing that the error was "harmless beyond a reasonable doubt." State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002).

Defendant was entitled to a new trial because a victim's statements, which were testified to at trial by two police officers after the victim died, were neither a cry for help nor the provision of information enabling the officer immediately to end a threatening situation, and thus the victim's statements to the officer in her home and her photo identification of defendant while at the hospital were testimonial and violated defendant's right to confrontation; because the identification of defendant as the perpetrator depended almost entirely on the victim's statements and photo identification, the error was not harmless. State v. Lewis, 361 N.C. 541, 648 S.E.2d 824, 2007 N.C. LEXIS 810 (2007).

As the evidence against defendant, which consisted of a codefendant's testimony, was not overwhelming absent the drugs found in defendant's apartment as a result of the illegal search, the constitutional error was not harmless beyond a reasonable doubt and defendant was entitled to a new trial. State v. McDougald, — N.C. App. —, 665 S.E.2d 99, 2008 N.C. App. LEXIS 1530 (2008).

When Error Not Relating to Constitutional Rights Is Prejudicial. — Errors relating to rights that do not arise under the federal Constitution are prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. State v. Freeland, 316 N.C. 13, 340 S.E.2d 35 (1986), aff'd, 321 N.C. 115, 361 S.E.2d 560 (1987); State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Presumption of Correctness. — A ruling of the trial court on an evidentiary point is presumptively correct, and counsel asserting prejudicial error must demonstrate that the particular ruling was in fact incorrect. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect. Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Errors Deemed Prejudicial Per Se. — Trial errors which are deemed prejudicial or deemed reversible per se obviate the need for a litigant to show harm to his cause. Such errors generally violate established rules or procedures in the courts and justify reversal because they are prejudicial to the administration of justice. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

Per Se Rule Not Applicable to All Violations. — Extending the reversible error per se rule to all violations of this Chapter would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of this section. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

With regard to a defendant's convictions for felonious possession of cocaine and possession of drug paraphernalia, the trial court did err by overruling the defendant's objection to and denying his motion to strike the prosecutor's question to a witness that inquired whether the witness knew that the trial court had found probable cause for the investigating officers to have searched him. However, the mere asking of the question, without more, did not result in sufficient prejudice to the defendant to necessitate a new trial since he failed to show that there was a reasonable possibility that a different result would have been reached in the absence of the trial court's error. State v. Wade, — N.C. App. —, 679 S.E.2d 484, 2009 N.C. App. LEXIS 1170 (July 21, 2009).

Error Must Affect Probable Result of Trial. — The appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and must show that a different result would have likely ensued. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

Even when it is error to deny defendant's motion for mistrial, it is incumbent upon an appellant not only to show error but also to show that the error was prejudicial to him. Where the error claimed could not have made the difference between a guilty verdict and an acquittal, no prejudice results to the defendant. State v. Carr, 61 N.C. App. 402, 301 S.E.2d 430 (1983), cert. denied, 308 N.C. 545, 304 S.E.2d 239 (1983).

An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed. State v. Smith, 87 N.C. App. 217, 360 S.E.2d 495 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 667 (1988).

To meet the burden of showing that he was prejudiced, defendant must show that, had the error in question not been committed, a different result would have been reached at the trial. Where defendant argued only that the evidence was irrelevant, and never addressed the effect of the error on her conviction, defendant failed to show that she was prejudiced by the admission of the evidence. State v. Keys, 87 N.C. App. 349, 361 S.E.2d 286 (1987).

Where trial court erred by not allowing defendant to question the complainant in the presence of the jury regarding the allegation of rape made five months earlier and subsequently withdrawn, defendant was entitled to a new trial because there was a reasonable probability that the outcome of the trial would have been different. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

Defendant was granted a new trial where the trial court failed to give a limiting instruction concerning statements from a co-defendant describing defendant's involvement in the robbery, and there was a reasonable possibility the outcome of the trial would have been different for defendant with the instruction. State v. Robinson, 136 N.C. App. 520, 524 S.E.2d 805, 2000 N.C. App. LEXIS 58 (2000).

Prejudicial errors occurs when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

G.S. 15A-903(a)(1) requires prosecutors to disclose, in written or recorded form, statements made to them by witnesses during pretrial interviews; accordingly, where the trial court erred in denying defendant's motion to compel discovery of notes of pretrial interviews that the prosecutor had with a witness, and it could not be determined whether the error prejudiced the outcome of the case under G.S. 15A-1443(a), a motion for appropriate relief was remanded for an evidentiary hearing. State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Even assuming that the trial court erred in allowing a police officer to testify as to the victim's prior statements, defendant did not establish that the error was prejudicial under G.S. 15A-1443(a) because it was entirely unlikely that the statements at issue had any serious effect on the trial's outcome as the State of North Carolina presented other evidence that the jury could have used to find defendant guilty. State v. Streeter, 191 N.C. App. 496, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (2008).

Defendant was not prejudiced, as contemplated by G.S. 15A-1443(a), by a trial court's limitation on cross examination pursuant to N.C. R. Evid. 611(b): (1) defense counsel was permitted to question a child victim about the child's relationship with the child's mother, the child's belief that the child's mother preferred the child's sisters over the child, and the child's frustration with the child's living conditions; and (2) to the extent that counsel was limited in some respects when cross-examining the child, counsel was able to elicit comparable testimony from other witnesses, defendant, and the child's mother. In light of this extensive evidence, admission of testimony about the kinds of fights the child had with the child's mother, the child's crying about having to do housework, how the child expressed the child's frustration, and the child's desire that defendant and the child's mother not marry could not have affected the verdict. State v. Cook, — N.C. App. —, 672 S.E.2d 25, 2009 N.C. App. LEXIS 112 (2009).

Joinder Held Prejudicial Error. — Joinder for trial of the defendant's possession of stolen property and financial card theft charges with the charges arising from certain home invasions was prejudicial error where the sole common denominator between the possession of stolen property charges and the charges arising out of the home invasions was that some of the evidence found in defendant's bedroom linked him to the armed robbery and the automobile break-ins, supporting the possession of stolen property and financial card theft charges, while other evidence found in the bedroom linked defendant to the home invasions and where, absent that evidence, the jury might well have reached a different verdict. State v. Perry, 142 N.C. App. 177, 541 S.E.2d 746, 2001 N.C. App. LEXIS 49 (2001).

All Circumstances Considered. — Not every impropriety on the part of the judge results in prejudicial error; whether the judge's actions amount to reversible error is a question to be considered in light of all of the circumstances. State v. Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985), rev'd on other grounds, 316 N.C. 337, 341 S.E.2d 565 (1986).

Curing of Error by Appropriate Instructions. — When incompetent or objectionable evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in the admission of the evidence is cured and, in like manner, improper argument or remarks by counsel are usually cured by appropriate instructions by the court to the jury. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

When the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Matter Must Appear of Record. — Where the matter complained of does not appear of record, appellant has failed to make the irregularity manifest and it will not be considered as a basis for prejudicial error. State v. Milby, 302

N.C. 137, 273 S.E.2d 716 (1981).

In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached. State v. Loren, 302 N.C. 607, 276 S.E.2d 365 (1981).

To warrant a new trial, defendant must show that the ruling complained of was material and prejudicial to his rights and that a different result would have likely ensued. State v. Haynes, 54 N.C. App. 186, 282 S.E.2d 830 (1981).

Not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. Where evidence has been improperly admitted would not, if excluded, have changed the result of the trial, a new trial will not be granted. State v. Galloway, 304 N.C. 485, 284 S.E.2d 509 (1981).

Defendant not entitled to new trial based on trial errors unless such errors were material and prejudicial. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

For case holding that the trial court's failure to give a requested identification charge was error, although error was not prejudicial error under subsection (a), see State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988).

Although trial court did not allow defense counsel to impeach defendant with evidence of his prior convictions, where defendant made no offer of proof as to the matter excluded, nor was the answer apparent from the context in which the question was asked of defendant, the defendant failed to carry his burden of showing prejudice and the court had no basis for concluding that a substantial right of defendant was affected. State v. Locklear, 322 N.C. 468, 368 S.E.2d 377 (1988).

And Cannot Result from Defendant's Own Conduct. — While the term "duress" may be a legal term of art, the definition of which was not readily apparent to defendant's expert witness, the expert testimony complained of was offered by defendant's own expert witness in regard to defendant's mental condition; a defendant may not complain of prejudice resulting from her own conduct. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

Where defendant argued on appeal that defendant was improperly denied the chance to present the testimony of the victim, defendant could not prove that defendant was prejudiced pursuant to G.S. 15A-1443(a), as defendant declined to reopen defendant's case and to call the victim. State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003), cert. granted, 357 N.C. 453, 586 S.E.2d 273 (2003).

Mother and father could not argue on appeal that the trial court should not have relied on videotaped interviews with the older daughter in rendering its decision that the older daughter was abused and the younger daughter was neglected, as the mother and father themselves introduced the videotapes into evidence and urged the trial court to view them; accordingly, they could not argue they were prejudiced by their own conduct in admitting the videotapes. In re Morales, 159 N.C. App. 429, 583 S.E.2d 692, 2003 N.C. App. LEXIS 1518 (2003).

Trial court committed no error when the court did not instruct the jury in defendant's murder case on the defense of imperfect self-defense given that defendant's attorney and defendant both agreed when asked that they did not want the instruction given. Based on G.S. 15A-1443(c), the defendant could not claim error when the trial court followed defendant's wish and did not give the instruction. State v. Goodwin, 190 N.C. App. 570, 661 S.E.2d 46, 2008 N.C. App. LEXIS 1020 (2008).

Burden is on the Appellant. — The burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981); State v. McKnight, 87 N.C. App. 458, 361 S.E.2d 429 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988).

On appeal the burden shifts: Once the motion to dismiss has been denied, defendant-appellant assumes the twin burdens of assuring that the record is properly made up and showing that error has occurred to his or her prejudice; if the record is deficient or silent upon a particular point, the reviewing court will presume that the trial judge acted correctly. State v. White, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

The burden is on the defendant to show prejudice. State v. Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985), rev'd on other grounds, 316 N.C. 337, 341 S.E.2d 565 (1986).

The defendant bears the additional burden, when challenging a jury instruction, to show that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given. State v. Carson, 80 N.C. App. 620, 343 S.E.2d 275 (1986).

The defendant has the burden of showing that he was prejudiced by the admission of the evidence. In order to show prejudice, defendant must meet the statutory requirements of G.S. 15A-1443(a). State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987).

When relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, a defendant has the burden of showing that the error was prejudicial. This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Defendant has the burden under this section of demonstrating that but for the erroneous admission of challenged evidence, there is a "reasonable possibility" that the jury would have reached a verdict of not guilty. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Defendant in his murder trial did not carry his burden of establishing that the exclusion of a witness's testimony prejudiced the result of his trial. The evidence was admitted through the testimony of both the defendant and his mother that the victim had shot the witness in a prior altercation, and the witness's testimony, if admitted, and regardless of any impeachment evidence, would not have been favorable to the defendant in light of the witness's testimony that he was the aggressor in the prior altercation, whereas, the defendant in his trial was contending that the victim had been the aggressor. G.S. 15A-1443(a). State v. Nance, 157 N.C. App. 434, 579 S.E.2d 456, 2003 N.C. App. LEXIS 750 (2003).

When defendant claimed his statutory right to consult with counsel was violated, after he was arrested for driving while impaired, he had the burden, under G.S. 15A-1443(a), of proving prejudice from the alleged statutory violation. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

When defendant asserted that the trial court abused its discretion by denying his motion for mistrial and committed plain error by failing to recess the jury's deliberations in his trial from 5:00 p.m. on Friday until Monday morning, he had to demonstrate, under G.S. 15A-1443(a), that he was prejudiced by these alleged errors. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

Burden is on a defendant to show that an error occurred at his criminal trial and that such error was prejudicial to him. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Improper Impeachment of Testimony by Extrinsic Evidence. — Defendant was granted a new trial on his convictions involving the sexual abuse of his grandchildren; the trial court committed prejudicial error under G.S. 15A-1443(a) by allowing the State to impeach by extrinsic evidence testimony by defendant's son and two daughters that defendant had never sexually abused them, and the error was so highly prejudicial that it likely affected the verdict, and because the evidence of prior sexual misconduct was not admissible under a hearsay exception, G.S. 8C-1, N.C. R. Crim. P. 404(b). State v. Mitchell, 169 N.C. App. 417, 610 S.E.2d 260, 2005 N.C. App. LEXIS 682 (2005).

Comments Regarding Defendant's Failure to Testify Prejudicial. — Where the evidence did not overwhelmingly show that defendant was guilty of first degree murder, the prosecutor's comments concerning defendant's failure to testify, which were not timely corrected by the trial court, required a new trial. State v. Riley, 128 N.C. App. 265, 495 S.E.2d 181 (1998).

Incorrect Instruction. — Where the first instruction given by the trial court, although in error, would not have required a new trial if the subsequent instruction was correct, but the second instruction was not correct, the defendants satisfied their burden of showing prejudicial error and were entitled to a new trial. State v. Kelly, 120 N.C. App. 821, 463 S.E.2d 812 (1995).

The trial court committed plain error by instructing the jury on statutory sexual offense instead of first degree sexual offense as charged in three indictments and, by failing to submit the proper jury instructions for the three counts of first degree (forcible) sexual offense against the defendant, effectively dismissed those charges. State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000).

When, in instructing on the offense of keeping a dwelling for the sale of controlled substances, the trial court erroneously declined to include defendant's requested language that a possession of controlled substances occurred for a required duration of time, because defendant proffered evidence that he did not possess controlled substances for the required duration of time, the error was not prejudicial because defendant admitted that he controlled the dwelling in question and that he knew marijuana was sold from it; furthermore, the jury found defendant possessed diazepam, so the trial court's instruction was substantially correct in light of the evidence, and, in light of defendant's admissions, the trial court's error in failing to define "keeping" as possession "over a duration of time" was not prejudicial. State v. Sanders, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005).

Defendant was entitled to a new trial under G.S. 15A-1443(a) because there was a reasonable possibility that a different result would have been reached at trial if the jury had been properly instructed by the trial court. State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Failure to Give Limiting Instruction. — When, at a joint trial, evidence is admitted against one defendant that is not admissible against a co-defendant, it is the duty of the trial court to give a specific limiting instruction due to the inherent danger of confusing the jury with the admission of evidence applicable only to one of multiple defendants. State v. Robinson, 136 N.C. App. 520, 524 S.E.2d 805, 2000 N.C. App. LEXIS 58 (2000).

When a trial court erroneously admitted statements from an absent witness which defendant had not had the opportunity to cross-examine, because it did not give the jury a limiting instruction directing it not to consider the statements for the truth of the matter asserted, overwhelming evidence of defendant's guilt, aside from the erroneously admitted statements, together with the testimony and two identifications by the victim, who walked and talked with defendant for about 30 minutes on a clear afternoon, rendered the erroneous admission of these statements harmless beyond a reasonable doubt, under G.S. 15A-1443(b). State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213, 2004 N.C. App. LEXIS 1167 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 866 (2004), cert. dismissed, 359 N.C. 192, 607 S.E.2d 651 (2004), cert. dismissed, — N.C. —, 631 S.E.2d 136 (2006).

Failing to Instruct on Necessary Elements of Indecent Liberties Charge. — The trial court committed plain error, and thereby effectively dismissed the indictment, by omitting to instruct the jury on the necessary elements for one of five indecent liberties charges. The State contended that since the jury had already been instructed on the other four indecent liberties charges, one of which was for the same victim, "the jury was fully and completely aware of the elements of the offense," and that the omission was "overlooked by everyone—including [the] Defendant" who failed to object at trial. State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000).

Error Held Not Cured by Instruction. — The trial court in a homicide prosecution erred in failing to include not guilty by reason of defense of another in the final mandate to the jury, and such error was not cured by discussion of the law of defense of another in the body of the charge. State v. Patterson, 50 N.C. App. 280, 272 S.E.2d 924 (1981).

Failure to Summarize Evidence. — The trial court's instructions to the jury were prejudicial where the trial court did not summarize the evidence as required by G.S. 15A-1232, but instead consistently and without exception stated the contentions of the parties, and in stating the State's contentions, included matters that were not in evidence. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Jury Instruction Regarding Defendant's Likelihood of Committing Murder Was Not Prejudicial. — Defendant was not prejudiced where defendant requested the court to instruct the jury that a person with the trait of peacefulness may be less likely to commit "the crime of first degree murder," but the court instructed that a person with the trait of "peacefulness" may be less likely to commit "the alleged crime." State v. Fowler, 159 N.C. App. 504, 583 S.E.2d 637, 2003 N.C. App. LEXIS 1511 (2003).

Exposure of Jury to Evidence of Guilt of Alleged Principals. — Exposure of the jury to strong and virtually irrebuttable evidence that the alleged principals were convicted of the same crimes charged against defendant upon the state's theory that he participated in the crimes as an aider and abettor was not harmless beyond a reasonable doubt. State v. Brown, 319 N.C. 361, 354 S.E.2d 225 (1987).

When Inquiry into Prior Convictions Is Prejudicial. — Inquiry into prior convictions which exceeds the limitations established in State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977) is reversible error. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

As prosecutor's questions on cross-examination were inquiries which went beyond the time and place of defendant's convictions and the punishment imposed, and as the case turned on credibility, defendant was prejudiced by the trial judge's order overruling defendant's objections to such questions. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

Defendant's prior conviction for selling cocaine was inadmissible under G.S. 8C-1-404(b) in defendant's prosecution for possession with intent to sell or deliver cocaine; the weight of cocaine rocks and the unpackaged state of the rocks did not make the prior conviction and the current charge similar, the events were eight years apart, and the admission was prejudicial under G.S. 15A-1443(a) when the inference afforded by the amount of drugs in defendant's possession did not outweigh the prejudice caused by the erroneous admission of his prior conviction. State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105, 2007 N.C. LEXIS 596 (2007).

Introduction of Evidence "Out of Turn". — Although the trial court committed error by allowing the State to introduce evidence of defendant's history of prior criminal activity "out of turn," the error was not prejudicial under the circumstances. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Admission of inculpatory statement made prior to administration of Miranda rights was prejudicial error since absent such evidence, the State's theory of constructive possession, rested on defendant's physical presence in a house where he did not reside and thus, the appellate court could not say that there was no reasonable possibility that the violation might have contributed to the conviction. State v. Crudup, 157 N.C. App. 657, 580 S.E.2d 21, 2003 N.C. App. LEXIS 945 (2003).

Where murder defendant's incriminating statements were products of police-

initiated interrogation without the presence of counsel, the trial court erroneously denied defendant's motion to suppress those statements, as the evidence of her guilt, other than her own confession, was less than overwhelming and, therefore, admission of her incriminating statements was not harmless beyond a reasonable doubt. State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711, cert. denied, 323 N.C. 479, 373 S.E.2d 874 (1988).

Erroneous Exclusion of Evidence of Defendant's Understanding of Miranda. — The exclusion of evidence concerning defendant's understanding of the Miranda warnings was error. As a matter of law that there was a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial. State v. Sanchez, 328 N.C. 247, 400 S.E.2d 421 (1991).

Pretrial Identification Erroneously Admitted. — The defendant was entitled to a new trial where the trial court's denial of defendant's motion to suppress the robbery victim's pretrial identification was not demonstrably harmless error; because "there [wa]s a substantial likelihood" that the victim misidentified the defendant, the admission of the pretrial identification violated his right to due process under the Constitution of the United States State v. Pinchback, 140 N.C. App. 512, 537 S.E.2d 222, 2000 N.C. App. LEXIS 1210 (2000).

Error Admitting Pretrial Statement. — State failed to meet burden of demonstrating that error in admitting defendant's pretrial statement was harmless beyond a reasonable doubt where the statement at issue contained admissions to elements of all three charged offenses. State v. Morris, 332 N.C. 600, 422 S.E.2d 578 (1992).

New trial ordered where inculpatory statements were admitted, but defendant made the statements to the detectives after invoking his right to counsel. State v. Jackson, 348 N.C. 52, 497 S.E.2d 409 (1998), cert. denied, 525 U.S. 943, 119 S. Ct. 365, 142 L. Ed. 2d 301 (1998), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

Stale Miranda Warnings. — Defendant's conviction of battered child syndrome felony murder would be reversed where his statement should have been suppressed since he was in custody, the officer initiated questioning by the word "how," and the 19-hour-old Miranda warning was stale, and, since the defendant's response bolstered his earlier incriminating statements, the State did not carry its burden under G.S. 15A-1443(b) to prove that the response was not prejudicial or harmless beyond a reasonable doubt. State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002), cert. denied, 356 N.C. 175, 569 S.E.2d 277 (2002).

It was reversible error for trial court to allow extrinsic evidence of prior inconsistent statements to impeach defense witness' testimony when that testimony concerned matters collateral to the issues in the case (what he did or did not tell his parole officer), and had that evidence not been erroneously admitted there was a reasonable possibility of a different result. See State v. Williams, 322 N.C. 452, 368 S.E.2d 624 (1988).

Improper Admission of Horizontal Gaze Nystagmus Test. — Failure to lay a proper foundation for the admission of a horizontal gaze nystagmus test was reversible error where the defendant met his burden of showing a reasonable possibility that a different outcome would have been reached at trial had the test results not been erroneously admitted. State v. Helms, 348 N.C. 578, 504 S.E.2d 293 (1998).

Erroneously Admitted Character Evidence. — Because a trial court erred in admitting, as character evidence, a murder defendant's prior violent acts towards his former girlfriend and the prosecution referred to these prior bad acts three times in his closing argument, the appeals court found that due to the incendiary nature of the evidence improperly admitted, and the emphasis placed on that evidence at trial, its admission was prejudicial error requiring a new trial pursuant to G.S. 15A-1443. State v. Dennison, 163 N.C. App. 375, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004).

Although the admission of reputation testimony violated G.S. 8C-1, Rule 404(a), the error was not prejudicial because the evidence regarding one witness's possession of a crack pipe was cumulative and there was ample evidence to convict defendant without the evidence of his brother's reputation as a dealer of drugs. State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

Defendant was prejudiced pursuant to G.S. 15A-1443(a) by the trial court's decision to allow the State to cross-examine defendant regarding two prior criminal charges that had been voluntarily dismissed against him, as the State sought to show that defendant had engaged in violent conduct previously with only slight provocation and that he then claimed self-defense against those charges; however, such evidence of an alleged violent propensity was specifically not allowed under N.C. R. Evid. 404(b), and there was insufficient evidence regarding the factual circumstances of the other incidents to determine whether defendant acted similarly in the charge that defendant was on trial for. State v. Goodwin, 186 N.C. App. 638, 652 S.E.2d 36, 2007 N.C. App. LEXIS 2266 (2007).

Evidence Erroneously Admitted as Substantive Evidence. — Experts statement, which intimated the cause of the alleged victim's post-traumatic stress syndrome was the sexual abuse inflicted by defendant, was erroneously admitted as substantive evidence to prove victim suffered a sexual assault by anal penetration and that defendant committed the offense. State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995).

The state could not show that the improper introduction of letter that contained the only evidence of defendant's motive to kill the victim was harmless beyond a reasonable doubt. State v. Swindler, 339 N.C. 469, 450 S.E.2d 907 (1994), overruled in part, State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998).

Denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327, cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

The erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

Even if it were inadmissible as hearsay, the testimony was harmless since there was no reasonable possibility that a different result would have been reached at trial had this statement not been admitted. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

A trial judge's rulings with respect to the scope of cross-examination will not be disturbed unless the defendant can show that the verdict was improperly influenced thereby. This rule is consistent with the requirement of subsection (a) that a defendant has the burden of showing prejudice. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

State's Cross-Examination of Defendant Held Prejudicial Error. — State's cross-examination of defendant, examination of the officer and closing argument attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that part of defendant's testimony was an after-the-fact creation; since the court could not declare beyond a reasonable doubt that there was no reasonable possibility that the prosecutor's conduct might have contributed to defendant's conviction, it was sufficiently prejudicial to warrant a new trial. State v. Shores, 155 N.C. App. 342, 573 S.E.2d 237, 2002 N.C. App. LEXIS 1597 (2002).

Erroneous Jury Instructions as to Mitigating Circumstances. — Where the trial court instructed the jury to answer each mitigating circumstance "no" if the jury did not unanimously find the circumstance by a preponderance of the evidence the instruction constituted error as a juror could have found the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs where defendant consumed two beers and smoked five marijuana cigarettes six-and-one-half hours before the murder. State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991).

Where the trial court submitted eight possible mitigating circumstances and the jury, operating under a unanimity instruction, found only one, and there was evidence to support at least some of the circumstances not found, and the State did not deny that the unanimity requirement might have affected at least one juror's vote on at least some of the seven circumstances not found and thus affected the jury's sentencing recommendation, the Supreme Court could not conclude that the McKoy error was harmless, and would order a new sentencing proceeding. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

McKoy error as to issue of whether murder was committed while the defendant was under the influence of a mental or emotional disturbance was not harmless, and because of it, defendant was entitled to be given a new capital sentencing hearing. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991), appeal dismissed, 347 N.C. 580, 502 S.E.2d 605 (1998).

Erroneous Instruction on Lesser Offense. — Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief. State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

In a prosecution for rape where defendant's sole defense was that he did not commit the act upon which the greater and lesser offenses were based, and where there was no contention that there was anything in the charge to the jury which clouded that defense, the jury's verdict finding defendant guilty of second-degree rape implicitly, but clearly, rejected his defense that he did not commit the act upon which the charges were based; therefore, the submission of the lesser-included offense was not prejudicial to defendant but to the contrary was in his favor. State v. Summitt, 301 N.C. 591, 273 S.E.2d 425, cert. denied, 451 U.S. 970, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981).

Erroneous Instruction on Willfulness. — Where, in a prosecution of a Nursing Director under G.S. 131E-189, for failing to perform acts required by the North Carolina Medical Care Commission, under the instructions given on the element of willfulness, a jury could have concluded that the defendant was guilty if they determined the defendant failed to act, but with a proper instruction the jury would have understood that the defendant's decisions, even if intentional, were not necessarily a violation of the law, the error required a new trial. State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

Erroneous Instructions. — Defendants were entitled to a new trial regarding kidnapping charge where instructions on second-degree kidnapping and acting in concert were unclear. State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997).

The applicable standard to determine prejudice where trial court has failed to submit a statutory mitigating circumstance supported by the evidence is whether the error is harmless beyond a reasonable doubt under subsection (b). State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Failure to Admit Exhibit Which Would Cast Doubt on State's Circumstantial Evidence. — The trial court's failure to admit the exhibit in a murder trial was error, the remaining question was whether its action was sufficiently prejudicial to warrant a new trial. Because the evidence against this defendant was entirely circumstantial and because the excluded evidence was relevant to, and cast doubt upon, such a fundamental element of the state's theory of the case it was sufficiently prejudicial to warrant a new trial. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Failure to Give Promised Jury Instruction Concerning Defendant's Failure to Testify in His Capital Murder Trial. — In a capital murder case, the trial judge committed error in failing to give a requested and subsequently promised jury instruction concerning defendant's decision not to testify during the guilt-innocence phase of the trial, and because of the historical importance of the right affected and the trial tactics employed by defendant's attorney, the trial judge's error was prejudicial to defendant's cause. State v. Ross, 322 N.C. 26, 367 S.E.2d 889 (1988).

Prejudicial Error in Instructions on Intoxication. — Where although there was little question that defendant committed a homicide, the case was relatively close on the degree of his culpability, due to both substantial evidence of defendant's intoxication at the time he committed the crime and the manner of the fatal assault and defendant's actions immediately before and after it, and the central issue for the jury in light of the evidence adduced was whether defendant should be found guilty of first or second degree murder, since this issue hinged largely on how the jury would consider the evidence of defendant's intoxication, the court was satisfied that had an error in the instructions on intoxication not been made, there was a reasonable possibility that a different result would have obtained at trial and, therefore, defendant would be awarded a new trial. State v. Mash, 323 N.C. 339, 372 S.E.2d 532 (1988).

Same — Failure to Give Jury Instruction. — Where the trial court erred in failing to instruct the jury in the burglary case regarding defendant's voluntary intoxication, defendant was entitled to a new trial under G.S. 15A-1443, because there was a reasonable probability that a different result would have occurred had the instruction been given. State v. Keitt, 153 N.C. App. 671, 571 S.E.2d 35, 2002 N.C. App. LEXIS 1248 (2002), aff'd, 357 N.C. 155, 579 S.E.2d 250 (2003).

Failure to appoint additional counsel for the defendant in a timely manner violated the mandate of this section and was prejudicial error per se. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Exclusion of Evidence Relevant to Defense. — In prosecution of defendant for committing sexual offenses upon two of her young stepsons, trial court committed reversible error in excluding evidence that defendant, her husband and the oldest stepson consulted a lawyer for the purpose of bringing an action for custody of the boys against their natural mother shortly before mother accused defendant of sexual offenses against them, as this evidence was relevant in tending to establish why mother might have suborned her sons' testimony. State v. Helms, 322 N.C. 315, 367 S.E.2d 644 (1988).

The trial court erroneously sustained the State's objection to the question about whether defendant felt that his life was threatened because that evidence was highly relevant to the crucial question of defendant's state of mind at the time of the shooting, his knowledge and belief of danger, and his knowledge and belief of the necessity for action in relation to his plea of self-defense, and the error was prejudicial since the excluded testimony went to the heart of defendant's self-defense claim. State v. Webster, 324 N.C. 430, 378 S.E.2d 748 (1989).

The defendant was entitled to a new trial because a different result might have been reached had the trial court not excluded relevant and admissible evidence which tended to exonerate the defendant of the murder of an elderly victim and which further showed another person as the perpetrator beyond conjecture or mere implication. State v. Israel, 353 N.C. 211, 539 S.E.2d 633, 2000 N.C. LEXIS 912 (2000).

Although the State conceded it had committed a discovery violation by failing to disclose an officer's handwritten notes until the middle of the trial, the violation was not a Brady violation; as defendant had the handwritten notes while the officer was still being cross-examined, the violation was not sufficiently material or prejudicial so as to undermine confidence in the outcome of the trial. Defendant was not entitled to a new trial. State v. Icard, 190 N.C. App. 76, 660 S.E.2d 142, 2008 N.C. App. LEXIS 866 (2008).

As the trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible as to his self-defense claim, and defendant demonstrated a reasonable possibility that, had the trial court not committed the error, the result at trial would have been different; thus, the defendant was prejudiced by the error. State v. Ledarius Montreal Banks, 191 N.C. App. 743, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

The failure to grant defendant access to exculpatory evidence contained in the county's social service records violated his constitutional rights, was prejudicial and entitled him to a new trial. State v. McGill, 141 N.C. App. 98, 539 S.E.2d 351, 2000 N.C. App. LEXIS 1284 (2000).

Error in excluding lay testimony on defendant's capacity to proceed required that verdict and judgment be vacated and further proceedings ordered; there was reasonable possibility trial court might have reached different conclusion in determining defendant's capacity to proceed where the only evidence offered suggesting defendant was competent to proceed to trial was two reports written by doctor some three and five months before hearing and the evidence of defendant's condition during the three to five months before trial was improperly excluded testimony of lay witnesses. State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989).

Offer of Proof as to Expert Testimony. — Any error resulting from the trial court's ruling, without allowing an extended offer of proof, that defendant's witness could not testify as to proper narcotics procedures so as to impeach the undercover narcotics officer, whose "buy" resulted in defendant's arrest, was harmless pursuant to this section where the defense counsel had several opportunities to describe the content of the proposed testimony. State v. Mackey, 352 N.C. 650, 535 S.E.2d 555, 2000 N.C. LEXIS 751 (2000).

Failure to Allow Relevant Evidence. — Because (1) testimony tending to show that defendant did not have the capacity to premeditate or deliberate was relevant in determining the presence or absence of an element of the offense of murder with which he was charged, (2) G.S. 8C-1, Rule 704 allows opinion testimony even though it relates to an ultimate issue, and (3) the testimony was not inadmissible under any other rule of evidence, the trial court committed prejudicial error in not allowing the testimony. State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Where defendant sought to reveal that two years ago witness had deceived a person he was investigating in an effort to obtain a confession for that crime, the evidence was probative of the witness's character for untruthfulness, was not too remote and was unfairly prejudicial; thus, the defendant was entitled to a new trial. State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1 (1997), cert. granted, 345 N.C. 756, 485 S.E.2d 299 (1997), discretionary review improvidently allowed, 347 N.C. 348, 492 S.E.2d 354 (1997).

Defendant was entitled to a new trial due to the improper exclusion of opinion testimony as to the truthfulness or untruthfulness of a victim under G.S. 8C-1-405(a) and G.S. 8C-1-608(a) as defendant was prejudiced under G.S. 15A-1443(a) since: (1) the state's case rested almost exclusively on the victim's testimony; (2) because the victim did not report the alleged rape until over two weeks after the night of the incident, and defendant admitted to having consensual sexual intercourse with the victim; and (3) the credibility of the victim was of significant probative value. State v. Valdez-Hernendez, 184 N.C. App. 344, 646 S.E.2d 579, 2007 N.C. App. LEXIS 1449 (2007).

Prejudice from Excluded Evidence Held Cured. — Even if evidence that defendant requested a polygraph exam was erroneously excluded on cross-examination of the detective, any prejudice was cured by defendant's subsequent testimony that such a request was made. State v. Cabe, 136 N.C. App. 510, 524 S.E.2d 828, 2000 N.C. App. LEXIS 53 (2000), cert. denied, 351 N.C. 475, 543 S.E.2d 496 (2000).

Error Held Prejudicial. — Based on the presentation of evidence, the state's arguments, and the jury instruction, the jury almost certainly considered, improperly, defendant's entire criminal history in determining whether the statutory mitigating circumstance of no significant history of prior criminal activity existed. This error entitled defendant to a new sentencing proceeding. State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

Where the prosecutor's closing argument included direct references to defendant's failure to testify, the trial court's failure to give a curative instruction was error requiring a new trial. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

In child sexual abuse case where the medical evidence was in conflict, testimony by doctor that was offered to show that the victim was being truthful about allegations was prejudicial. For this reason defendant was entitled to a new trial. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

In spite of the court's conclusion that the admission of the witness's testimony was error, the error was not so prejudicial as to warrant a new trial. State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

A confrontation clause violation was substantially and irreparably prejudicial where incriminating materials that had not been admitted into evidence were inadvertently published to the jury. State v. Hines, 131 N.C. App. 457, 508 S.E.2d 310 (1998).

Defendant was granted a new trial because there was a reasonable possibility that, had the improperly admitted evidence of defendant's prior conviction of common law robbery been excluded, a different result might have been reached in defendant's trial. State v. Willis, 136 N.C. App. 820, 526 S.E.2d 191, 2000 N.C. App. LEXIS 148 (2000).

In defendant's trial on a charge of felony possession of cocaine, the trial court erred by allowing a deputy clerk to testify regarding defendant's prior convictions for possession with intent to sell and deliver cocaine and sale of cocaine, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b), without requiring evidence of the underlying facts of the prior convictions to show similarities between the prior convictions and the offense charged, and given the conflicting evidence in defendant's case, the error was prejudicial. State v. Hairston, 156 N.C. App. 202, 576 S.E.2d 121 (2003).

Defendant's statutory sexual offense conviction was reversed and he was granted a new trial because the sealed portion of a department of social services file subpoenaed by defendant provided an alternative explanation for the victim's abuse; the file showed that: (1) the victim's brother had a history of violence, (2) the mother had left the victim alone with the brother, (3) the victim had lied in the past in meetings with a social worker, (4) the mother believed that she might have caused one of the victim's injuries, and (5) the mother believed that it was possible that the brother had sexually abused the victim. State v. Johnson, 165 N.C. App. 854, 599 S.E.2d 599, 2004 N.C. App. LEXIS 1518 (2004).

Erroneous exclusion of testimony from a car dealership employee who saw defendant's victim breaking car windows at the dealership, which should have been admitted during defendant's murder trial as evidence of the victim's violent character, was prejudicial under G.S. 15A-1443(a) even though defendant testified to the same incident on direct and redirect examination. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Because the arguments of defendant's counsel in mitigation did not constitute an admission of any aggravating factor, the trial court's sentencing procedure was erroneous under *Blakely*; since there was conflicting evidence as to defendant's role in the offense, as the fact that the jury could have found the heinous, atrocious, or cruel aggravator did not mean that the jury necessarily would have found it beyond a reasonable doubt, the error was not harmless beyond a reasonable doubt, and thus the matter had to be remanded for resentencing. State v. Hurt, 361 N.C. 325, 643 S.E.2d 915, 2007 N.C. LEXIS 407 (2007).

Trial court erred in admitting into evidence at the guilt stage of the trial the alleged emotional impact on others as a result of defendant's prior sexual misconduct. Defendant also showed that the error was prejudicial pursuant to G.S. 15A-1443(a) because the inflammatory nature of such evidence created a reasonable possibility that had the error not been committed a different result other than defendant being convicted might have been reached. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

State did not show harmless error pursuant to G.S. 15A-1443(b) beyond a reasonable doubt regarding trial court's denial of defendant's request for an instruction that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. That offense had an element of knowledge and, thus, defendant was entitled to (1) present a defense of mistake of fact and (2) have the jury instructed on that defense. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Trial court's failure to give an agreed upon modified jury instruction was prejudicial because the trial court's error resolved a disputed issue of fact for the jury when it identified the shooter as an accomplice, not an "alleged accomplice," and thus, necessitated a new trial. State v. Castaneda, — N.C. App. —, 674 S.E.2d 707, 2009 N.C. App. LEXIS 367 (2009).

Court of appeals did not err in ordering a new trial for defendant, who was convicted of damaging a computer system at her workplace in violation of N.C. Gen. Stat. 14-455 after being fired from her position, because the trial court's refusal to instruct the jury on the element of willfulness was prejudicial error when the jury could reasonably have reached a different result but for the omission; based on defendant's testimony, there was a reasonable possibility that the jury could have found that defendant believed she had her supervisor's permission to delete all of the files that she intentionally deleted and that any deletion of the files was accidental, not willful. State v. Ramos, 363 N.C. 352, 678 S.E.2d 224, 2009 N.C. LEXIS 610 (June 18, 2009).

Defendant was prejudiced by the erroneous admission of testimony regarding prior instances of domestic violence occurring more than 10 years earlier between defendant and a former girlfriend, particularly in light of the lack of physical or medical evidence of abuse against the alleged child victim and the fact that the case rested primarily upon the jury's credibility assessment of the alleged victim and defendant. State v. Ray, — N.C. App. —, 678 S.E.2d 378, 2009 N.C. App. LEXIS 1069 (July 7, 2009).

Alleged Prior Bad Acts Erroneously Admitted. — Where defendant was accused of sexually abusing his 14-year-old adopted daughter, the trial court erred in admitting testimony of alleged prior bad acts committed by defendant; namely, defendant's alleged frequent nudity, his alleged frequent fondling of himself, and an adulterous affair in which he was allegedly involved, as under the circumstances of this case, the admission of such evidence was highly prejudicial and of questionable relevance. State v. Maxwell, 96 N.C. App. 19, 384 S.E.2d 553, cert. denied, 326 N.C. 53, 389 S.E.2d 83 (1990).

In case charging defendant with sexual abuse of young children, where defendant's credibility was critical to her defense, erroneous admission of evidence of her prior drug use was not harmless. State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870, cert. denied, 341 N.C. 424, 461 S.E.2d 768 (1995).

Erroneous Admission of Drug Evidence. — Evidence of substantial amounts of drugs belonging to others and seized at the trailer where the defendant lived was irrelevant, prejudicial and inadmissible to show his knowledge that the substance in a van he was driving was cocaine; the defendant was not charged with any offense in connection with the drugs seized at the trailer and the circumstantial evidence presented at trial—the fact that drugs belonging to other people were discovered at the trailer defendant shared with others—was too weak to support an inference of knowledge on his part. State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52, 2000 N.C. App. LEXIS 1287 (2000).

Improper Evidence Reinforced by Jury Argument Held Prejudicial. — Questions of the district attorney and the argument to the jury as to the defendant's failure to tell the police of his defense were prejudicial errors; since there was not an eyewitness to the shooting other than the defendant, and since his defense depended on the jury's acceptance of his version of the event, the State had not demonstrated beyond a reasonable doubt that it was harmless to attack the credibility of this version by improper evidence, which improper evidence was reinforced by jury argument. State v. Hoyle, 325 N.C. 232, 382 S.E.2d 752 (1989).

Prejudicial Error from Improper Argument by Prosecution. — Defendant, who alleged an insanity defense following shootings, was entitled to a new trial because the appellate court could not say beyond a reasonable doubt that the prosecutor's argument, which was improper and prejudicial, pursuant to G.S. 15A-1230, because of misleading characterizations and improper inferences did not contribute to defendant's conviction. State v. Millsaps, 169 N.C. App. 340, 610 S.E.2d 437, 2005 N.C. App. LEXIS 617 (2005).

Erroneous Admission of Evidence Improperly Seized During Warrantless Search. — First degree murder conviction was reversed because the trial court erroneously denied defendant's motion to suppress where the officer's warrantless entry into the victim's residence was impermissible under the exigent circumstances theory advanced by the state. State v. McKinney, 174 N.C. App. 138, 619 S.E.2d 901, 2005 N.C. App. LEXIS 2307 (2005), rev'd in part, on other grounds, 361 N.C. 53, 637 S.E.2d 868 (2006).

Defendant's Absence Held Not Prejudicial. — Nothing in the record showed that defendant was prejudiced by his absence during part of the presentation of the prosecution's evidence in defendant's capital case where all proceedings took place in open court, where everything that took place was reflected in the record, and where the record showed that defense counsel were in court and participated throughout defendant's absence to protect his interests, and that the trial judge told counsel they could confer with the defendant as to the possibility of his return at any time, and where the trial judge undertook to perform his duty to assure defendant's presence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Exclusion of Expert Testimony Held Error. — Trial court's error in excluding expert testimony concerning the defendant's mental capacity was prejudicial. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Testimony on Chain of Custody Procedures by SBI Not Prejudicial. — Admission of testimony referring to the chain of custody procedures followed by the state bureau of investigation (SBI), stating that the evidence from a crime scene is transferred back to the local police department once the district attorney clears the police officer of any wrongdoing, was not prejudicial since defendant failed to show a reasonable possibility that, had the testimony not been allowed, the result would have been different; the testimony referred to all items collected for evidence and was allowed only to show the SBI's general procedure regarding evidence. State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Trial Court's Failure to Rule on Defendant's Motion to Dismiss Was Prejudicial. — Trial court's failure to rule on defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence, as required by G.S. 15A-1227(c), prejudiced defendant because the only evidence of defendant's involvement in the robbery was hearsay testimony that was admitted for impeachment, not substantive, purposes. State v. Batchelor, 190 N.C. App. 369, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

Prejudicial Error Not Shown. — Where doctor was allowed to testify about defendant's mental state at the time of the murders and gave his opinion that defendant did not form the specific intent to kill, but was not allowed to give his opinion that the defendant "snapped", defendant received a fair trial, free of prejudicial error. State v. Burgess, 345 N.C. 372, 480 S.E.2d 638 (1997).

The trial court erred, but not to reversal, in allowing the State during the murder trial to question the defendant during cross-examination in an effort to impeach his truthfulness regarding his interest in another woman, where the inquiry was brief and was terminated by a sustained objection and an instruction to disregard the question and the defendant had already testified that his wife had filed for divorce. The State should have been limited to asking defendant to acknowledge the existence of the photographs, and then asking him whether he had told his wife about them. State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 2000 N.C. App. LEXIS 1104 (2000).

The trial court did not commit prejudicial error in allowing the defendant-insurer and defendant-driver to amend their answers on the first day of trial after the plaintiff reached a settlement with another defendant-driver. Warren v. GMC, 142 N.C. App. 316, 542 S.E.2d 317, 2001 N.C. App. LEXIS 80 (2001).

Trial court did not commit error in murder trial of defendant accused of strangling two women whose bodies showed scratch marks made by a person with long fingernails, by admitting photographs of the defendant taken by the media during a pretrial hearing to demonstrate the length of defendant's fingernails at that time where defendant had since the hearing cropped his fingernails. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Murder defendant was not prejudiced by the testimony of defendant's case manager as to defendant's frustration and desire to leave a homeless shelter and that defendant was irritated and argumentative. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Defendant failed to carry his burden to show prejudice because any alleged prejudice that may have resulted from a detective's alleged conclusory testimony that defendant was guilty was rendered moot when the detective testified that other people were included in the investigation of a crime. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Where a police officer testified in part as an expert and in part as a layman, but there was no showing of his expertise concerning the original ownership of a television, and there was no indication that the officer was in a better position than was the jury to deduce the ownership of the television, the admission of the officer's testimony was error, but it was not prejudicial error, because there was no showing that a different result would have been reached if the testimony had not been admitted. State v. White, 154 N.C. App. 598, 572 S.E.2d 825, 2002 N.C. App. LEXIS 1520 (2002).

Trial court properly denied defendant's motion for a continuance pursuant to G.S. 15A-952 after defense counsel questioned defendant's competency to proceed during jury selection, as during the period between the trial court's ruling on the motion and an evaluation by a doctor which found defendant competent, the only proceedings that took place were the State's questioning and excusal of a prospective juror for cause, the excusal of another prospective juror by the trial court based on his work schedule, and the State's questioning and acceptance of one juror, and therefore the trial court's ruling on the motion to continue was not the source of any prejudice to defendant pursuant to G.S. 15A-1443. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Where defendant provided no evidence that a media member said anything to a prospective juror that would prejudice the case or that the juror responded to the media member's comment, defendant failed to show prejudice as required by G.S. 15A-1443(a). State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

When defense counsel asked the jury to find defendant guilty based on the State's failure to prove defendant guilty beyond a reasonable doubt, and the trial court, in declining to declare a mistrial, said double jeopardy might prevent the State from retrying defendant, if this statement by the trial court was error, it was not apparent, under G.S. 15A-1443(a), that if the error had not been committed, a different result would have been reached, so the trial court did not abuse its discretion by denying a mistrial. State v. Mason, 159 N.C. App. 691, 583 S.E.2d 410, 2003 N.C. App. LEXIS 1524 (2003).

Trial court did not err by allowing the State to introduce evidence that defendant was convicted of driving while impaired after he was involved in an automobile accident in 1996 to prove that he acted with malice when he drove while under the influence of alcohol and caused the death of a child in an automobile accident that occurred in 2001, and a police officer's testimony that defendant resisted arrest when he was arrested in 1996 did not prejudice defendant in his second trial to the extent that his conviction for second-degree murder had to be reversed. State v. Locklear, 159 N.C. App. 588, 583 S.E.2d 726, 2003 N.C. App. LEXIS 1535 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 394 (2004), aff'd, 359 N.C. 63, 602 S.E.2d 359 (2004).

Admission of statements made by defendant but not disclosed to defendant or his counsel by a certain time did not mandate reversal where defendant failed to show that he was unduly prejudiced by the testimony; defendant's actions in removing the victim from one place to another, without her consent, for the purpose of terrorizing her, were sufficient to establish the elements of the charged offense. State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004).

Although a trial court violated G.S. 15A-1214(f) when it deviated from the statutorily mandated jury selection process in selection of replacement jurors when the prosecutor passed less than a full panel of 12 replacement jurors to defendant on two separate occasions, defendant did not object to the deviations at trial, nor did he show that he was prejudiced by such deviation, and accordingly, he was not entitled to a new trial; defendant was required to prove that a reasonable possibility existed that, had the error not been committed, a different result would have been reached at trial, which he could not show because he did not exhaust his peremptory challenges and he therefore could not claim that he was forced to accept an undesirable juror. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Based on the overwhelming evidence of defendant's guilt, the admission of an expert witness's opinion as to whether two sisters, who were the victims of sexual abuse, had lied, was not prejudicial error, because a different result at trial was not caused in as much as the victims' testimony was consistent with statements made to parents, counselors, social workers, law enforcement officers, and the expert witness; further, the expert witness's medical examinations discovered numerous physical and emotional injuries consistent with the victims' histories, which were indicative of sexual abuse. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

In a case involving felony malicious conduct by a prisoner, evidence regarding the treatment required for spitting if it went into an open wound, eyes, or mouth, even if erroneously admitted, did not constitute a prejudicial error. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

Even assuming that videotapes from a food store were not properly admitted into evidence, reversal was not required because defendant was not prejudiced by their admission given the admittance of defendant's statement in which defendant confessed to using the victim's credit card to purchase beer and cigarettes at the food store. State v. Brooks, 178 N.C. App. 211, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

Trial court did not commit prejudicial error when it allowed the jury to review a redacted officer's report that admitted portions of defendant's statement to the officer that were testified to at trial. State v. Combs, 182 N.C. App. 365, 642 S.E.2d 491, 2007 N.C. App. LEXIS 696 (2007).

Because a sheriff had a nondelegable duty to provide medical care to inmates, defendant, who was employed by prison health services as a mental health clinician, was an agent of the sheriff as a matter of law; in a prosecution for sexual activity by a custodian, the trial court did not err in barring in limine the introduction of a contract, which according to defendant showed that he was an independent contractor and not an agent or employee of the sheriff's office, because as a matter of law defendant was acting as an agent of the sheriff when the crimes were allegedly committed. State v. Wilson, 183 N.C. App. 100, 643 S.E.2d 620, 2007 N.C. App. LEXIS 844 (2007), aff'd, 362 N.C. 162, 655 S.E.2d 359 (2008).

No prejudicial error pursuant to G.S. 15A-1443(a) existed in the trial court's change of the sentences from concurrent to consecutive after a comment by the clerk because the clerk merely gave the trial court notice as to an omission in the details of the sentence imposed, and did not change the trial judge's mind and the trial court's statement to defendant at the outset of the sentencing hearing that it planned to impose a significant sentence supported its later assertions that it was its intention to impose consecutive, not concurrent, sentences. State v. Mead, 184 N.C. App. 306, 646 S.E.2d 597, 2007 N.C. App. LEXIS 1456 (2007).

Even if defendant had not waived his claim of error based on the trial court's admission of an officers' testimony concerning his intent to spit on an officer in his trial for malicious conduct by a prisoner, G.S. 14-258.4, defendant failed to prove that, had the alleged error by the trial court not been committed, a reasonable possibility existed that a different result would have been reached at trial; the state's evidence at trial was sufficiently strong to preclude any reasonable possibility that the jury would have found differently if the trial court excluded the challenged testimony. State v. Gutierrez, 185 N.C. App. 297, 648 S.E.2d 239, 2007 N.C. App. LEXIS 1693 (2007).

Because the jury was satisfied that defendant had the requisite intent for first degree murder and rejected other possible verdicts, including involuntary manslaughter, which required no intent, defendant was not prejudiced under G.S. 15A-1443(a) by the trial court's failure to instruct on accident. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

On appeal from convictions including rape and kidnapping, the trial court did not err or abuse its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against the victim, as: (1) defendant failed to state his grounds for objection to the admission of physical evidence; (2) the evidence was relevant; (3) the prior acts evidence was properly admitted to show defendant's motive, intent or purpose, opportunity, and plan; (4) defendant failed to request a limiting instruction at the time of the admission of the receipt, and failed to request that the trial court redact the movie titles from the receipt; and (5) even assuming that defendant's general objection preserved the matter for appellate review, the record revealed that the admission of the receipt into evidence did not prejudice defendant. State v. Daniels, 189 N.C. App. 705, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

Admission of a nine-millimeter bullet, although irrelevant, did not amount to prejudicial error under G.S. 15A-1443(a), because there was no reasonable possibility that admission of the bullet contributed to defendant's conviction considering the other evidence presented. Witnesses testified that defendant was at the scene of the murder, argued with the victim before the shooting, threatened to kill the victim, and the victim identified defendant as the person who shot him. State v. Bodden, 190 N.C. App. 505, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008), review denied, appeal dismissed 336 N.C.131, 675 S.E.2d 660 (2009).

Although a trial court erred in admitting a trooper's opinion testimony that defendant was impaired at the time of the collision when the testimony was not based on the trooper's personal knowledge but was based solely upon hearsay and conjecture, defendant failed to show any reasonable possibility that the jury would have reached a different verdict had the trial court properly excluded the inadmissible opinion testimony; the record showed overwhelming evidence that defendant: (1) drank heavily before operating his vehicle, (2) caused a tractor trailer truck to run off the road, (3) almost swerved into another truck, (4) struck a vehicle parked on the shoulder of the highway, (5) told the trooper he "had two beers," and (6) tested positive for the presence of amphetamines, marijuana, and opiates in his body. State v. Cook, — N.C. App. —, 666 S.E.2d 795, 2008 N.C. App. LEXIS 1750 (2008).

Pursuant to G.S. 15A-1443(a), the admission of a photograph of the decedent and the decedent's family could not have prejudiced defendant at a murder trial, given that other evidence was heard regarding the decedent's family life. Defendant thus demonstrated no reasonable possibility that had the photographs been excluded at trial, the jury would have reached a different result. State v. Mitchell, — N.C. App. —, 671 S.E.2d 340, 2009 N.C. App. LEXIS 10 (2009).

State was properly allowed to cross-examine defendant about unrelated charges and criminal activity after defendant broached the subject during defendant's direct examination and there was not prejudice to defendant where the State's cross-examination did not go outside the scope of evidence introduced by defendant, but instead explained or rebutted defendant's testimony. State v. Cortes-Serrano, — N.C. App. —, 673 S.E.2d 756, 2009 N.C. App. LEXIS 259 (2009).

Even assuming, without deciding, that the conversation between defendant and former defense counsel was privileged and that defendant did not waive the privilege, admission of counsel's testimony regarding the conversation was not error, because defendant failed to demonstrate that defendant was prejudiced by the disclosure, where there was other evidence, including a letter detailing defendant's proposed testimony, which established defendant's guilt. State v. Watkins, — N.C. App. —, 672 S.E.2d 43, 2009 N.C. App. LEXIS 122 (2009).

While evidence of defendant's aunt's drug trafficking conviction was irrelevant to the controlled substance and firearms charges against defendant, its admission was not prejudicial where there was sufficient evidence to convict defendant based on controlled substances and firearms found in defendant's residence. State v. Cowan, — N.C. App. —, 669 S.E.2d 811, 2008 N.C. App. LEXIS 2248 (2008).

Even assuming the trial court erred in excluding evidence of alleged threats and the motivation for defendant's incriminating statements, defendant suffered no prejudice because the evidence was eventually admitted. State v. Reaves, — N.C. App. —, 676 S.E.2d 74, 2009 N.C. App. LEXIS 523 (2009).

Erroneous Admission of Response to Routine Booking Question Intended to Produce Incriminating Response. — Defendant's response to a routine booking question about his address violated Miranda, with respect to the maintaining a dwelling charge, because the officer who presented the question fully expected to produce an incriminating response. The error was not harmless because, without that evidence, it was apparent that the evidence was insufficient to support a conviction for maintaining a dwelling for the purpose of keeping or selling cocaine. State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

III. HARMLESS ERROR.

The proper standard for reversal in reviewing violations of defendant's state constitutional right to be present at his capital trial is the "harmless beyond a reasonable doubt" standard, and not the standard apparently prescribed in subsection (a) of this section. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Denial of Defendant's Right to Counsel. — Defendant was improperly forced to choose between testifying in defendant's own behalf or being represented by counsel at trial; by choosing to testify, defendant was forced to relinquish defendant's constitutional right to the assistance of counsel under the Sixth Amendment and N.C. Const., Art. I, § 23. The error was not harmless under G.S. 15A-1443(b) since the right to counsel was so basic to a fair trial that its infraction could never be treated as harmless error. State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007), cert. denied, appeal dismissed, 362 N.C. 89, 656 S.E.2d 280 (2007), review denied, 362 N.C. 89, 656 S.E.2d 280 (2007).

Test of harmless error must be applied on a case-by-case basis. State v. Atkins, 58 N.C. App. 146, 292 S.E.2d 744, cert. denied and appeal dismissed, 306 N.C. 744, 295 S.E.2d 480 (1982).

No Reasonable Possibility of Affecting Verdict. — The trial court's error during closing argument was harmless as it had no reasonable possibility of affecting the verdict. State v. Cabe, 131 N.C. App. 310, 506 S.E.2d 749 (1998).

An incorrect instruction on attempted second-degree murder was not prejudicial to the defendant where no such crime exists and the jury found defendant guilty of attempted first-degree murder; they would not have found him totally innocent had the instructions been correct. State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

The court's allowance of prosecutor's closing remark that defendant had "killed before and ... he's killed again" was not reversible error in light of the overwhelming evidence of his guilt. State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792, 2001 N.C. App. LEXIS 35 (2001), cert. dismissed, 353 N.C. 392, 548 S.E.2d 151 (2001), cert. denied and appeal dismissed, 353 N.C. 392, 548 S.E.2d 152 (2001).

Even assuming arguendo that a trial court erred in overruling defendant's objection to the admission of the co-defendant's confession, the error was harmless beyond a reasonable doubt because the evidence against defendant was overwhelming. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const. art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded based on the victim's independent identification of defendant as the perpetrator. State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005), vacated, remanded, Lewis v. North Carolina, 126 S. Ct. 2983, 165 L.Ed.2d 985 (2006) (remanded for further consideration in light of Davis v. Washington, 126 S. Ct. 226, 165 L.Ed.2d 224 (2006)).

Although a trial court violated defendant's USCS Const. Amend. 6 confrontation rights by allowing a detective to testify that a deceased victim had identified defendant as her rapist, the error was harmless since another victim was able to identify defendant after her attack. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In a rape and kidnapping case, evidence of a criminal citation issued to defendant for drugs a few days before an attack was not relevant because it did not matter whether defendant actually possessed drugs; the admission of the evidence was harmless because the state could have proven the attack at any rate due to the testimony of the victim. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In a rape and kidnapping case, evidence that defendant possessed pornographic magazines was not relevant because it did not tend to make the existence of any fact that is of consequence more or less probable since they were not shown to the victim, and they were not used to show dominion and control over a motel room; however, the error was harmless since a different outcome in the case would not have resulted due to overwhelming evidence of guilt. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

Even though three of a prosecutor's questions specifically referred to defendant's invocation of his right to an attorney during questioning, no new trial was required under G.S. 15A-1443 because the court found the error harmless in light of the overwhelming evidence of guilt presented against defendant. State v. Rashidi, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), aff'd, 360 N.C. 166, 622 S.E.2d 493 (2005).

Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const. art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded based on the victim's independent identification of defendant as the perpetrator. State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005), vacated, remanded, Lewis v. North Carolina, 126 S. Ct. 2983, 165 L.Ed.2d 985 (2006) (remanded for further consideration in light of Davis v. Washington, 126 S. Ct. 226, 165 L.Ed.2d 224 (2006)).

In a rape and kidnapping case, evidence of a criminal citation issued to defendant for drugs a few days before an attack was not relevant because it did not matter whether defendant actually possessed drugs; the admission of the evidence was harmless because the state could have proven the attack at any rate due to the testimony of the victim. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

Evidence that defendant, who shot a police officer with a shotgun, possessed a pistol was irrelevant because the pistol was not connected to the shooting in any way; the error was harmless under G.S. 15A-1443(a), however, because of the overwhelming evidence of defendant's guilt. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Even if the introduction of evidence of defendant's alleged gang membership was in error, any error was harmless because the outcome of the jury trial would have been the same had the evidence not been admitted; the state presented overwhelming evidence that defendant shot and killed his victim, defendant admitted to the shooting, and no one, including defendant, testified to seeing any type of weapon in the victim's hands at anytime during the confrontation between him and defendant. State v. Perez, 182 N.C. App. 294, 641 S.E.2d 844, 2007 N.C. App. LEXIS 582 (2007).

Although defendant's constitutional right to be present at every stage of defendant's criminal trial was violated when the trial court refused to allow defense counsel to review jury questions, the violation of that right was harmless beyond a reasonable doubt; the record revealed that the questions indicated that the jury had already agreed unanimously on second-degree murder, which was defendant's ultimate conviction, and was confused about whether their rejection of first-degree murder had to be unanimous. State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (2008).

State should not have been allowed to introduce evidence in its case-in-chief about the victim's good character merely because defense counsel forecasted during opening statements the introduction of evidence of the victim's bad character. Since defendant offered no evidence in his case-in-chief of the victim's bad character, the admission of character evidence as to the victim was in error; however, the error was harmless under G.S. 15A-1443(a) because there was sufficient evidence to refute defendant's claim that, but for the admission of the character evidence, the jury would have reached a different verdict. State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009).

Testimony offered by a detective, offering his opinion about the events depicted in two poor quality bank surveillance tapes, concluding that the video corroborated the victim's testimony that she was forced to withdraw money from an ATM against her will, was an inadmissible lay opinion testimony under G.S. 8C-1, N.C. R. Evid. 701 that invaded the province of the jury and should not have been admitted; however, the error was not prejudicial to defendant as the trial court's instruction to the jury that they were charged with evaluating the images on the videotape and were free to disagree with the detective's interpretation likely cured any impermissible reliance by the jury on the detective's statements. Further, the victim's own testimony as to what happened in the parking lot and at the bank, the knife recovered from the crime scene, and the victim's report of her rape and abduction constituted sufficient evidence to support the jury's decision, independent from the detective's testimony, and required a finding that the error was not prejudicial to defendant under G.S. 15A-1443(a). State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009).

Even if the trial court erred in not admitting evidence of the victim's character in defendant's trial for first degree murder, the error was harmless where defendant failed to demonstrate prejudice; defendant failed to show that there was a reasonable probability of a different verdict if the evidence had been admitted, as defendant was allowed to testify that the victim stated that the victim was a member of a street gang and had shot people in the past, the victim testified that whenever defendant saw the victim and a friend together one or both were armed, and defendant established that the victim was carrying a gun on the day of the shooting. State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009).

Insubstantial technical error which could not have affected the result of the trial will not be held prejudicial on appeal. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Mere technical error is not sufficient to require the granting of a new trial. The error must be so prejudicial as to affect the result. State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982).

Trial court's failure to order a transcript of sentencing hearing did not constitute prejudicial error. In the absence of an abuse of discretion, a judgment will not be disturbed because of either the sentencing procedure or procedural conduct. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

Admission of irrelevant evidence is ordinarily considered harmless error and the burden is upon appellant to show that he was prejudiced. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521, appeal dismissed, 302 N.C. 401, 279 S.E.2d 356 (1981).

The admission of irrelevant evidence is generally considered harmless error. The defendant has the burden of showing that he was prejudiced by the admission of the evidence. In order to show prejudice, the defendant must meet the statutory requirements of subsection (a) of this section. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Although evidence was not relevant to any issue in the case and had little probative value, there was no tendency to prejudice the defendant. State v. Beamer, 339 N.C. 477, 451 S.E.2d 190 (1994).

Admission of irrelevant evidence will be treated as harmless unless the defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

The admission of the gun was harmless beyond a reasonable doubt since defendant's defense to the charge of murder was self-defense, not that he was not the killer. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

The admission of the victim's Bibles into evidence, although not relevant, did not constitute error prejudicial to defendant. State v. Rose, 335 N.C. 301, 439 S.E.2d 518, cert. denied, 512 U.S. 1246, 114 S. Ct. 2770, 129 L. Ed. 2d 883 (1994), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

Incompetent evidence is harmless unless it is made to appear that the defendant was prejudiced thereby and that a different result would have likely occurred if the evidence had been excluded. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980), appeal dismissed, 301 N.C. 724, 276 S.E.2d 285 (1981).

Erroneous admission of hearsay, like erroneous admission of other evidence, is not always so prejudicial as to require a new trial. Unless such error infringes upon a criminal defendant's constitutional rights, the defendant has the burden of showing that he was prejudiced by the error and that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

The trial court's admission of a police officer's statement recounting that the defendant's wife had told him that the defendant had pulled out a patch of her hair did not constitute prejudicial error, in light of the overwhelming evidence of defendant's guilt, although the hearsay statement was collateral to the main issues in the prosecution, and should not have been admitted. State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Because there was no evidence that a conspiracy to rob a convenience store was in existence at the time statements in question were made, the trial court erred in admitting the hearsay statements as a statement by a co-conspirator under G.S. 8C-1, Rule 801(d); however, the error was harmless pursuant to G.S. 15A-1443(b) because the remaining evidence that defendant took part in the robbery was overwhelming. State v. Stephens, 175 N.C. App. 328, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006).

The admission of a dead witness's testimony as related through another witness was harmless beyond a reasonable doubt where the statement was nearly identical to a third witness's prior testimony. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Merely asking an improper question to which an objection is sustained does not automatically result in prejudice to a defendant; when the trial court sustains a defendant's objections to improper questions and instructs the jury to disregard such questions, any possible prejudice to the defendant is cured. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Prosecutor's Question as to Details of Prior Conviction. — Where defendant testified on direct examination that he had been convicted of assault, the prosecutor's question as to whether the assault involved a shooting was basically no more than an inquiry into whether the conviction was, in reality, one for a more serious offense, i.e., assault with a deadly weapon, and even if the inquiry was error, the error was not of such magnitude as to require a new trial under the test of prejudicial error contained in subsection (a). State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Erroneous Exclusion of Evidence. — No prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Although defendant failed to preserve his claim that the trial court improperly excluded evidence of his remorse during his sentencing hearing after he was convicted of committing first-degree felony murder, such exclusion, though erroneous, was found to be harmless beyond a reasonable doubt pursuant to G.S. 15A-1443(b), as there was other evidence of defendant's remorse before the jury and accordingly, the exclusion did not affect the outcome of the trial. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Trial court's ruling excluding expert's opinion as to defendant's ability to adjust to prison life was error; however, the error was harmless due to testimony on same subject by other expert. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Evidence Was Not Harmless Beyond Reasonable Doubt. — Jury's exposure to information on photograph which violated defendant's constitutional right of confrontation was not harmless beyond a reasonable doubt; unauthenticated evidence would have been inadmissible at trial as hearsay and incompetent character evidence and the evidence went to the heart of defendant's alibi defense. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Violation of Rights Held Harmless Error. — Although a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial, such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt. Thus, where any violation of the defendant's rights was de minimis and the evidence against defendant was overwhelming, the trial court's error, if any, was harmless beyond a reasonable doubt. State v. Elmore, 337 N.C. 789, 448 S.E.2d 501 (1994).

Overwhelming admissible evidence of defendant's guilt rendered the erroneous admission of evidence seized from his trash can, in violation of his Fourth Amendment rights, harmless, under G.S. 15A-1443(b). State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266, 2002 N.C. App. LEXIS 710 (2002), cert. denied, 356 N.C. 173, 569 S.E.2d 273 (2002).

While the admission into evidence of an accomplice's written statement made during his interrogation violated defendant's Sixth Amendment right to confrontation, the error was not prejudicial under G.S. 15A-1443(b) where there was overwhelming evidence that defendant and his accomplices broke into a building in the early morning hours to steal a computer. State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

Trial court's error in allowing the State to question defendant about defendant's failure to make a statement to a detective and in allowing the State to reference defendant's silence in closing argument was harmless beyond a reasonable doubt under G.S. 15A-1443(b) as the State insinuated that an innocent man would have spoken with a detective, and that defendant's failure to do so permitted an inference of guilt, which violated defendant's Fifth Amendment rights, but the State presented substantial evidence of defendant's guilt other than defendant's silence. State v. Adu, — N.C. App. —, 672 S.E.2d 84, 2009 N.C. App. LEXIS 117 (2009).

Admission of Improper Testimony Held Harmless Error. — In a prosecution for breaking and entering, attempted rape and larceny, testimony by the victim that she had a breast removed because of cancer and that since being struck by defendant she had suffered with her back and had been diagnosed as having bone cancer was irrelevant, but the admission of such testimony was not so prejudicial that a different result would have ensued had such testimony not been admitted. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

Where the evidence, including the implication of defendant's own admission, pointed overwhelmingly to his culpability in murder, any error in admitting that portion of defendant's statement in which he asserted his constitutional right to remain silent did not contribute to his conviction and was harmless beyond a reasonable doubt. State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987).

Even if the trial court erred in excluding a statement made by murder victim two weeks before his death, to the effect that he wanted to buy a gun to kill the defendant, was erroneous, defendant failed to carry his burden of showing that he was prejudiced thereby, where extensive testimony of similar import was admitted. State v. Torres, 322 N.C. 440, 368 S.E.2d 609 (1988).

Although it was error to allow prosecutor to cross-examine defendant in a murder case about a fight he was involved in at the hospital where his competency evaluation took place, the error was held harmless where the testimony portrayed defendant as the victim rather than the aggressor and tended to cast him in a favorable light, and there was no reasonable possibility that a different result would have been reached at trial absent the error. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Where improperly admitted evidence merely corroborated testimony from other witnesses, there was no reasonable possibility that the jury would have reached a different result absent the testimony. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where defendant contended the trial court erroneously admitted the witness's testimony that she was "afraid" of defendant at the time of trial and where defendant did not object at trial nor assign error on appeal to the witness's immediately preceding testimony that defendant had threatened to kill her and sell her child if she reported the crime, there was not a reasonable possibility that a different result would have been reached if the trial court had excluded the witness's statement that she was afraid of defendant at the time of trial. State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

Even if admitting evidence of murder defendant's involvement with martial arts activities and his interest in, and possession of weapons was error, it was harmless error in light of other evidence presented at trial; victim was shot three times by a .22 rifle which had to be reloaded each time before the next shot could be fired and defendant was heard to state that he wanted to "finish off" the victim after the victim had already been shot. State v. McElroy, 326 N.C. 752, 392 S.E.2d 67 (1990).

Testimony regarding defendant's failure to spend time with his sons did not tend to show that the victim was afraid of defendant or that she had no intention of reconciling with him. Rather, the evidence tended to show defendant's bad character and, as such, should not have been admitted. In light of all the evidence that was properly introduced, however, this tangential bit of evidence could not have affected the outcome of the trial. Therefore, it was not prejudicial error. State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

By asserting the testimonial privilege in response to selected questions on cross-examination, witness attempted to disclose part of the facts and withhold the rest. The trial court should have either required witness to answer the questions, or stricken all or part of his direct testimony after allowing him to assert the testimonial privilege; the failure of the trial court to strike all or part of his direct testimony was harmless error. State v. Ray, 336 N.C. 463, 444 S.E.2d 918 (1994).

Erroneous admission of hearsay evidence does not always require a new trial; the burden will be on the state to demonstrate, beyond a reasonable doubt, that the error was harmless. State v. Sisk, 123 N.C. App. 361, 473 S.E.2d 348 (1996), aff'd in part and discretionary review improvidently allowed in part, 345 N.C. 749, 483 S.E.2d 440 (1997).

Error in excluding testimony was harmless beyond a reasonable doubt. State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997).

In view of the weight of the substantive evidence against the defendant, the admission of improper testimony was harmless. State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Although it was error for the trial court to permit a licensed clinical psychologist to testify that the alleged assault by defendant was the "triggering event" of the victim's post-traumatic stress disorder since this testimony directly implicated defendant as the person who sexually assaulted her, the error was not prejudicial. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Evidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving defendant committed the offenses of indecent liberties with a child and first degree sex offense with a female child under the age of 13 and should not have been admitted by the trial court; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002), cert. denied, 356 N.C. 623, 575 S.E.2d 757 (2002).

Trial court's admission of defendant's statements without making specific findings on the issue of defendant's competence at the time he confessed was harmless error since the record indicated that the trial court specifically concluded that defendant had the mental capacity to freely, knowingly, and understandingly waive his Miranda rights. State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003), cert. denied, 357 N.C. 464, 586 S.E.2d 274 (2003), aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004).

Assuming arguendo the judge erroneously allowed testimony concerning the decedent's relationship with her family, any error was harmless because defendant failed to show a reasonable possibility a different result would have been reached absent the admission of the testimony. Three eyewitnesses and the officer investigating the accident testified, and the evidence indicated, that defendant passed two cars over a double yellow line approaching and navigating a sharp curve around which he was unable to see, which caused the death of the decedent. State v. Wade, 161 N.C. App. 686, 589 S.E.2d 379, 2003 N.C. App. LEXIS 2268 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 33 (2004).

Although the trial court erred in admitting the hearsay statements of the witness, the error was harmless under G.S. 15A-1443(b) given the presence of overwhelming evidence of premeditation required for the conviction of first-degree murder; this evidence included the fact that defendant brought the murder weapon to the residence where the murder occurred, that defendant stabbed or lacerated the victim 51 times, and that the responding police officer saw that defendant's clothes were heavily blood stained. State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Although it was error to permit the prosecutor and an officer to reference defendant's invocation of his right to counsel, the state met its burden to show that the error was harmless beyond a reasonable doubt; the state illustrated that defendant's statement regarding whether he had ever owned a gun was made prior to invoking his right, and the references at trial to defendant's invocation of rights occurred only in this context. State v. Christian, 180 N.C. App. 621, 638 S.E.2d 470, 2006 N.C. App. LEXIS 2518 (2006).

State's Failure to Disclose Expert Witness Deemed Harmless Error. — Although the State of North Carolina violated G.S. 15A-903(a)(2) by failing to provide defendant with required expert discovery reasonably before trial and the trial court abused its discretion in failing to grant defendant a continuance of the trial for that reason, the trial court's denial of defendants' motion for a continuance was harmless error under G.S. 15A-1443(b) because defendant suffered no prejudice due to the additional evidence that was against defendant. State v. Cook, 362 N.C. 285, 661 S.E.2d 874, 2008 N.C. LEXIS 494 (2008).

Introduction of evidence concerning defendant's plea bargaining and habitual offender status was not plain error where the defendant himself admitted to the actions underlying the crimes for which he was convicted, then introduced evidence of his plea discussions to support his contention that he did not consider himself guilty of the crimes with which he was charged, presumably an effort to indicate his lack of criminal intent and where the court instructed the jury to disregard the habitual offender evidence. State v. Thompson, 141 N.C. App. 698, 543 S.E.2d 160, 2001 N.C. App. LEXIS 20 (2001), cert. denied, 353 N.C. 396, 548 S.E.2d 157 (2001).

Failure to Admit Testimony Held Harmless Error. — Failure to admit a statement unlikely to have affected the trial's outcome is harmless error. State v. Jordan, 130 N.C. App. 236, 502 S.E.2d 679 (1998).

Prosecution's Improper Closing Argument to Jury Held Harmless Error. — Trial court abused its discretion in allowing the state, over defendant's objection, to make arguments referencing the amount of punishment that the finding of an aggravating factor would empower a judge to impose and the effect of the merger doctrine on defendant's convictions in the closing argments, as those issues were irrelevant to the issue of a factor's presence in an offense; however, based on the overwhelming evidence that defendant was operating his vehicle at a dangerously high rate of speed while legally intoxicated, there was no reasonable possibility that, had the error in question not been committed, a different result would have been reached, and the error was therefore not prejudicial. State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (2008).

Instruction Not to Consider Evidence Held Sufficient. — In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder. Since the trial court, after the motions to strike were allowed, instructed the jury not to consider the stricken evidence and specifically referred to the evidence and the witness who provided it, there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration, and defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge. No abuse of that discretion appeared. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Although the prosecutor improperly commented on defendant's failure to produce records of his alleged dental visit during which he received an intoxicating substance, the error was harmless because the jury received a curative instruction and defendant made no showing that the jury failed to follow that instruction. State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

Inversion of Order of Proof Not Prejudicial. — In a prosecution for first-degree murder, the trial court did not err in requiring defendant to present his evidence before the State put on its evidence during a hearing on defendant's motion to suppress, and there was no merit to defendant's contention that the inversion of the order of proof resulted in a shift of the burden of proof, since the order of proof is merely a matter of practice without legal effect; there was nothing in the trial court's order denying defendant's motion to suppress to indicate that the trial judge believed otherwise; and defendant was not prejudiced by the order of proof because it resulted in his having to call one of the State's principal witnesses as his own. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Failure to Pass Full Panel Not Prejudicial. — Although the jury selection procedure violated the express requirement of G.S. 15A-1214(d) that the state pass a full panel of twelve jurors, the defendant failed to show prejudice where he was not forced to accept an undesirable juror—he did not exhaust his peremptory challenges nor request removal of the juror for cause—and, thus, could not establish any prejudice as a result of the jury selection procedure under this section. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Unanimity Requirement for Mitigating Factors at Sentencing Held Not Harmless Error. — Where, in a murder prosecution the jury failed to find unanimously several proposed mitigating circumstances supported by substantial evidence, and where some, but not all, jurors may have found credible the evidence in support of some or all of these circumstances and that the nonstatutory circumstances had mitigating value, had each juror been allowed to consider such of these circumstances as each found to exist, and the evidence supporting them, in the final weighing process, it cannot be said beyond a reasonable doubt that there would not have been a different result in the sentence. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

Trial court's instructions, in a capital sentencing proceeding, that jury unanimity was required as to any mitigating circumstances was not harmless error where evidence was substantial enough that jury might reasonably have found each of six possible mitigating circumstances; jury was not required to indicate whether it found each individual mitigating circumstances to exist, but only to indicate on the form provided that "yes," it had found "one or more" of the mitigating circumstances to exist. State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990), cert. denied, 499 U.S. 942, 111 S. Ct. 1043, 113 L. Ed. 2d 459 (1991); State v. Upchurch, 332 N.C. 439, 421 S.E.2d 577 (1992).

Failure to Admit Mitigating Circumstances Instruction. — Error by the trial court in not submitting a requested mitigating circumstances instruction as to the defendant's reputation within the community was harmless as the court submitted two mitigating circumstances instructions to the jury pertaining to the defendant's character. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Failure to Submit Mitigating Circumstance in Capital Case. — A new sentencing hearing under G.S. 15A-2000 will not be ordered for the erroneous failure to submit a mitigating circumstance if that error was harmless beyond a reasonable doubt. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983); State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

The trial court's refusal to submit to the jury the defendant's self-serving statement that "the defendant did not set out to kill [the victim] and attempted to leave the house several times before the lethal acts occurred" was harmless where it submitted the catchall mitigating circumstance and where the underlying requested circumstance was fully argued to the jury by defense counsel during closing argument. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Method of Jury Selection Not Prejudicial. — Voir dire served the dual purpose of ascertaining whether grounds existed for challenging for cause and of enabling counsel for the state and for the defendant to exercise intelligently their peremptory challenges, and any error in restricting defendant's questioning of prospective jurors was harmless error. State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995), cert. denied, 516 U.S. 1161, 116 S. Ct. 1048, 134 L. Ed. 2d 194 (1996).

Method of Jury Selection Not Prejudicial Where Defendant Failed to Object or Use His Challenges. — Though the trial court deviated from the statutorily prescribed method of jury selection under Article 72 of this Chapter, defendant failed to show that he was prejudiced because he had full opportunity to examine and challenge prospective jurors and because, when the jury was finally constituted, defendant had one peremptory challenge remaining and had exercised no challenges for cause so that the jurors selected obviously met with his approval. State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980).

A mere slip of the tongue by the judge while reading his instructions to the jury which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Trial court's failure to conduct a voir dire in order to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photographic line-up was error; however, assuming, arguendo, that the photographic line-up was impermissibly suggestive, the presence of clear and convincing evidence of the independent origin of the identification, rendered the trial court's failure to conduct a voir dire harmless. State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992).

Erroneously Admitted In-Court Identification of Defendant Held Harmless. — In a rape case where victim's in-court identification of defendant was challenged by defendant the court recognized that only in the most unusual situations would an erroneously admitted in-court identification of defendant by victim be harmless beyond a reasonable doubt. But the facts here where the victim was never able to positively identify defendant coupled with school security officer's unequivocal identification left any improperly suggestive identification procedures harmless. State v. Parker, 322 N.C. 559, 369 S.E.2d 596 (1988).

Reading Portion of Fifth Amendment Held Harmless. — The trial court did not commit reversible error in prohibiting the reading to the jury of that portion of the Fifth Amendment pertinent to the defendant's election not to testify, where in his general instructions to the jury, the judge gave an accurate and complete statement of the law applicable to defendant's election not to testify. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Where the trial court's failure to instruct on alibi did not reduce the State's burden of proof, beyond a reasonable doubt, of every element of the crimes charged, and the trial court's instructions did not violate the defendant's due process rights, the harmless error standard of subsection (a) of this section, rather than the provisions of subsection (b), applied. State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L. Ed. 2d 659 (1993).

No Error in Deputy's Testimony That Defendant Stated His Birthdate During Booking. — In prosecution for first-degree sexual offense and taking indecent liberties with children, the defendant was not prejudiced by the admission of the deputy's testimony that the defendant stated his birthdate during the booking procedure, where there was ample evidence aside from defendant's statement from which the jury could have found that defendant was at least 16 years of age at the time of the crimes; therefore, even assuming that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to G.S. 15A-910, the error was harmless. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Prosecutor's Improper Vouching for Credibility of Witness Did Not Warrant New Trial. — Defendant failed to meet the burden of showing, in the totality of the trial and closing arguments, that the jury would have reached a different result had the trial court sustained defendant's objection to the prosecutor's improper statements, wherein the prosecutor improperly vouched for the credibility of witnesses, or instructed the jury in a broader manner so as to preclude consideration of all of the improper arguments; thus, the prosecutor's improper statements were not found to be so egregious as to require a new trial. State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

Trial Court's Questioning of Witness. — Assuming a trial court erred in questioning a witness, any error was harmless because defendant failed to demonstrate prejudice, and due to the overwhelming evidence against defendant, there was no reasonable possibility that a different result would have been reached if the trial court had not questioned the witness. State v. Young, — N.C. App. —, 671 S.E.2d 372, 2009 N.C. App. LEXIS 57 (2009).

No Error Where Defendant Failed to Show Prejudice. — Where the jury was selected from citizens of another county, the trial court quite frequently admonished the jury against discussing the case or gaining information about it from outside sources, and defendant presented no evidence that the jury did anything other than follow the trial court's orders, he failed to show prejudice in the trial court's decision not to sequester jurors. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

In prosecution for rape, first-degree kidnapping, sexual offense, and common law robbery, the admission of the officer's testimony that the defendant had a rifle in his car when he was arrested, if error, was not prejudicial, where there was no intimation by the officer that the defendant attempted to use the rifle when he was arrested, that was used in the commission of any crime or that possession of the rifle was otherwise unlawful. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Where jury convicted defendant of murder in the first degree based on malice, premeditation and deliberation, and based on the felony murder rule, defendant's contention that the trial court's instructions to the jury on acting in concert and aiding and abetting allowed him to be convicted on theories unsupported by the evidence was rejected. Without the instructions, the jury would nevertheless have convicted defendant of first degree murder under either theory because the evidence, when viewed as a whole, was sufficient to permit the jury to infer that defendant and his brother acted together with a common purpose to commit, at least, the robbery and that the defendant aided and abetted his brother in the commission of the crime of murder in the first degree based on the felony murder rule. State v. Lane, 328 N.C. 598, 403 S.E.2d 267, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 261 (1991).

Even if the implication that defendant knowingly purchased a stolen handgun was improper argument, there being no evidence to support it, the defendant was unable to sustain the burden of showing prejudice. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

Where there was overwhelming evidence of defendant's guilt, there was not a reasonable possibility that the jury would have reached a different result if witness had not testified, thus, any error in the admission of the testimony was not prejudicial. State v. Sneeden, 336 N.C. 482, 444 S.E.2d 218 (1994).

Where prosecutor asserted that defendant was lying, although the statements constituted error, defendant failed to object, and considering all the facts and circumstances revealed in the record which showed overwhelming evidence against defendant, defendant failed to show that the error was prejudicial. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996).

In light of the evidence that was properly admitted, the defendant did not meet his burden of showing that there was a reasonable possibility that a different result would have been reached if the trial court had allowed expert witness to state his opinion of the defendant's credibility. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Defendant failed to show prejudice. State v. Wagner, 343 N.C. 250, 470 S.E.2d 33 (1996).

Testimony of what defendant's brothers said should not have been admitted because the brothers' state of mind was not relevant and could not be used to show defendant's state of mind, but the defendant failed to demonstrate that a reasonable possibility existed that, had this evidence been excluded, a different result would have been reached at trial. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

Where there was substantial evidence of defendant's guilt and there was no reasonable possibility that a different verdict would have been reached, the improper admission of testimony was not prejudicial under section (a). State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (1998).

Where defendant was incorrectly sentenced to life imprisonment, and, within a few hours, re-sentenced to life without parole based on the court's corrected interpretation of G.S. 14-17, his claim that his being misinformed of his ineligibility for parole prejudiced him by causing him to forgo presenting evidence of imperfect self-defense was without merit. State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

While the better practice would be for jurors to submit written questions to the trial court, for the court to hold a bench conference to rule on any objections outside the presence of the jury, and for the court to read jurors' questions to the witness, the trial court did not abuse its discretion in permitting the questioning of a State's witness by the jurors, especially since the jurors' questions were posed solely to clarify the potentially confusing images depicted in the crime scene photographs; defendant failed to carry his burden under G.S. 15A-1443(a) of proving that the outcome of his trial would have been different had the questioning not been permitted, particularly in the light of the other strong evidence presented as to defendant's guilt. State v. Jones, 158 N.C. App. 465, 581 S.E.2d 107 (2003).

Even if defendant was correct that a portion of his statement was admissible under G.S. 8C-1, Rule 106 in his trial for attempted first-degree rape, he failed to show that, had the statement been admitted, a different result would have been reached. State v. Owen, 159 N.C. App. 204, 582 S.E.2d 689, 2003 N.C. App. LEXIS 1443 (2003).

Even if the trial court's admission of evidence concerning defendant's refusal to have children, her sexual promiscuity and affairs, her alternative lifestyle, her belief in the Wiccan religion, and her ability to manipulate others was error, the error was not prejudicial to defendant, as the admissibility of the fact that defendant had sexual relations with others made it improbable that the outcome of the trial would have been different had that bit of embellishment not been admitted. State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007).

Defendant failed to show that he was prejudiced under G.S. 15A-1443(a) by the exclusion of the testimony of two witnesses, who would have stated that certain power tools and extension cords were given or lent to him, in his prosecution for, inter alia, felonious larceny; other evidence, including that the extension cords had the victim's initials on them, was sufficient to convict. State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008).

Any error in submitting kidnapping charges to the jury was harmless in light of the robbery conviction also submitted, and because there was no reasonable possibility the sentencing recommendation would have differed since the jury also found the G.S. 15A-2000(e)(5) and (9) aggravators. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Failure to Give Limiting Instruction. — Given the overwhelming evidence of defendant's prior traffic violations, he failed to show a reasonable possibility that the absence of a limiting instruction by the trial court as to his prior assault conviction likely caused the jury to convict him of second degree murder following a traffic accident. State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002), cert. granted, 356 N.C. 170, 568 S.E.2d 852 (2002).

Insufficient Peremptory Instruction. — Although the trial court initially erred in permitting the prosecutor to comment upon the defendant's failure to call the defendant's spouse to testify at trial, the trial court later issued a peremptory instruction that the jury should disregard the argument and that the failure of the defendant to call the defendant's spouse should not be held against the defendant; despite the fact that the instruction was insufficiently detailed, the error was not prejudicial given the additional evidence concerning defendant's guilt. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Giving of Limiting Instructions Did Not Constitute Expression of Opinion by Judge. — Where, in prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant objected to co-conspirator's admissions, and the trial court gave a limiting instruction, the giving of limiting instructions did not constitute an impermissible expression of opinion by the trial court, where the defendant did not object to the instructions, nor does he contend on appeal that the instructions were incorrect, except for the contention that the instructions constituted an impermissible expression of opinion, and he did not establish a reasonable possibility that, absent the error, a different result would have been reached at trial. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Error in instructions with respect to actual or constructive possession did not entitle defendant to a new trial, because the central issue was whether defendant's use of pistol to threaten and endanger victim was close enough in time to the taking of property as to constitute one continuous transaction, and the trial court's instructions upon this point were clear and correct. State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Judge's Failure to Instruct the Jury on Misdemeanor Larceny Was Harmless Error. — In a prosecution for robbery with a dangerous weapon, if it was error for the trial court to fail to instruct the jury on misdemeanor larceny, the error was harmless beyond a reasonable doubt, under G.S. 15A-1443(b), given the overwhelming evidence of defendant's guilt; while defendant denied possessing or using a knife to accomplish the taking, he did not deny his threat of force against the victim, and the victim's testimony unequivocally showed that in a single, continuous transaction defendant stole videotapes and, in order to escape, threatened the victim with a knife after a pursuit that ended only 20 feet from the victim's store. State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663, 2003 N.C. App. LEXIS 1434 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Error in Jury Instructions Held Not Prejudicial. — Because the instructions given by the trial court contained purposes not charged in the respective indictments, the instructions were erroneous; however, upon an examination of the instructions and the record in its entirety, the appellate court determined that the defect was not a fundamental error since a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment, and the error in the instructions was not prejudicial. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Despite the trial court's erroneously informing a deadlocked jury under G.S. 15A-1235 that if they did not agree upon a verdict another jury might be called upon to try the case, and that the state and defendant had a tremendous amount of time and money invested, given the evidence, defendant was not entitled to a new trial; the error was not so fundamental under

G.S. 15A-1443 that absent the error, the jury probably would have reached a different verdict or the error constituted a miscarriage of justice. State v. Pate, 187 N.C. App. 442, 653 S.E.2d 212, 2007 N.C. App. LEXIS 2423 (2007).

Erroneous Jury Instruction Not Harmless Beyond a Reasonable Doubt. — In a second degree rape charge under G.S. 14-27.3 where the victim alleged that she said no and that defendant engaged in sexual intercourse with her while she was asleep, and defendant alleged that the victim was awake and consented to intercourse, the State and defendant presented contradictory evidence on the elements of force and against the victim's will, but the trial court impermissibly instructed the jury that two elements — force and lack of consent — were established as a matter of law if victim was found to be sleeping or similarly incapacitated; the trial court's jury instruction created a reasonable likelihood that the jury did not deliberate upon the contradictory evidence, but rather understood the trial court's instruction to mean force and lack of consent had been established. Thus, there was a reasonable likelihood the jury concluded the victim was asleep by a standard less than beyond a reasonable doubt; therefore, pursuant to G.S. 15A-1443(b), the erroneous jury instruction was not harmless beyond a reasonable doubt, and defendant was entitled to a new trial. State v. Smith, 170 N.C. App. 461, 613 S.E.2d 304, 2005 N.C. App. LEXIS 1075 (2005), aff'd, modified, 360 N.C. 341, 626 S.E.2d 258 (2006).

Limiting Defendant's Argument. — The trial court's error in denying the defendant the right to advise the jury of the possible sentences he could receive if convicted, as allowed by this section, was harmless. State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000).

It was not prejudicial error for the prosecuting attorney to argue that the medical expert was paid for testifying when there was no evidence that the medical expert had been paid anything because it is well known that physicians are paid for their work, and the fact that the medical expert might have been paid need not imply that he would not testify truthfully; therefore, the defendant did not show there was a reasonable possibility there would have been a different result if the argument had not been made. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Defendant was not prejudiced by the expert testimony of a pediatrician at defendant's trial on charges of first degree statutory rape of a female child under 13 years old, statutory sexual offense of a female child under 13 years old, and taking indecent liberties with a child; although the pediatrician had formulated her opinion in part from statements the victim made to her mother and a social worker, the victim testified at trial and the defendant had ample opportunity to cross-examine her. State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Erroneous Admission of Expert Testimony on Premeditation. — Where defendant's state of mind at the time of the killing was the central issue of the case, and without the challenged testimony of the State's expert, the only testimony going to the mens rea of first degree murder was lay opinion testimony that defendant knew right from wrong, and the contradictory testimony of three experts called by defendant regarding defendant's ability to plan or to form specific intent, the error in allowing State's expert testimony that defendant was capable of premeditating was compounded by the State's argument to the jury and was not harmless error. Accordingly, defendant was entitled to a new trial on the first degree murder charge. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Admission of Crime Scene Sketches. — Although defendant failed to request a limiting instruction at the time sketches were introduced, the trial court nevertheless gave such an instruction in its charge to the jury. Any error in admitting the sketches into evidence was harmless beyond a reasonable doubt. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Admission of Evidence of Possession of Pornography Not Prejudicial. — Evidence of defendant's possession of pornographic magazines and videos was improperly admitted as evidence of defendant's intent to engage in a sexual relationship with the victim, or as evidence of defendant's preparation, plan, knowledge or absence of mistake in defendant's trial for taking indecent liberties with a child and first degree sex offense with a female child under the age of 13; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002), cert. denied, 356 N.C. 623, 575 S.E.2d 757 (2002).

Admission of Photographs Harmless Error. — The trial court's error in a first-degree murder case in allowing the jury to be shown certain photographs of the victim's body lying in a casket was harmless beyond a reasonable doubt in view of the overwhelming evidence of defendant's guilt. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Photographs of the victim's wounds are not highly inflammatory and prejudicial where they depict only minor cuts and where without such photographs there is still sufficient evidence of each and every element of the crimes charged to support the jury's verdict. State v. Whilhite, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied and appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982), rev'd in part and aff'd in part, 308 N.C. 798, 303 S.E.2d 788 (1983).

No Error Where Photograph Admitted Did Not Lead Jury to Believe It to Be a Mug Shot. — The trial court did not abuse its discretion in allowing the officer to testify that during the course of her investigation she identified a photograph of the defendant, where it lent credence to her subsequent identification of him at trial, and a careful review of the record revealed no evidence that would have led the jury to believe that the photograph was a mug shot. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Police Documents Identifying Defendant as Murder Suspect Nonprejudicial. — Trial judge did not err by allowing jurors to see documents from the Police Department, S.B.I. and F.B.I., which identified defendant as the suspect in murder. It seems obvious that any criminal defendant standing trial before a jury is, by definition, a suspect in the case. Thus, even assuming error, defendant could not demonstrate that he suffered prejudice. State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

Exclusion of Cumulative Evidence. — Court's refusal to permit witness to testify that, based upon his personal knowledge of the State's only eyewitness, he would not believe the State's witness under oath, where immediately before that evidence was offered, that witness testified without objection that in his opinion the State's witness was a liar and that he had told him he would take a bribe to change his testimony, was not prejudicial, as the refused evidence was cumulative. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Even assuming the trial court erred by excluding medical testimony offered by defendant to show that the driver of a farm tractor involved in an accident on a public road had extensive health problems and problems with alcohol in order to raise doubts about who caused the accident, the error was not prejudicial because that testimony was cumulative to other testimony that the defendant was permitted to introduce. State v. Holland, 150 N.C. App. 457, 566 S.E.2d 90, 2002 N.C. App. LEXIS 708 (2002), cert. denied, 356 N.C. 685, 578 S.E.2d 316 (2003).

Admission of Identification with Hypnotically Refreshed Details. — Trial court's determination that witness' identification was based upon her observations the night of the murder and was related immediately to police well before hypnosis, and that it was "not tainted" by her subsequent hypnotic sessions, was uncontradicted by any evidence in the record. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

The jury had before it sufficient evidence to evaluate witness's credibility, including proof of bias, and no reasonable possibility existed that a different result would have been reached had testimony been allowed in response to other questions; hence, the error in excluding this testimony was harmless. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Admission of Hearsay Testimony Held Harmless Error. — Failure of the trial court to determine specifically that murder victim's statement to her attorney was not covered by any explicit exception to the hearsay rule was error, but the error was harmless where the evidence of defendant's guilt was overwhelming. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

The admission of testimony by the victim's mother and grandmother, over defendant's objection, that the victim had been placed "on lock-up" as a result of a back injury that prevented him from working did not prejudice the defendant, by indicating the parties' relative strengths, such that the outcome of his trial would have been different if the trial court had excluded the testimony at issue. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Even if a murder defendant's allegation that certain testimony allowed by the court constituted inadmissible hearsay was correct, the evidence was of so little probative value when compared to the overwhelming competent evidence of defendant's guilt, the testimony did not contribute evidence of defendant's guilt and thus, any error in admitting the testimony was harmless. State v. Warren, 327 N.C. 364, 395 S.E.2d 116 (1990).

In light of strong and unequivocal evidence of direct threats against a woman, made by the defendant while she was in his presence and he was armed with a firearm, there was no reasonable possibility that admitting the opinion testimony of a security guard, who testified that defendant "said something else to me that indicated to me that he was planning to shoot a woman," affected the result reached by the jury at trial. Therefore, any error in the admission of this testimony was harmless. State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993).

Defendant could not assign error to hearsay testimony which he elicited. State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996).

Although victim's hearsay statement identifying perpetrator was erroneously admitted, the error was harmless because there was sufficient undisputable evidence without the victim's hearsay statement identifying defendant as the perpetrator. State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

No Prejudice from Excluding Uncommunicated Threats Where Defen-

dant Testifed as to the Same Information. — Defendant's conviction and sentence on a charge of first-degree murder pursuant to G.S. 14-17 was upheld; defendant's argument that the trial court erred in denying his motion to dismiss for insufficient evidence pursuant to G.S. 15A-954 was waived because defendant failed to renew his motion at the close of all the evidence as required by N.C. R. App. P. 10(c)(3), the trial court properly excluded the victim's uncommunicated threats to defendant into evidence, because defendant failed to put on evidence of self-defense as was required to admit such evidence pursuant to G.S. 8C-1, Rule 803(3), and defendant did not suffer any prejudice pursuant to G.S. 15A-1443(a) because defendant testified to substantially the same evidence that was contained in the uncommunicated threat. State v. Messick, 159 N.C. App. 232, 585 S.E.2d 392, 2003 N.C. App. LEXIS 1493 (2003).

Admission of Unwarned, Inculpatory Statements. — Trial court committed error by admitting defendant's unwarned, inculpatory statement made after he had been handcuffed and placed in the back of a patrol car, but the State met its burden of demonstrating that this error was harmless beyond a reasonable doubt, under G.S. 15A-1443(b), given the overwhelming evidence against defendant. State v. Johnston, 154 N.C. App. 500, 572 S.E.2d 438, 2002 N.C. App. LEXIS 1438 (2002), appeal dismissed, 356 N.C. 687, 578 S.E.2d 320 (2003).

Admission into Evidence of Inculpatory Statement by Defendant Not Error. — Trial court did not err in admitting into evidence inculpatory statements made by defendant in response to police questioning as the police detective advised defendant of the Miranda rights, and any error present in the court's conclusion that defendant was not in custody at the time of the questioning was harmless beyond a reasonable doubt under G.S. 15A-1443. State v. Dewalt, 190 N.C. App. 158, 660 S.E.2d 111, 2008 N.C. App. LEXIS 903 (2008).

Trial court's exclusion of defendant's proposed cross-examination regarding codefendant's outstanding warrants was reasonable in view of its repetitive and cumulative effect, was harmless error beyond a reasonable doubt, and was not a violation of the North Carolina Constitution. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Harmless Error Where Defendant's Testimony Contradicted Proffered Instruction. — The trial court's failure to instruct the jury on defendant's law-abidingness and not using drugs was not prejudicial to defendant where defendant's own testimony contradicted testimony of witness that defendant was law-abiding and where there was very strong evidence of defendant's guilt. State v. Moreno, 98 N.C. App. 642, 391 S.E.2d 860 (1990).

Admission of Written Statement Contradictory Testimony. — Where the defendant argued that a witness' written statement contradicted her trial testimony and was, therefore, inadmissible as corroborative evidence, assuming arguendo that the written statement contradicted her trial testimony and was not corroborative, its admission into evidence was harmless. State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993).

Defendant failed to show that the trial court abused its discretion in granting the prosecution's pretrial motion for consolidation, where the defenses of the defendants were not antagonistic, and this was not a case in which testimony was received in evidence against one of the defendants that would not have been admissible had their trials not been consolidated. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

No Abuse of Discretion Where Burden of Proof Argument Subject to Different Interpretations. — Where the state objected to defendant's closing argument on the basis that it implied that the state bore the burden of disproving the insanity defense, but defense contended that its argument properly stated that the state bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder, it was held that the argument was reasonably subject to either interpretation, and therefore, the trial court did not abuse its discretion by sustaining the state's objection. See State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Receipt of Lesser of Two Sentences. — Upon defendant's conviction of first degree murder, he could only be sentenced to death or life imprisonment and he received a life sentence, the less severe of the permissible options; therefore he could not have been prejudiced by the failure of the trial court to grant a motion for mistrial directed only to the sentencing phase. State v. Darden, 323 N.C. 356, 372 S.E.2d 539 (1988).

Denial of Defendant's Motion to Produce Handwriting Analyses. — Although it was arguably error to deny defendant's motion to produce the results of analyses of a state's witness' handwriting, nevertheless, there was no error where defendant made no showing that the trial court's ruling affected the preparation or presentation of his defense, to his prejudice. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Harmless Error Where Jury Not Tainted By Television Broadcast. — Any error which may have been committed by the court was harmless beyond a reasonable doubt, where the court, in order to be certain that the jury was not tainted by television broadcast, examined each of the jurors and alternates in chambers with only a court reporter present. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Prosecutor's Misstatement of Testimony. — Where prosecutor misstated a witness' testimony while examining defendant, the misstatement was not harmful because the defendant denied that the witness had testified as stated by the prosecutor and denied that the witness' testimony was truthful. State v. Warren, 327 N.C. 364, 395 S.E.2d 116 (1990).

Prosecutor's Question as to Whether Defendant Prepared His Testimony. — The trial court committed no prejudicial error in allowing prosecutor to cross-examine defendant regarding whether defendant and his family discussed and planned their testimony with attorneys prior to trial. State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64, 1999 N.C. App. LEXIS 917 (1999), cert. denied, 351 N.C. 190, 541 S.E.2d 725 (1999).

Prosecutor's Questioning of Murder Defendant's Mother Held Harmless Error. — Prosecutor's questioning of capital murder defendant's mother about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions and the mother testified she was not afraid of her son. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

The trial court's exclusion of the defendant's letters to his mother was proper where the letters were cumulative and unreliable and where their exclusion was harmless beyond a reasonable doubt; the letters were unreliable in that they were written by a defendant facing a capital sentencing proceeding to a likely witness in the proceeding. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Deputy's Statements Regarding Witness Statement. — Deputy's unsolicited side comment about a witness having seen blood in defendant's bathtub did not constitute sufficient grounds for a new trial under subsection (a) of this section. State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997).

Disallowing Questions About Defendant's Background and Character. — The trial court was correct in not allowing the questions about family history and mental illness without a foundation establishing whether defendant's mental illness was hereditary; where the same or similar evidence was admitted through other witnesses, no prejudice resulted from disallowing a witness' testimony about defendant's background and character. State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995).

Admission of Defendant's Differing Statements as to His Whereabouts Held Harmless. — Although the trial record did not contain the findings required by subsection (d) of G.S. 7A-595 [see now G.S. 7B-2101(d)], admission of defendant's statement at trial was not prejudicial because it was not inculpatory. It merely gave somewhat differing versions of the defendant's whereabouts on the day in question. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Admission of Defendant's Illegally Obtained Confession Was Harmless Error. — Defendant's decision to testify in rape case was induced by the strength of the State's evidence and not by the erroneous admission of defendant's statement; therefore, the State met its burden of showing that the erroneous admission of defendant's illegally obtained confession constituted harmless error. State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (1995).

Admission of Refusal to Submit to Alcohol Tests. — The suppression of evidence of the defendant's refusal to submit to blood- and urine-alcohol tests would not have resulted in a different verdict; consequently, the admission of this evidence was not prejudicial error. State v. Davis, 142 N.C. App. 81, 542 S.E.2d 236, 2001 N.C. App. LEXIS 45 (2001), cert. denied, 353 N.C. 386, 547 S.E.2d 818 (2001).

Harmless Error Occurred Where Defendant Invited Error. — Where defense counsel elicited an in-custody statement made by defendant on cross-examination of an SBI agent and did not object to its admission at trial, the error was invited and defendant could not complain of error on appeal. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

Defendants invited error and appellate relief was unavailable where defendants' counsel did not object to the instructions the trial court delivered, and counsel did not request additional instructions even after the trial court specifically stated that the jury charge would not include any instructions on lesser included offenses; defendants foreclosed any inclination of the trial court to instruct on the lesser-included offense thereby inviting the alleged error that the trial court failed to instruct the jury on common robbery as a lesser included offense to the charge of robbery with a dangerous weapon. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Erroneously Admitted Juvenile's Confession Not Harmless Error. — When a juvenile's confession obtained outside the presence of his parent, contrary to G.S. 7B-2101(a)(2) and (b), was erroneously admitted into evidence against the juvenile, under the facts of the case the error was not harmless, under G.S. 15A-1443(a), because the juvenile's statement "it happened," made while his parent was present, was too nonspecific to allow the detailed, written confession later improperly obtained to be considered cumulative. In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

Erroneous Admission of Cocaine Not Harmless Error. — Trial court's error regarding admission of cocaine was not harmless, in the context of defendant's conviction of possession of cocaine, because if the cocaine were suppressed, there was a reasonable possibility that a different result would have been reached. State v. Barnes, 158 N.C. App. 606, 582 S.E.2d 313, 2003 N.C. App. LEXIS 1232 (2003).

Where Defense Broached Topic. — Where the jury heard testimony from a defense witness regarding defendant's suspected distribution of drugs, the State's offer of testimony regarding the sheriff's department's investigation of defendant "for the use or distribution of controlled substances," followed by a curative instruction by the trial judge, did not constitute reversible error. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Overwhelming Evidence of Defendant's Guilt. — Error in overruling defendant's objection and allowing the State to cross-examine defendant about statements was harmless where the evidence of defendant's guilt was overwhelming. State v. Shannon, 117 N.C. App. 718, 452 S.E.2d 825 (1995).

Given the overwhelming evidence of defendant's guilt and because the prosecutor's remarks were made in anticipation of contrasting biblical arguments actually made by defendant, any error was harmless beyond a reasonable doubt. State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (1996).

Although the North Carolina criminal court erred in admitting into evidence the defendant's confession made to his commanding officer, because under the circumstances the defendant, a U.S. Marine, was in a custodial interrogation and was not advised of his Miranda rights, the error was harmless beyond a reasonable doubt as the testimony was duplicative of extensive other testimony. State v. Davis, 158 N.C. App. 1, 582 S.E.2d 289, 2003 N.C. App. LEXIS 932 (2003).

Defendant's conviction for first-degree murder was upheld on appeal, despite that the trial court erring by admitting the statements of two unavailable robbery victims with regard to their statements to police after the crime, which identified and implicated defendant and three others, without affording defendant the right to confrontation, because the evidence of defendant's guilt was overwhelming, which rendered the trial court's error harmless. State v. Allen, 171 N.C. App. 71, 614 S.E.2d 361, 2005 N.C. App. LEXIS 1186 (2005), cert. dismissed, 360 N.C. 66, 621 S.E.2d 875 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

Error Held Harmless. — In light of the substantive and corroborative testimony from other witnesses, defendant did not demonstrate a reasonable possibility that a different result would have been reached absent the admission of the disputed portion of sexual abuse expert's testimony in a trial for committing indecent liberties with a child; the error was therefore harmless. State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (1993).

Where, although relevant testimony as to defendant's sanity was excluded, the defendant was able to elicit substantial evidence of a similar nature which tended to negate the defendant's capacity to understand the nature of his acts and the difference between right and wrong in relation thereto, there was not a reasonable possibility that, had the error not been committed in excluding this cumulative evidence, there would have been a different result; this was harmless error. State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993).

Even though admission of diary entry was error, there was no reasonable possibility that the admission of the diary entry affected the jury's verdict that defendant was guilty of first-degree murder. State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994).

Where defendant presented substantial expert testimony that described defendant's various mental disorders and lack of capacity to form a specific intent to kill, exclusion of defendant's statement to psychologist during defendant's treatment was not prejudicial error. State v. Kilpatrick, 343 N.C. 466, 471 S.E.2d 624 (1996).

Where the evidence of defendant's guilt was overwhelming, defendant could not show that had the witness not been permitted to describe defendant's use of his knife to skin a deer, a different result would have been reached at trial. State v. Johnston, 344 N.C. 596, 476 S.E.2d 289 (1996).

In light of the overwhelming evidence of defendant's guilt, there was no basis for concluding that a different result would have been reached if the items seized from the defendant's temporary residence had not been admitted into evidence. State v. Bruton, 344 N.C. 381, 474 S.E.2d 336 (1996).

There was no prejudice and no reasonable possibility that a different result would have been reached even if the court had granted defendant's motion to strike the identification testimony on the basis that it was vague and conjectural. State v. Roseboro, 344 N.C. 364, 474 S.E.2d 314 (1996).

Where the defendant could show no likelihood of achieving a different result, the trial court's erroneous admission of the state's evidence of prior contradictory statements by one of its witnesses under the guise of corroborating evidence was harmless. State v. Francis, 343 N.C. 436, 471 S.E.2d 348 (1996).

Owing to the overwhelming evidence of the defendant's guilt, the admission of a confession in violation of defendant's Sixth Amendment rights was harmless error. State v. Roope, 130 N.C. App. 356, 503 S.E.2d 118 (1998), cert., 349 N.C. 374, 525 S.E.2d 189 (1998).

Although it was error to admit defendant's incriminating statement that crack cocaine was in defendant's pocket because defendant was not given Miranda warnings while in custodial interrogation, the error was not prejudicial because the statement was voluntary, the cocaine was found in defendant's coat, and there was no reasonable possibility that the exclusion of the statement would have resulted in a different verdict. State v. Phelps, 156 N.C. App. 119, 575 S.E.2d 818, 2003 N.C. App. LEXIS 84 (2003), appeal dismissed, review denied, 357 N.C. 468, 587 S.E.2d 64 (2003).

In defendant's trial on charges of conspiracy to commit first degree murder, attempted first degree murder, and assault with a deadly weapon with intent to kill, the trial court did not commit reversible error by not allowing defendant to cross-examine a police officer about statements another police officer made to the officer who testified, but even assuming that the trial court's ruling was erroneous, the appellate court found that defendant did not show prejudice because the testimony was excluded. State v. Lynn, 157 N.C. App. 217, 578 S.E.2d 628, 2003 N.C. App. LEXIS 533 (2003).

Officer's testimony was not improper on the issue of constructive possession of drugs; even if the trial court erred in allowing the officer's testimony after a question by the state linking constructive possession with being "next to" the drugs, defendant had failed to show that had the alleged error not been committed, a different result would have been reached, as required by G.S. 15A-1443(a). State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006), affirmed in part, reversed in part on other grounds, and remanded, 361 N.C. 309, 644 S.E.2d 201 (2007).

Even assuming that the admission of a chemist's affidavit containing defendant's blood alcohol level from a prior DWI conviction in South Dakota was error, it was harmless beyond a reasonable doubt, and did not require reversal under G.S. 15A-1443(a), in light of other evidence of impairment relating to the DWI conviction, presented without objection. State v. Heinricy, — N.C. App. —, 645 S.E.2d 147, 2007 N.C. App. LEXIS 1166 (2007).

Admission of evidence seized pursuant to an invalid search warrant was harmless beyond a reasonable doubt because it was merely cumulative of properly admitted evidence and the other of defendant's guilty and possible motives was overwhelming. State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

Even if the trial court erred in denying suppression of ammunition and a gun box that was seized from defendant's closet upon the mistaken belief that co-occupants of the house where defendant was residing had the authority to consent to the search or that defendant consented thereto, such error was harmless under G.S. 15A-1443(b) where the evidence was merely cumulative of other evidence that was properly seized or admitted in defendant's trial. State v. Early, — N.C. App. —, 670 S.E.2d 594, 2009 N.C. App. LEXIS 49 (2009).

The participation of a bailiff in a courtroom demonstration in the role of the murder victim if error was harmless beyond a reasonable doubt in spite of the defendant's assertion that the bailiff had "constant contact" with the jury. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Failure to Include Defendant in Discussion Regarding Removal of Leg Shackles. — Even if trial judge's conversation with defendant's standby counsel, held outside defendant's presence, concerning whether or not to remove his leg shackles constituted a "stage" in the proceeding, the error in excluding the defendant was harmless beyond a reasonable doubt. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222, 1999 N.C. App. LEXIS 857 (1999), appeal dismissed, cert. denied, 351 N.C. 119, 541 S.E.2d 468 (1999).

Failure to Remove Leg Shackles. — Where State offered overwhelming evidence of malice, premeditation, and deliberation to support a first-degree murder conviction, jury would not likely have reached a different verdict if defendant had not been made to appear in shackles, and any error in allowing such appearance was harmless beyond a reasonable doubt. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222, 1999 N.C. App. LEXIS 857 (1999), appeal dismissed, cert. denied, 351 N.C. 119, 541 S.E.2d 468 (1999).

Refused to Allow Cross-Examination. — If it was error for the trial court to preclude defendant from cross-examining a prosecution witness about prior shoplifting convictions, nevertheless, as a second offense of shoplifting was a Class 2 misdemeanor, concerning which the witness could be cross-examined, defendant did not show prejudice from this error. State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

In defendant's trial for felony child abuse resulting in serious bodily injury, defendant was not entitled to a new trial based on the trial court's decision to sustain the State's objection to defendant's cross-examination of a social worker regarding the social worker's observations of the demeanor of the victim's mother, as there was no reasonable probability that the outcome would have been different if the trial court had allowed the social worker to answer defendant's question given that the jury was presented with other evidence similar to that which defendant sought to introduce through the challenged question. State v. Chapman, 154 N.C. App. 441, 572 S.E.2d 243, 2002 N.C. App. LEXIS 1467 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 898 (2003).

IV. RIGHTS UNDER FEDERAL CONSTITUTION.

The proper standard of reversal in reviewing violations under N.C. Const., Art. I, § 23 of defendant's right to be present at all stages of his capital trial is the rigorous standard prescribed for review of violations of defendant's right to be present at trial under the federal Constitution. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Defendant Precluded from Challenging Benefit Received. — Where defendant opposed joinder of third murder, and State, consequently, had no evidence available to support a statutory aggravating circumstance related to the severed case and was thereby precluded from submitting it to the jury, defendant obtained a benefit which he could not claim, on appellate review, was illegal. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Errors Affecting Constitutional Rights. — General rule that an instruction that evidence is not to be considered, accompanied by withdrawal of that evidence, cures any error in its admission is inapplicable when the error admitting the evidence is of constitutional dimension; when the error committed deprives a defendant of a constitutional right, prejudice is presumed, and the burden is on the State to prove otherwise. State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

Error Presumed Prejudicial. — Error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error committed was harmless beyond a reasonable doubt. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982); State v. Autry, 321 N.C. 392, 364 S.E.2d 341 (1988).

Defendant was granted a new trial where defendant's Sixth Amendment right to counsel was violated and the appellate court could not determine beyond a reasonable doubt that the admission of officer's testimony was harmless beyond a reasonable doubt; the error was prejudicial since the State failed to argue that the admission of defendant's statement to the officer was harmless beyond a reasonable doubt. State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002).

***Blakely* Error was Harmless.** — Trial court's *Blakely* error in finding that defendant committed the present offense while on pretrial release on another charge without submitting the question to a jury was harmless pursuant to G.S. 15A-1443(b) because defendant never disputed that he was on pretrial release when he committed the crimes, and the validity of the charges for which he was on pretrial release was irrelevant. State v. Watts, 185 N.C. App. 539, 648 S.E.2d 862, 2007 N.C. App. LEXIS 1808 (2007), cert. denied, Watts v. North Carolina, — U.S. —, 128 S. Ct. 1719, L.E.2d 525 (2008).

Overwhelming evidence of guilt may render constitutional error harmless. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

The presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt. State v. Autry, 321 N.C. 392, 364 S.E.2d 341 (1988).

Overwhelming Evidence Held to Render U.S. Const., Amend. IV Violation Harmless. — Where trial court erred in denying defendant's motion to suppress evidence obtained from warrantless seizure of his automobile, error was harmless beyond a reasonable doubt since evidence presented at voir dire showing defendant guilty of crimes charged was overwhelming, where defendant admitted in his initial meeting with police that he had been wearing a Dracula costume the night before, where victim positively and unwaveringly identified defendant both in pre-trial photographic showing and at the voir dire hearing, and where defendant confessed to crimes. State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Prejudice Presumed from Counsel's Inadequate Preparation Time. — Once the inadequacy of time for counsel to prepare is shown, prejudice from the denial of defendant's constitutional right to effective counsel is presumed under subsection (b) of this section, and the burden falls on the State to show beyond a reasonable doubt that the error was harmless. State v. Maher, 305 N.C. 544, 290 S.E.2d 694 (1982).

Trial by Jury. — The trial court's reference to the possibility of a separate sentencing jury did not violate the defendant's rights under the Eighth Amendment by diluting the responsibility of the jury, nor was it misleading, although the better practice would be for the trial court to make no mention of a different jury at the preliminary stage of the trial. State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 2001 N.C. LEXIS 265 (2001), cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

The presence of an alternate juror in the jury room during the jury's deliberations violates N.C. Const., Art. I, § 24 and G.S. 9-18 and constitutes reversible error per se. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

Reading of Search Warrant Affidavit to Jury. — The trial court committed reversible error in permitting the witness in cocaine prosecution to read the entire search warrant affidavit to the jury, because the statements and allegations contained in the affidavit were hearsay statements which deprived the accused of his rights of confrontation and cross-examination. State v. Edwards, 315 N.C. 304, 337 S.E.2d 508 (1985).

Because failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity is a violation of both our statute and the Eighth Amendment, the standard for determining prejudice is subsection (b), which provides that violation of defendant's federal constitutional rights is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt. State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).

§ 15A-1444. When defendant may appeal; certiorari.

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

(b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

(f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, ss. 8, 9; 1993, c. 538, s. 27; 1994, Ex. Sess., c. 24, s. 14(b); 1997-80, s. 4.)

OFFICIAL COMMENTARY

Subsection (a) states the familiar rule of appellate practice that appeal, as a matter of right, is available when final judgment has been entered. (Entry of judgment is defined in G.S. 15A-101, by virtue of a concurrent amendment.)

A number of cross references are included in subsections (b), (c), (d) and (f) for the purpose of pointing out as well as locating other appellate rules, trial de novo in misdemeanor cases, and the rules with regard to appeal from motions for appropriate relief.

Subsection (e) carries forward the provisions of G.S. 15-180.2, a 1973 statute, which provide(d) only discretionary review when a defendant has plead guilty or entered a plea of no contest. The exception relates to review of determinations on motions to suppress vital evidence.

As subsection (g) indicates, review by writ of certiorari is available. That discretionary review is necessarily controlled by the rules of the appellate division.

G.S. 15-179 had provided that the State may appeal in seven enumerated instances. These areas had imposed an effective limitation to appeal on matters of law. The statute here proposed is less complicated in statement and follows the federal revision (Title 18, U.S. Code, § 3731) after the case of United States v. Sisson, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970). Appeals by the State have been few in number and it is not contemplated that this provision will substantially change that situation.

Editor's Note. — Session Laws 2009-86, ss. 1 through 3, provide: "SECTION 1. The Administrative Office of the Courts shall revise the 'Transcript of Plea' form that is provided to a defendant who enters a plea of guilty or no contest to a criminal offense so that the form more clearly informs the defendant that G.S. 15A-1444 imposes limitations on the right of appeal when a defendant pleads guilty or no contest to a criminal offense with which the defendant is charged, and that also assists a judge in determining whether the defendant's plea is a product of informed choice as required by G.S. 15A-1022(b). In revising the form, the Administrative Office of the Courts shall insert to the list of items that currently appear on the form a new item that reads as follows: 'Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?'.

"SECTION 2. The Administrative Office of the Courts shall revise the 'Transcript of Plea' form that is provided to a defendant who decides to enter a plea of guilty to a criminal offense so that the form more clearly informs the defendant that under G.S. 15A-268 there may be a shorter preservation period for biological evidence when a defendant pleads guilty to a criminal offense than if the defendant had been tried and convicted by a jury for the same offense, and that also assists a judge in determining whether a defendant's plea is a product of informed choice as required by G.S. 15A-1022(b). In revising the form, the Administrative Office of the Courts shall insert to the list of items that currently appear on the form a new item that reads as follows: 'Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?'.

"SECTION 3. The Administrative Office of the Courts shall revise the form pursuant to this act by September 1, 2009, and the revised form shall be made available for pleas of guilty or no contest that are entered on or after October 1, 2009."

Legal Periodicals. — For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

This section provides the exclusive statutory authority for appeals in criminal proceedings. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

Certiorari to Review Judgment in Habeas Corpus. — By analogy, G.S. 7A-27(a), former G.S. 15-180.2 and N.C.R.A.P., Rule 21(b) were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

The Fair Sentencing Act did not allow appeal of a presumptive sentence as of right. State v. Cain, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986); State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991).

Because defendant's sentence for an attempted escape conviction was in the presumptive range, he had no direct appeal as a matter of right. State v. McDonald, 163 N.C. App. 458, 593 S.E.2d 793, 2004 N.C. App. LEXIS 510 (2004), cert. denied, 358 N.C. 548, 599 S.E.2d 910 (2004).

Appeal under subsection (a1) of this section is limited to the issue of whether the sentence entered is supported by evidence introduced at the trial and the sentencing hearing. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

When a convicted felon is given a sentence in excess of the presumptive sentence, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Where defendant was entitled to appeal as of right only in the case in which the sentence exceeds the presumptive, the court neither erred nor abused its discretion in refusing to allow him to appeal in forma pauperis in the other cases. State v. Benfield, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

The defendant was not entitled to assert, on direct appeal, error relating to his sentence, where the sentence which he received was less than the presumptive term set by former G.S. 15A-1340.4(f)(1) for second degree murder, a Class C felony. State v. Knight, 87 N.C. App. 125, 360 S.E.2d 125 (1987), cert. denied, 321 N.C. 476, 364 S.E.2d 662 (1988).

Although G.S. 15A-1444(a1) permits a defendant to appeal the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing, the scope of appellate review is confined to a consideration of those assignments of error set out in the record on appeal. N.C. R. App. P. 10(a). State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830, 2003 N.C. App. LEXIS 1767 (2003).

A defendant who has been found guilty is entitled under subsection (a1) to appellate review of the issue of whether his sentence is supported by the evidence presented at trial or during the sentencing hearing. The reviewing court must also determine whether the trial court abused its discretion in weighing the aggravating and mitigating factors. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Writ of Certiorari Limited. — While G.S. 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, the appellate court is limited to issuing a writ of certiorari in appropriate circumstances to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief, N.C. R. App. P. 21(a)(1). State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Defendant's claim of a Blakely v. Washington, 542 U.S. 296 (2004), violation was not reached as defendant was indicted on March 13, 1995, which was before the certification date of the State v. Allen, 615 S.E.2d 256 (2005), opinion, his appeal was not pending direct review, and his case was final; defendant did not appeal the trial court's acceptance of the plea agreement under which he entered his Alford pleas, the finding of aggravating and mitigating factors by the trial court, nor his sentence to 55 years of imprisonment and it was not until November 7, 2003, that defendant filed a petition for a writ of certiorari and was allowed a limited review of only those issues within his appeal of right pursuant to G.S. 15A-1444(a1) and (a2). State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343, 2006 N.C. App. LEXIS 582 (2006).

Since none of the circumstances set out in G.S. 15A-1444(e) applied to defendant's guilty plea, the court was without authority under N.C. R. App. P. 21 to issue a writ of certiorari. State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006), cert. denied, — N.C. —, 631 S.E.2d 141 (2006).

Defendant did not have a right of appeal from a judgment entered upon his guilty plea when his assertions on appeal were not issues from which defendant had an appeal of right as enumerated by G.S. 15A-1444; although G.S. 15A-1444(e) permitted a defendant to petition for a writ of certiorari, pursuant to N.C. R. App. P. 21(a)(1), the court of appeals was limited to issuing a writ of certiorari, and because defendant had not failed to take timely action, was not appealing from an interlocutory order, and was not seeking review pursuant to G.S. 15A-1422(c)(3), the court of appeals was without authority to issue a writ of certiorari. State v. Rinehart, — N.C. App. —, 673 S.E.2d 769, 2009 N.C. App. LEXIS 244 (2009).

Writ of Certiorari Available to Defendant Not Entitled to Appeal Sentence. — Pursuant to subsection (a1) of this section, a defendant who had entered a plea of guilty to a felony was not entitled to appeal as a matter of right unless his sentence exceeded the presumptive term set by former G.S. 15A-1340.4; however, he could petition for review of the issue by writ of certiorari. State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

Although defendant was not entitled to an appeal as of right after the trial court failed to follow the procedures for accepting a guilty plea, defendant was entitled to review pursuant to a writ of certiorari. State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731, 2004 N.C. App. LEXIS 297 (2004).

Although defendant had pleaded guilty to larceny, the court found that defendant was entitled to petition for a writ of certiorari for review of his assignment of error pertaining to the voluntariness of his guilty plea. State v. Carter, 167 N.C. App. 582, 605 S.E.2d 676, 2004 N.C. App. LEXIS 2338 (2004).

Petition for Certiorari Allowed. — Trial court erred in ordering defendant to surrender her nursing license when she pled guilty to possessing drug paraphernalia, when such surrender was not part of the plea agreement, and the trial court failed to inform defendant of her right to withdraw her plea, and thus failed to follow required procedure; defendant filed a petition with the appellate court for a writ of certiorari, which allowed the petition and reviewed the merits of her contentions. State v. Carriker, 180 N.C. App. 470, 637 S.E.2d 557, 2006 N.C. App. LEXIS 2385 (2006).

No Appeal of Finding of Aggravation Was Permitted As of Right. — Defendant was not entitled to appeal his sentence as of right under G.S. 15A-1444(e) where he contended that the trial court erred in finding as a non-statutory aggravating factor for sentencing that the murder he pleaded guilty to was committed with malice, premeditation and deliberation. State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Although the defendant who was stripped of her jail credit for time in home detention could not appeal under this section, the court elected to treat her appeal as a petition for writ of certiorari and granted it, pursuant to N.C. R. App., Rule 21. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

No Appeal from Interlocutory Order in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of subsection (d) of this section and the North Carolina Supreme Court's decision in State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986), the court of appeals has concluded that the statutory basis, G.S. 1-277, for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam), and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972), is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the court of appeals would decline to follow. State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, cert. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987), insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or G.S.

1-277. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Denial of defendant's motion to dismiss, which was based on double jeopardy grounds, was an interlocutory order from which no appeal would lie in absence of statutory provision. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

No Right to Appeal Transfer Decision Upon Guilty Plea. — Under G.S. 15A-1444, defendant had no right to appeal a transfer decision upon a plea of guilty because the appeal did not fall within any of the categories of appeal permitted under G.S. 15A-1444; moreover, defendant did not petition for a writ of certiorari and G.S. 7B-2603(d) did not establish an exception to G.S. 15A-1444(e). State v. Evans, 184 N.C. App. 736, 646 S.E.2d 859, 2007 N.C. App. LEXIS 1600 (2007).

No Right to Appeal from Extension Orders. — On appeal from an order revoking probation, defendant did not waive his right to appeal because he had no right to appeal the extension orders. State v. Satanek, 190 N.C. App. 653, 660 S.E.2d 623, 2008 N.C. App. LEXIS 997 (2008).

When the language of subsection (e) of this section is read conversely, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court. It follows that a defendant whose motion to withdraw his plea of guilty, made during the term and on the day following pronouncement of judgment, was denied, is entitled to appeal as a matter of right. State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1880).

No Conflict with § 7A-27(a). — There is no conflict between subsection (e) and G.S. 7A-27(a). State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Evidence offered on the hearing of a post-trial motion for appropriate relief does not relate back so as to justify a holding that the trial judge erroneously instructed the jury at trial. State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, cert. denied, 449 U.S. 960, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

No Right of Appeal From Plea Bargain Deal. — Because defendant pled guilty to a drug offense and received a lawful sentence pursuant to the exact terms of his plea bargain, he had no right to appeal from his guilty plea under G.S. 15A-1444(a1) and (a2). Moore v. Hunt, 499 F. Supp. 2d 679, 2007 U.S. Dist. LEXIS 59663 (W.D.N.C. 2007).

Defendant who entered a plea of guilty to 10 misdemeanors was not entitled to appeal as a matter of right, since none of the exceptions in G.S. 15A-979 or this section applied. State v. Noll, 88 N.C. App. 753, 364 S.E.2d 726 (1988).

Defendant's Plea Was Improperly Conditioned upon Appellate Review of Issues He Was Not Entitled to Have Reviewed. — Although defendant specifically conditioned his entire plea agreement on appellate review, defendant's right to appeal was limited to the motion to suppress evidence and did not provide for review of the other motions because they were not listed under N.C. R. App. P. 21; since defendant was entitled to the benefit of his bargain, his guilty plea was vacated and remanded, which placed defendant back in the position he was in before striking the illegal bargain to appeal issues not properly presented on appeal from his guilty plea. State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5, cert. granted, 357 N.C. 660, 589 S.E.2d 882 (2003).

Since defendant made a procedural, constitutional argument about the determination of his sentence, he did not have a statutory right to appeal the issues of whether the trial court erred by determining, without a jury, that defendant had 10 prior record level points and whether the trial court erred by failing to consider mitigating factors at the sentencing hearing. State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006), cert. denied, — N.C. —, 631 S.E.2d 141 (2006).

Motion to Withdraw Guilty Plea Was Properly Denied. — Defendant's motion to withdraw his guilty plea and petition for a writ of certiorari were denied where, inter alia: (1) defendant never asserted his legal innocence; (2) the State's evidence of premeditation was not weak; (3) there appeared to be a significant amount of time between the entry of the plea and defendant's desire to change it; (4) defendant was not denied the effective assistance of counsel; and (5) defendant was competent, within the meaning of G.S. 15A-1001(a) (2001), at the time of the entry of his plea. State v. Ager, 152 N.C. App. 577, 568 S.E.2d 328, 2002 N.C. App. LEXIS 969 (2002), appeal dismissed, 356 N.C. 616, 575 S.E.2d 29 (2002).

Habitual Felon Plea. — Although defendant could appeal the denial of defendant's motion to suppress based on misunderstandings in the plea agreement, pursuant to G.S. 15A-1444(e) and N.C. R. App. P. 21(a)(1), the appellate court lacked authority to review, either as of right or by certiorari, the denial of defendant's motion to dismiss a habitual felon indictment. State v. Smith, — N.C. App. —, 668 S.E.2d 612, 2008 N.C. App. LEXIS 2021 (2008).

Appeal Allowed on Issue of Record Level. — Defendant was permitted to appeal a trial court's alleged incorrect assessment of his prior record level upon his guilty plea. State v. Lindsay, 185 N.C. App. 314, 647 S.E.2d 473,

2007 N.C. App. LEXIS 1715 (2007).

Dismissal of Appeal. — Defendant's appeal of his conviction on 13 drug-related offenses was dismissed where defendant neither sought to withdraw his guilty plea nor to obtain any other relief by motion in the superior court. State v. Nance, 155 N.C. App. 773, 574 S.E.2d 692, 2003 N.C. App. LEXIS 21 (2003).

Where defendant entered a plea of nolo contendere under G.S. 15A-1444(a1), (a), (e), defendant was not entitled to appeal the habitual felon status determination, and the appeal of this issue was, therefore, dismissed; this matter did not deal with sentencing, and defendant did not file an unsuccessful motion to withdraw the no contest plea. State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Defendant's appeal of an order denying his motion to dismiss the charges of misdemeanor and felony habitual driving while intoxicated (DWI) was dismissed because defendant had no right to appeal pursuant to G.S. 15A-1444(e); defendant, who pled guilty to the felony habitual DWI charge after his motion to dismiss was denied, had no statutory right to appeal his conviction, and he waived appellate review of his double jeopardy argument. State v. Corbett, 191 N.C. App. 1, 661 S.E.2d 759, 2008 N.C. App. LEXIS 1132 (2008).

Appeal dismissed because defendant was not entitled to appellate review as a matter of right under subsection (a1). State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

Because defendant had no appeal as of right, and had not petitioned for a writ of certiorari, his notice of appeal was a nullity, and the appellate court had no jurisdiction. State v. Waters, 122 N.C. App. 504, 470 S.E.2d 545 (1996).

Defendant who could not have raised any of the issues enumerated in subsection (a2) had no right to appeal. State v. Hamby, 129 N.C. App. 366, 499 S.E.2d 195 (1998).

Under G.S. 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Where defendant's assignments of error related to the trial court's decision to grant a continuance and the clarity of the charging instrument, the errors were not sentencing issues pursuant to G.S. 15A-1444(a2) and defendant did not have an appeal by right or by certiorari for the entry of a plea of "no contest" to habitual driving while impaired and habitual felon status. State v. Moore, 156 N.C. App. 693, 577 S.E.2d 354, 2003 N.C. App. LEXIS 200 (2003).

Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Defendant who entered an Alford plea to taking indecent liberties with his step-child was not entitled to appeal on the grounds that the bills of information were not supported by the State's factual basis for the plea because there was evidence that the child's natural father had committed the crimes. State v. Jeffery, 167 N.C. App. 575, 605 S.E.2d 672, 2004 N.C. App. LEXIS 2331 (2004).

Defendant had no statutory right to appeal because the sentence imposed by the trial court was in the presumptive range. State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

Defendant did not have a right of appeal from a judgment entered upon his guilty plea to escape from state prison and attaining the status of an habitual felon because defendant's assertions on appeal that his freedom from double jeopardy and his right to a speedy trial were violated were not issues from which he had an appeal of right as enumerated by G.S. 15A-1444. State v. Rinehart, — N.C. App. —, 673 S.E.2d 769, 2009 N.C. App. LEXIS 244 (2009).

Where Defendant Did Not Give Timely Notice of Appeal. — Where defendant did not move to withdraw a guilty plea pursuant to G.S. 15A-1024, did not give timely notice of appeal pursuant to G.S. 15A-1444, and did not petition for writ of certiorari pursuant to G.S. 15A-1444(e) and N.C. R. App. P. 21(c), any challenge to the original judgment was waived; since defendant waived the right to appeal by consenting to an initial extension of probation under G.S. 15A-1342, the trial court was entitled to revoke defendant's probation and activate the sentence under G.S. 15A-1344(d) after a second violation of probation. State v. Rush, 158 N.C. App. 738, 582 S.E.2d 37, 2003 N.C. App. LEXIS 1255 (2003).

Defendant could not, based on *Blakely,* challenge his aggravated suspended sentences by appealing the order revoking his probation and activating the sentences because it was an impermissible collateral attack on the original judgments, from which defendant did not timely give a notice of appeal under G.S. 15A-1342(f), G.S. 15A-1444, and N.C. R. App. P. 4(a). State v. Holmes, 361 N.C. 410, 646 S.E.2d 353, 2007 N.C. LEXIS 594 (2007).

Where defendant pleaded guilty to being an habitual felon, and did not move in the trial court to withdraw his guilty plea, defendant was not entitled to an appeal of right from the trial court's ruling. State v. Young, 120 N.C. App. 456, 462 S.E.2d 683 (1995).

Since the court was not required under former § 15A-1340.4(b) to make findings of aggravating and mitigating factors to support the sentence imposed, defendant had no appeal as of right pursuant to subsection (a1). State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (1994).

When a convicted felon is given a sentence in excess of the presumptive range, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. State v. Weary, 124 N.C. App. 754, 479 S.E.2d 28 (1996).

Imposition of Judgment on Prayer for Judgment Necessary for Appeal. — Appellate court was unable to address defendant's assignments of error for armed robbery convictions because the trial court never imposed judgment on defendant's prayer for judgment. State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004).

Post-Conviction Motion for DNA Testing. — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

Claim that Sentencing Judge Biased Not Barred. — G.S. 15A-1444(a1) did not bar an appeal because defendant was not contending that his sentence was not supported by the evidence, but rather that the sentencing judge was biased. State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978); State v. Sinclair, 45 N.C. App. 586, 263 S.E.2d 811 (1980); State v. Rivard, 57 N.C. App. 672, 292 S.E.2d 174 (1982); State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658 (1982); State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982); State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Jones, 309 N.C. 214, 306 S.E.2d 451 (1983); State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); State v. Howard, 70 N.C. App. 487, 320 S.E.2d 17 (1984); State v. Dickey, 71 N.C. App. 225, 321 S.E.2d 492 (1984); State v. Johnson, 71 N.C. App. 607, 322 S.E.2d 810 (1984); State v. Ford, 71 N.C. App. 748, 323 S.E.2d 358 (1984); State v. Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985); State v. Bolinger, 320 N.C. 596, 359 S.E.2d 459 (1987); State v. Hester, 93 N.C. App. 594, 378 S.E.2d 553 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Maye, 104 N.C. App. 437, 410 S.E.2d 8 (1991); State v. O'Neal, 116 N.C. App. 390, 448 S.E.2d 306; State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999); State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002); State v. Edgerson, 164 N.C. App. 712, 596 S.E.2d 351, 2004 N.C. App. LEXIS 1013 (2004); State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006); State v. Lawrence, — N.C. App. —, 667 S.E.2d 262, 2008 N.C. App. LEXIS 1742 (2008).

Cited in State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979); State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980); State v. Fennell, 51 N.C. App. 460, 276 S.E.2d 499 (1981); Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981); State v. Gaynor, 61 N.C. App. 128, 300 S.E.2d 260 (1983); State v. Hough, 61 N.C. App. 132, 300 S.E.2d 409 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Gaynor, 61 N.C. App. 128, 300 S.E.2d 260 (1983); State v. Hough, 61 N.C. App. 132, 300 S.E.2d 409 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Miller, 64 N.C. App. 618, 307 S.E.2d 843 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Hinnant, 65 N.C. App. 130, 308 S.E.2d 732 (1983); State v. Smith, 65 N.C. App. 420, 309 S.E.2d 1 (1983); State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983); State v. Jones, 66 N.C. App. 274, 311 S.E.2d 351 (1984); State v. Thompson, 66 N.C. App. 679, 312 S.E.2d 212 (1984); State v. Coker, 312 N.C. 432, 323 S.E.2d 343 (1984); State v. Collier, 72 N.C. App. 508, 325 S.E.2d 256 (1985); State v. Williamson, 72 N.C. App. 657, 326 S.E.2d 37 (1985); State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986); State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986); State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987); State v. Parker, 319 N.C. 444, 355 S.E.2d 489 (1987); State v. Carver, 319 N.C. 665, 356 S.E.2d 349 (1987); State v. Wall, 87 N.C. App. 621, 361 S.E.2d 900 (1987); State v. Brewer, 321 N.C. 284, 362 S.E.2d 261 (1987); State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988); State v. Holden, 321

N.C. 689, 365 S.E.2d 626 (1988); State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988); State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989); State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990); State v. Absher, 329 N.C. 264, 404 S.E.2d 848 (1991); State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993); State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995); State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995); State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997); State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998); State v. Rudisill, 137 N.C. App. 379, 527 S.E.2d 727, 2000 N.C. App. LEXIS 321 (2000); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000); State v. China, 150 N.C. App. 469, 564 S.E.2d 64, 2002 N.C. App. LEXIS 580 (2002); State v. Spivey, 150 N.C. App. 189, 563 S.E.2d 12, 2002 N.C. App. LEXIS 394 (2002); State v. Dickson, 151 N.C. App. 136, 564 S.E.2d 640, 2002 N.C. App. LEXIS 654 (2002); State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002); State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002); State v. Bivens, 155 N.C. App. 645, 573 S.E.2d 259, 2002 N.C. App. LEXIS 1611 (2002); State v. Starkey, 177 N.C. App. 264, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006); State v. Hasty, 181 N.C. App. 144, 639 S.E.2d 94, 2007 N.C. App. LEXIS 33 (2007); State v. Ryder, — N.C. App. —, 674 S.E.2d 805, 2009 N.C. App. LEXIS 457 (2009).

§ 15A-1445. Appeal by the State.

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

(2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(3) When the State alleges that the sentence imposed:

a. Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;

c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

d. Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

(b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979. (1977, c. 711, s. 1; 1993, c. 538, s. 28; 1994, Ex. Sess., c. 14, s. 28.)

CASE NOTES

I. General Consideration.
II. Appealable Orders and Judgments.
III. Nonappealable Orders and Judgments.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited below were decided under former G.S. 15-179.

Right Is Statutory. — As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right. State v. Horton, 7 N.C. App. 497, 172 S.E.2d 887 (1970); State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

And May Not Be Enlarged by Court. — The right of the State to appeal is statutory, which right may not be enlarged by the superior court, and when the superior court remands a cause with provision that the State may appeal from any judgment thereafter rendered by the lower court, the provision giving the State the right to appeal is void. State v. Cox, 216 N.C. 424, 5 S.E.2d 125 (1939). See State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956); State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

Strict Construction. — Statutes authorizing an appeal by the prosecution will be strictly construed. State v. Horton, 7 N.C. App. 497, 172 S.E.2d 887 (1970); State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981); State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982).

State had no statutory right to make motion to set aside judgment on basis of newly discovered evidence. But, because the trial court could have set aside the judgment on its own authority, allowing the State's motion was harmless error. State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Proper Court for Appeal. — If the State's right to appeal arises in the district court, the appeal is to the superior court; if it arises in the superior court, the appeal is to the appellate division. State v. Greenwood, 12 N.C. App. 584, 184 S.E.2d 386 (1971), rev'd on other grounds, 280 N.C. 651, 187 S.E.2d 8 (1972).

The word "appeal" in this section includes appellate review upon writ of certiorari. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Scope of Review of Suppression Order. — On appeal by State of an order against the State suppressing evidence, the scope of appellate review is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

The defendant's failure to raise the issue of double jeopardy did not prevent the appellate court from considering the issue. State v. Vestal, 131 N.C. App. 756, 509 S.E.2d 249, 1998 N.C. App. LEXIS 1563 (1998).

Applied in State v. Whaley, 58 N.C. App. 233, 293 S.E.2d 284 (1982); State v. Holmes, 59 N.C. App. 79, 296 S.E.2d 1 (1982); State v. Baker, 65 N.C. App. 430, 310 S.E.2d 101 (1983); State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Cited in State v. Hamilton, 36 N.C. App. 538, 245 S.E.2d 91 (1978); State v. Collins, 38 N.C. App. 617, 248 S.E.2d 405 (1978); State v. Charlotte Liberty Mut. Ins. Co., 39 N.C. App. 557, 251 S.E.2d 867 (1979); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979); State v. Turner, 54 N.C. App. 631, 284 S.E.2d 142 (1981); State v. Turner, 305 N.C. 356, 289 S.E.2d 368 (1982); State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604 (1982); State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982); State v. Schneider, 60 N.C. App. 185, 298 S.E.2d 432 (1982); State v. Adams, 67 N.C. App. 116, 312 S.E.2d 498 (1984); State v. Ransom, 74 N.C. App. 716, 329 S.E.2d 673 (1985); State v. Harvey, 78 N.C. App. 235, 336 S.E.2d 857 (1985); State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986); State v. Tarantino, 83 N.C. App. 473, 350 S.E.2d 864 (1986); State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988); State v. Pakulski, 95 N.C. App. 517, 383 S.E.2d 442 (1989); State v. Monroe, 102 N.C. App. 567, 402 S.E.2d 850 (1991); State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991); State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994); State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (1994); State v. Munsey, 342 N.C. 882, 467 S.E.2d 425 (1996); State v. Judd, 128 N.C. App. 328, 494 S.E.2d 605 (1998); State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (1999); State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007); State v. McLamb, 186 N.C. App. 124, 649 S.E.2d 902, 2007 N.C. App. LEXIS 1981 (2007).

II. APPEALABLE ORDERS AND JUDGMENTS.

What Verdicts Appealable. — In a criminal prosecution where there is a plea and general verdict of not guilty, the State has no right of appeal; such verdict ends the case; but under this section the State may appeal from a judgment for defendant on a special verdict. State v. Lane, 78 N.C. 547 (1878); State v. Monger, 107 N.C. 771, 12 S.E. 250 (1890); State v. Winston, 194 N.C. 243, 139 S.E. 240 (1927).

The State has no right to appeal from a verdict of not guilty. State v. Gilbert, 30 N.C. App. 130, 226 S.E.2d 229 (1976).

Appeal from Dismissal Without Prejudice. — A dismissal without prejudice under former G.S. 15A-703 does not bar further prosecution by the State. It does not finally dispose of the case or charge against defendant, and therefore, it is not appealable. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

The State must petition for writ of certiorari in order to seek appellate review of dismissal of criminal charges without prejudice for violation of a defendant's statutory speedy trial rights. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Appeal of Motions to Suppress. — The language of subsection (c) of G.S. 15A-979 making orders of the superior court granting motions to suppress evidence appealable to the appellate division prior to trial "upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case," constitutes a statutory prerequisite which must be met in order for the State to have the right to appeal, prior to trial, an order granting a motion to suppress. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

Appeal from Grant of Motion to Suppress Made In Limine. — When the motion to suppress must be and is made in limine or can be and is made in limine, then the defendant can appeal if the motion is denied and he enters a plea of guilty; and the State can appeal if the motion is granted. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Dismissal of Criminal Charges. — Subsection (a) clearly provides that the State may appeal the dismissal of criminal charges only when further prosecution would not be barred by the rule against double jeopardy. State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610, cert. denied, 337 N.C. 805, 449 S.E.2d 751 (1994).

The State had the right to appeal, under G.S. 15A-1445(a)(1), where the trial court dismissed a driving while impaired charge, for insufficient evidence, after the jury found the defendant guilty, because the only effect of a successful appeal would be to reinstate the jury's original verdict; the defendant would not be subjected to a second trial and so the rule against double jeopardy would not be violated. State v. Scott, 146 N.C. App. 283, 551 S.E.2d 916, 2001 N.C. App. LEXIS 859 (2001), cert. granted, 355 N.C. 221, 560 S.E.2d 360 (2002), cert. denied, 537 U.S. 833, 123 S. Ct. 141, 154 L. Ed. 2d 50 (2002).

State's appeal from the dismissal of one count against defendant was not interlocutory because G.S. 15A-1445(a)(1) permitted appeal from a "decision" as well as a "judgment." Although there was not a judgment because a sentence was not pronounced, as required by G.S. 15A-101, there was a decision, dismissal of the resisting charge; therefore, defendant's motion to dismiss the State's appeal was denied. State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584, 2007 N.C. App. LEXIS 2201 (2007).

Double Jeopardy Clause Not Offended. — In a case where the State appealed a trial court order dismissing a driving while impaired charge for insufficient evidence after the jury found the defendant guilty of the offense and reversal on appeal would merely reinstate the jury's verdict, appellate review of such an order did not offend the policy against multiple prosecution. Where there is no threat of either multiple punishments or successive prosecutions, the Double Jeopardy Clause of U.S. Const., amend. V is not offended. State v. Scott, 146 N.C. App. 283, 551 S.E.2d 916, 2001 N.C. App. LEXIS 859 (2001), cert. granted, 355 N.C. 221, 560 S.E.2d 360 (2002), cert. denied, 537 U.S. 833, 123 S. Ct. 141, 154 L. Ed. 2d 50 (2002).

Appeal from Judgment "Regularly Taken." — When, after defendant was convicted of possession of cocaine and having attained the status of being an habitual felon, the trial court, sua sponte, granted a motion for appropriate relief, vacating the habitual felon conviction, and reducing defendant's sentence, finding the sentence violated defendant's rights under the Eighth and Fourteenth Amendments, the State's appeal from the trial court's grant of appropriate relief was not from a judgment "regularly taken," under G.S. 15A-1445, because, while the relief the trial court granted might have been considered to have effectively dismissed defendant's charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of defendant's habitual felon status, the State had to have the right to appeal from the underlying judgment convicting defendant and not the order granting appropriate relief, and that underlying judgment did not dismiss a charge against defendant or impose an unauthorized prison term, so the State had no right to appeal from that judgment. State v. Starkey, 177 N.C. App. 264, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

Where Jury Verdict Vacated. — When a trial court granted defendants' motions to dismiss criminal charges and vacated jury verdicts finding defendants guilty, the state could properly appeal, under G.S. 15A-1445(a)(1), because double jeopardy did not prohibit a prosecution since the jury had already rendered verdicts; thus, if the State succeeded on appeal, defendants would not be subject to re-trial, as the court would reinstate the jury's verdicts. State v. Hernandez, 188 N.C. App. 193, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

III. NONAPPEALABLE ORDERS AND JUDGMENTS.

No Right to Appeal from Dismissal on Merits. — State had no right to appeal from trial court's dismissal of criminal charges against defendant based on (1) defendant's motion to suppress the State's evidence because of entrapment and (2) insufficiency of the evidence, since the charges were dismissed on the merits and involved a determination of guilt or innocence, and further proceedings against defendant would be barred under principles of double jeopardy. State v. Murrell, 54 N.C. App. 342, 283 S.E.2d 173 (1981), cert. denied, 304 N.C. 731, 288 S.E.2d 804 (1982).

A motion to dismiss pursuant to G.S. 15A-1227 tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under G.S. 15-173. Therefore, following such dismissal defendant cannot again be placed in jeopardy upon these same charges, and the State has no right of appeal from the judgment entered. State v. Ausley, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

Interlocutory Orders. — The State has no right to appeal from: an order of mistrial; a judgment granting a defendant a new trial for newly discovered evidence; and adjudication that certain duties of defendant under a probation judgment had ended; a determination that a suspended sentence could not be revoked. In all these cases, the orders attempted to be appealed were interlocutory and not final. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

State has no right of appeal pursuant to G.S. 15A-1445(a)(1) from a superior court's interlocutory order because G.S. 15A-1445(a)(1) does not grant the State a right of appeal to the appellate division from a superior court's interlocutory order that may have the same "effect" of a final order but requires further action for finality. State v. Fowler, — N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

Order Sustaining Plea of Former Acquittal. — The right of the State to appeal to the Supreme Court from adverse rulings of the superior court or to the superior court from adverse rulings of an inferior court is governed by this section. And the State has no right, under this section, to appeal from an order of the superior court sustaining a defendant's plea of former acquittal. State v. Wilson, 234 N.C. 552, 67 S.E.2d 748 (1951); State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956).

The State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal. State v. Reid, 263 N.C. 825, 140 S.E.2d 547 (1965); State v. Peguise, 2 N.C. App. 526, 163 S.E.2d 294 (1968).

Refusal to Submit Aggravating Circumstances to Jury. — The State has no right to appeal the trial judge's action in refusing to submit any aggravating circumstances to the jury at the sentencing phase of defendant's trial. If the State's right to appeal is to be enlarged, it must be done by the legislature. State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982).

Concurrent Sentence. — State had no right to appeal from a concurrent sentence because the sentence was governed by G.S. 14-7.6, which was outside the scope of appeal of G.S. 15A-1445(a)(3)(c); however, because the concurrent sentence was contrary to G.S. 14-7.6, under N.C. R. App. P. 2 the court would treat the appeal as a mandamus petition, vacate the judgment, and remand for resentencing. State v. Watkins, 189 N.C. App. 784, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

Appeal Precluded By Double Jeopardy. — Double jeopardy precluded defendant's retrial for conspiracy to deliver marijuana, where the jury had been sworn and jeopardy had attached, and the trial court dismissed the charges after learning of error, in conducting the undercover investigation. State v. Vestal, 131 N.C. App. 756, 509 S.E.2d 249, 1998 N.C. App. LEXIS 1563 (1998).

§ 15A-1446. Requisites for preserving the right to appellate review.

(a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court. Formal exceptions are not required, but when evidence is excluded a record must be made in the manner provided in G.S. 1A-1, Rule 43(c), in order to assert upon appeal error in the exclusion of that evidence.

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal, but the appellate court may review such errors affecting substantial rights in the interest of justice if it determines it appropriate to do so.

(c) The making of post-trial motions is not a prerequisite to the assertion of error on appeal.

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.

(2) Lack of jurisdiction of the trial court over the person of the defendant.

(3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.
(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).
(5) The evidence was insufficient as a matter of law.
(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
(7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.
(8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
(9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.
(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.
(11) Questions propounded to a witness by the court or a juror.
(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.
(13) Error of law in the charge to the jury.
(14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.
(15) The defendant was not present at any proceeding at which his presence was required.
(16) Error occurred in the entry of the plea.
(17) The form of the verdict was erroneous.
(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.
(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28; 1983 (Reg. Sess., 1984), c. 1037, s. 1.)

OFFICIAL COMMENTARY

A crucial item in any system of appellate procedure is the rule stating the requirements for "preserving the right to appeal." The steps to be taken in the trial level have evolved over the years from the original purpose, which was in effect a statement of "charges" against the judge for making an error, into what is now recognized as a need simply to bring the matter to the attention of the trial judge sufficiently to permit him to correct the error. Thus, the Rules of Civil Procedure in G.S. 1A-1, Rule 46, and the appellate rules (N.C. Appellate Rules, Rule 10(b) make clear that formal "exceptions" are unnecessary and that no particular extra steps need be taken if an appropriate and timely objection has been made clear to the trial judge, at some time sufficiently close to the occurrence of the error to permit its correction. In addition to that notion, there is also the idea that there are certain errors that the defendant may appeal from whether or not he has given some signal that he thinks the judge has committed an error. On occasion this idea has appeared in the statement that certain errors need not be brought to the attention of the judge (as, for example, with regard to his charge). Sometimes that idea has been indicated by the straightforward statement that items were reviewable on appeal without the making of a motion, as was true of the 1967 statute which provided that the sufficiency of the evidence of the State was reviewable upon an appeal without the making of a motion for nonsuit (G.S. 15-173.1). Another form which this idea has taken is permitting a motion to be made in the appellate courts. Thus permitting in the appellate court a motion in arrest of judgment, based, for example, upon a defect in the pleading, is simply another way of stating that during the appeal the sufficiency of the pleadings may be raised even though no question has been raised in that regard in the trial court. This act undertakes to unify those devices and simply states that certain listed items may be raised on appeal whether or not objection, exception, or motion has been made in the trial court. Other errors must be appropriately brought to the attention of the trial court as provided in subsection (a).

Subsection (a) of this section is similar in basic import to G.S. 1A-1, Rule 46, of the Rules of Civil Procedure. It provides essentially that any timely objection or motion is sufficient and no particular formality is required to preserve the right to assert an alleged error upon appeal if that has been done.

Subsection (b) states the corollary that failure to make such timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal (but of course the court is granted the authority to review such errors in the interest of justice).

Subsection (c) is a duplicate of G.S. 15A-1422(e) and restates the idea that post-trial motions are not steps for the preservation of the right to appellate review, but rather are means of correcting errors at the trial level.

Subsection (d) contains a listing of errors which may be asserted upon appeal even if no objection, motion or exception was made in the trial court at the time the error is asserted to have been committed.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

For article discussing the mechanics of objecting, see 4 Campbell L. Rev. 339 (1982).

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For note, "United States v. Hyppolite: The Police Cannot Search Your House Because of the Way You Assert Your Constitutional Rights . . . or Can They?" see 75 N.C.L. Rev. 607 (1997).

For recent development, "The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt," see 84 N.C. L. Rev. 2100 (2006).

CASE NOTES

Subdivision (d)(6) Unconstitutional. — The General Assembly was without authority to enact subdivision (d)(6) of this section which permits appellate review of a contention that defendant was convicted under a statute that violates the United States Constitution or the North Carolina Constitution even though no objection, exception or motion on such ground was made in the trial division, since the statute violates the provisions of N.C. Const., Art. IV, § 13(2) giving the Supreme Court the exclusive authority to make rules of practice and procedure for the appellate division. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Subdivision (d)(13) Unconstitutional. — N.C.R.A.P., Rule 10(b)(2), and subdivision (d)(13) of this section are in conflict. Since N.C.R.A.P., Rule 10(b)(2), is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under N.C. Const., Art. IV, § 13(2), to the extent that subdivision (d)(13) is inconsistent with N.C.R.A.P., Rule 10(b)(2), the statute must fail. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

Subdivision (d)(5) Inconsistent with N.C.R.A.P., Rule 10(b)(2). — Insofar as subdivision (d)(5) of this section allows a party to raise arguments regarding the sufficiency of the evidence to support a finding of fact at sentencing, it is inconsistent with the spirit and purpose of Rule N.C.R.A.P., 10(b)(2) and statutes which are in conflict with the Rules of Appellate Procedure are ineffective. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798, cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

Construction with N.C.R.A.P., Rule 10. — When a conflict arises between a subsection of this section and N.C.R.A.P., Rule 10, the Rules of Appellate Procedure should control. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

To the extent that subdivision (d)(5) is inconsistent with N.C.R.A.P., Rule 10(b)(3), the statute must fail. State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Although subdivision (d)(5) of this section provides that questions of insufficiency of the evidence may be the subject of appellate review, even when no objection or motion has been made at trial, N.C.R.A.P., Rule 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Although subdivision (d)(5) of this section allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, this statute is negated by N.C.R.A.P., Rule 10(b)(3), which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit at trial. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Conflict between G.S. 15A-1446(d)(5), allowing insufficiency of the evidence to be raised on appellate review even though no objection was raised at trial, and N.C. R. App. P. 10(b)(3), providing that a defendant could not assign as error the insufficiency of the evidence unless he moved to dismiss the case at trial, was resolved in favor of the Rule. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

Effect of Failure to Note Exceptions. — Assuming arguendo that State's comment in its opening remarks regarding defendant's prior conviction was inappropriate, it was incumbent upon defendant to timely bring the alleged error to the attention of the court; by failing to do so, defendant deprived the court of the opportunity to appropriately rectify the alleged error, deprived the State of the opportunity to take the proper measures to correct its alleged error, and deprived the jury of the opportunity to hear the evidence, from the beginning, in the clear light of a trial unclouded by the alleged error. State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989).

In a juvenile delinquency proceeding in which the allegedly delinquent child was found to have sexually assaulted another child, the child's failure to object to a requirement of his probation that he admit the underlying offense, as part of treatment, did not preclude him from raising the issue on appeal, as the issue concerned whether his sentence was illegally imposed or was otherwise invalid as a matter of law, under G.S. 15A-1446(d)(18). In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

Failure to Note Exceptions Constitutes Waiver. — Failure of defendant, who represented himself, to note exceptions to rulings of the trial court constituted waiver of the right to assert the alleged errors on appeal. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980), appeal dismissed, 301 N.C. 723, 276 S.E.2d 285 (1981).

Where defendant did not object at trial to the prosecutor's argument to the jury, he waived the alleged errors and cannot raise them on appeal. State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982).

Generally, a defendant's failure to enter an appropriate and timely motion or objection results in a waiver of his right to assert the alleged error upon appeal. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Where there was no improperly overruled objection to the witness's competence due to defendant's failure to object to the court's finding that she was competent, the defendant was precluded from using the exception in subdivision (d)(9) to assign error to her testimony on the ground that she was incompetent. State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986).

Under this section, an assignment of error ordinarily will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. Failure to do so amounts to a waiver. State v. Reid, 322 N.C. 309, 367 S.E.2d 672 (1988).

Defendant failed to object to the admission of testimony at trial. A failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

An assignment of error ordinarily will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Except in Capital Cases. — Ordinarily, objection to the prosecuting attorney's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal. Failure to object waives the alleged error. An exception to this rule is found in capital cases where, because of the severity of the death sentence, this court will review alleged improprieties in the prosecutor's jury argument despite defendant's failure to timely object. However, even in death cases the impropriety must be extreme for the court to find that the trial judge abused his discretion in not recognizing and correcting ex mero motu an argument that defense counsel failed to find prejudicial when he heard it. State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982).

In trial for murder and robbery, although defendant failed to properly object to State's use of peremptory challenges which, under this rule, would normally have precluded appellate review of the issue, the Supreme Court nevertheless would consider defendant's argument, noting that defendant was tried prior to a retroactively effective United States Supreme Court decision upon which defendant based his argument on appeal, that defendant had raised the issue initially by motion at trial, and that defendant was on trial for his life. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

The appellate court was precluded, under G.S. 15A-1446(a) and (b), from considering issues which defendant did not preserve for review by making a timely objection before the trial court, despite the fact that this was a capital case. State v. May, 354 N.C. 172, 552 S.E.2d 151, 2001 N.C. LEXIS 943 (2001), cert. denied, 535 U.S. 1060, 122 S. Ct. 1923, 152 L. Ed. 2d 830 (2002).

Assignments of error must be based upon exceptions duly noted in the record in order for the issue to be preserved for consideration on appeal. State v. Brooks, 58 N.C. App. 407, 293 S.E.2d 653 (1982).

By failing to preserve evidence for review, defendant deprived the Supreme Court of the necessary record from which to ascertain if the alleged error was prejudicial. Proper consideration of defendant's argument was therefore precluded. State v. Miller, 321 N.C. 445, 364 S.E.2d 387 (1988).

Miscalculation of Prior Record Level was Appealable. — Even though defendant's prior record level for sentencing purposes may have been miscalculated, and defendant was entitled to appellate review of the calculation pursuant to G.S. 15A-1446(d)(18) despite defendant stipulating to defendant's prior conviction worksheet, defendant did not show that defendant's sentence was improper. When defendant's sentence was properly calculated, defendant still had the same point total and prior offense level, and, thus, any error did not prejudice defendant. State v. Goodwin, 190 N.C. App. 570, 661 S.E.2d 46, 2008 N.C. App. LEXIS 1020 (2008).

Benefit of Objection Lost When Same Evidence Later Admitted without Objection. — Where defendant only interposed a general objection and did not make a special request to have the witness qualified as an expert, this was insufficient to preserve an exception for review, since even if a general objection had been sufficient, its benefit was lost when substantially the same evidence was thereafter admitted without renewed objection. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

It is elementary that, nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered. An assertion by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule. State v. Hammond, 307 N.C. 662, 300 S.E.2d 361 (1983).

One of the requirements for appellate review under this statute is that there be an improperly overruled objection to testimony. If there is such a ruling, the appellant does not have to object to questions involving matters in the same line. State v. Battle, 61 N.C. App. 87, 300 S.E.2d 276, cert. denied, 309 N.C. 462, 307 S.E.2d 367 (1983).

Defendants waived exceptions at issue when witness testified to substantially the same effect on other occasions without objection. Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798 (1989).

Where during the voir dire hearing on a motion to suppress a confession, reference to the arrest warrant was repeatedly made, and defendant never objected or gave any indication that the legality of the arrest would be challenged upon appeal, the defendant could not on appeal for the first time attempt to raise the issue of his arrest as a basis to overturn the ruling of the trial judge. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Exception to the admission of testimony is waived when testimony of the same import is admitted without objection. State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

Where a relevant response was not apparent from the context of the examination, defendant was precluded from predicating error upon the trial court's ruling on the State's objection to the question. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

Assignment of error dismissed for failure to make timely objection. See State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

Defendant's contention that the trial court erred in denying a motion for a mistrial based on an improper identification was not properly preserved for review because defense counsel failed to raise an objection when the victim testified about the photo line-up. State v. Summers, 177 N.C. App. 691, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188, appeal dismissed, cert. denied, 637 S.3.2d 192 (N.C. 2006).

Objection to Exclusion of Evidence. — Under subsection (a) of this section, a party is required to take an exception to a ruling excluding evidence and offer such evidence into the record when the evidence is excluded. The purpose of this provision is to enable a reviewing court to make an informed decision. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

When evidence is excluded, the record must sufficiently show what purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Where the relevance of the proffered evidence was not "obvious from the record," and defendant did not make an offer of proof showing the substance of what the witness would have testified, defendant's question regarding the admissibility of the evidence would not be reviewed on appeal. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Certain Errors Subject to Appellate Review Even Though No Objection, Exception or Motion Made. — Pursuant to G.S. 15A-1446(d)(5), (d)(18), where defendant contended that the State failed to prove the existence of prior convictions by a preponderance of the evidence and that the foreign convictions were substantially similar to corresponding North Carolina offenses, the matter was reviewable even though defendant failed to object at the sentencing hearing. State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804, 2004 N.C. App. LEXIS 819 (2004).

While defendant did not specifically object to the trial court's entry of an award of restitution to cover the unsubstantiated expenses for genetic testing to prove that defendant was the father of his two daughters' children, the issue was deemed preserved for appellate review under G.S. 15A-1446(d)(18). State v. Shelton, 167 N.C. App. 225, 605 S.E.2d 228, 2004 N.C. App. LEXIS 2178 (2004).

Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

When defendant failed to object at his sentencing to a restitution order, he was nonetheless allowed to seek appellate review because G.S. 15A-1446(d)(18) allowed defendants to seek review of sentencing errors without an objection at trial. State v. Valladares, 182 N.C. App. 525, 642 S.E.2d 489, 2007 N.C. App. LEXIS 674 (2007).

Restitution order in an involuntary manslaughter prosecution was improper as the only information as to the amount of restitution owed to the victim's father was provided by the prosecutor and did not constitute evidence; the issue was preserved for appellate review under G.S. 15A-1446(d)(18) even though defendant did not specifically object. State v. Replogle, 181 N.C. App. 579, 640 S.E.2d 757, 2007 N.C. App. LEXIS 257 (2007).

Defendant's ex post facto argument fell within the provision of G.S. 15A-1446(d)(18); accordingly, the appellate court proceeded to the merits of defendant's ex post facto argument, even though defendant did not articulate this objection in his written motion to prohibit an aggravated sentence, nor during oral argument of his motion. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

Where defendant argued that the trial court committed error in ordering restitution to the victim in the amount of $2,301, even though defendant did not voice an objection to restitution at sentencing, this assignment of error was fully reviewable on appeal. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, it was insufficient to confer subject matter jurisdiction, the trial court lacked jurisdiction to enter a judgment of defendant's guilt on that offense, and arrest of judgment was proper; defendant was not required to object to the indictment defect at trial in order to preserve the issue, and the court declined to apply the invited error doctrine, based on precedent. State v. Kelso, 187 N.C. App. 718, 654 S.E.2d 28, 2007 N.C. App. LEXIS 2523 (2007).

Although defendant failed to object at trial to the trial court's use of the fact that defendant was on probation and pre-trial release at the time he committed the instant offenses to both increase his prior record level and aggravate his sentence, defendant nevertheless was permitted to raise the issue on appeal, because the issue concerned whether his sentence was illegally imposed or was otherwise invalid as a matter of law, pursuant to G.S. 15A-1446(d)(18). State v. Moore, 188 N.C. App. 416, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Sufficiency of the evidence may be raised on appeal pursuant to subdivision (d)(5). State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980).

Enhanced sentence imposed on defendant's drug convictions had to be remanded for resentencing, because error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review, G.S. 15A-1446(d)(5), (18), and the trial court failed to satisfy its burden under G.S.15A-1340.14(e) to show that defendant's Texas convictions were substantially similar to corresponding Class I North Carolina felony offenses. State v. Huu The Cao, 175 N.C. App. 434, 626 S.E.2d 301, 2006 N.C. App. LEXIS 185 (2006).

Sufficiency of Proof of Prior Convictions at Sentencing Hearing. — While defendant may have waived challenge to competency of assistant prosecutor's statements as to his prior convictions, he was not required to object at sentencing hearing in order to assert the insufficiency of the remarks as a matter of law to prove his prior convictions by a preponderance of the evidence. State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 663 (1988).

Appellate Review of Sentencing. — Appellate court need not employ N.C. R. App. P. 2 to reach the issue of whether a sentencing determination was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law because such issues may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902, 2003 N.C. App. LEXIS 2049 (2003).

Although appellate court could address, pursuant to G.S. 15A-1446, the issue of whether the sentence was illegally imposed, regardless of whether objection had been made, any error in requiring as a condition of probation that defendant accept responsibility for his crime was harmless because the record was replete with evidence amounting to sufficient violations to warrant revocation of probation. State v. Howell, 184 N.C. App. 369, 646 S.E.2d 622, 2007 N.C. App. LEXIS 1432 (2007), appeal dismissed, review denied, 362 N.C. 240, 660 S.E.2d 490 (2008).

Waiver under § 15-173 Unaffected by Subdivision (d)(5). — Under G.S. 15-173, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of G.S. 15A-1227(d) and subdivision (d)(5) of this section, allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Although defendant, under § 15-173, waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, pursuant to G.S. 15A-1227(d) and subdivision (d)(5) of this section, defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979), cert. denied, 304 N.C. 589, 290 S.E.2d 709 (1981).

By enacting N.C.R.A.P., Rule 10(b)(2), the Supreme Court has by preemption abrogated subdivision (d)(13). State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982), modified and aff'd, 308 N.C. 530, 302 S.E.2d 786 (1983).

Statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. State v. Hall, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

Objection to Recapitulation of Evidence. — Any objection of the court's recapitulation of the evidence presented must be brought to court's attention in time to afford an opportunity for correction. State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982).

Defendant did not attack the admission of his out-of-court statements on the ground of unlawful arrest, but attacked the voluntariness of them; therefore, defendant could not arise the issue of his alleged unlawful arrest for the first time on appeal. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

Before granting a new trial to a defendant under the plain error rule, the appellate court must be convinced that absent the alleged error, a jury probably would have reached a different verdict. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Plain Error Rule May Allow Relief Without Objection. — On rare occasions the "plain error" rule may allow a party relief even though no objection was made. Before relief will be granted under the "plain error" rule, however, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

Appellate court applied a plain error review because defendant failed to preserve his assignment of error regarding the admission of letters into evidence for review; given the additional evidence against defendant, the admission of the letters did not have a probable impact on the jury's finding of defendant's guilt. State v. Curry, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Trial court erred in finding defendant to have the status of a habitual felon, as the trial court did not inform defendant of the nature of the charges and consequences of pleading guilty to such a status, as required by G.S. 15A-1022(a)(1)-(4); defendant could raise the failure to so inform him on appeal even though he did not object at trial and apparently pled guilty to habitual felon status. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

Right to Appeal Waived by Insufficient Record. — Where the trial judge, upon plaintiff's objection, excluded testimony of defendant's expert witness which the defendant had attempted to elicit at trial, and where defendant made no offer of proof, and the record failed to disclose what the substance of the expert's evidence might have been, defendant waived its right to assert issue on appeal since the essential substance of the witness' testimony was not discernible from the record. River Hills Country Club, Inc. v. Queen City Automatic Sprinkler Corp., 95 N.C. App. 442, 382 S.E.2d 849 (1989).

Defendant failed to preserve his argument that the trial court improperly excluded testimony because he failed to establish on the trial record the significance of the excluded and what it would have revealed. State v. Gay, 151 N.C. App. 530, 566 S.E.2d 121, 2002 N.C. App. LEXIS 774 (2002), cert. denied, 356 N.C. 685, 578 S.E.2d 315 (2003).

Waiver Shown. — Where defendant gave notice of intent to appeal following suppression hearing in August, but did not give notice of appeal until April, judgment having been entered a week earlier, since defendant failed to make an appropriate and timely motion in the trial court, he waived his right to assert motions regarding new evidence on appeal, pursuant to this section. State v. Smothers, 108 N.C. App. 315, 423 S.E.2d 824 (1992).

The defendant waived the right to appellate review under subdivision (d)(5) where, after the court denied the initial motion to dismiss, the defendant did not renew his motion to dismiss at the close of all evidence. State v. Hinnant, 131 N.C. App. 591, 508 S.E.2d 537 (1998).

Applied in State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979); State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980); State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981); State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981); State v. Parker, 54 N.C. App. 522, 284 S.E.2d 132 (1981); State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885 (1982); State v. Jackson, 59 N.C. App. 615, 297 S.E.2d 610 (1982); State v. Queen, 65 N.C. App. 820, 310 S.E.2d 153 (1984); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Dorsey, 71 N.C. App. 435, 322 S.E.2d 405 (1984); State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985); State v. Brooks, 72 N.C. App. 254, 324 S.E.2d 854 (1985); State v. Jones, 72 N.C. App. 610, 325 S.E.2d 309 (1985); State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985); State v. Bunn, 79 N.C. App. 480, 339 S.E.2d 673 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); State v. Jordan, 319 N.C. 98, 352 S.E.2d 672 (1987); State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987); State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988); State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988); State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990); State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991); State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Canady, 330 N.C. 398, 410 S.E.2d 875 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994); State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996); State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000); State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005); State v. Cummings, 174 N.C. App. 772, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005); State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006); State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

Cited in State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981); State v. Froneberger, 55 N.C. App. 148, 285 S.E.2d 119 (1981); State v. McBryde, 55 N.C. App. 473, 285 S.E.2d 866 (1982); State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); State v. Boyd, 61 N.C. App. 238, 300 S.E.2d 578 (1983); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Jolley, 312 N.C. 296, 321 S.E.2d 883 (1984); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988); State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990); State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991); State v. Adams, 335 N.C.

401, 439 S.E.2d 760 (1994); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995); State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002); State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003); State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005); State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

§ 15A-1447. Relief available upon appeal.

(a) If the appellate court finds that there has been reversible error which denied the defendant a fair trial conducted in accordance with law, it must grant the defendant a new trial.

(b) If the appellate court finds that the facts charged in a pleading were not at the time charged a crime, the judgment must be reversed and the charge must be dismissed.

(c) If the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. In that case the court may remand for trial on the lesser offense.

(d) If the appellate court affirms only some of the charges, or if it finds error relating only to the sentence, it may direct the return of the case to the trial court for the imposition of an appropriate sentence.

(e) If the appellate court affirms one or more of the charges, but not all of them, and makes a finding that the sentence is sustained by the charge or charges which are affirmed and is appropriate, the court may affirm the sentence.

(f) If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence.

(g) If the appellate court finds that there has been reversible error and the rule against double jeopardy prohibits further prosecution, it must dismiss the charges with prejudice. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides a self explanatory listing of the various types of relief which are available upon appeal, including new trial, dismissal and further action with regard to the sentence. The utility of such a listing would appear to be obvious when read in light of the Rules of Appellate Procedure which provide in Rule 28(b)(4) that the appellant's brief should contain "a short conclusion stating the precise relief sought."

CASE NOTES

When judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal and the convictions on the predicate felonies are not disturbed upon appeal. State v. Pakulski, 326 N.C. 434, 390 S.E.2d 129 (1990).

Illegal Confession. — When a juvenile's confession obtained outside the presence of his parent, contrary to G.S. 7B-2101(a)(2) and (b), was erroneously admitted into evidence against the juvenile, the error was not harmless, under G.S. 15A-1443(a), and when the trial court erroneously declined to find whether the juvenile was in custody when he made the confession, the juvenile was denied a fair trial, contrary to G.S. 15A-1447(a). In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

Defendant Not Entitled to New Trial. — Evidence that defendant was arrested after being found under a pile of clothes while the police were searching for a person involved in a shooting was admissible because it was evidence of flight, tending to show that defendant had a guilty conscience, and the trial court did not allow testimony that defendant was found with marijuana and a pistol, which would have been unfairly prejudicial. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Although the trial court erred by the erroneous admission of extrinsic evidence of a specific incident, which attacked defendant's character for truthfulness, the error was not reversible under G.S. 15A-1447(a), and defendant was not entitled to a new trial, because defendant failed to show prejudice resulting from the admission of the evidence given the other evidence presented by witnesses at defendant's trial as the state presented testimony from two of the individuals who were present with defendant when the victim was murdered. Thus, the appellate court could not say as a matter of law that absent the erroneous admission of extrinsic evidence of the specific incident, which attacked defendant's character for truthfulness, there was a reasonable possibility that the jury's verdict would have been different. State v. Lee, 189 N.C. App. 474, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (2008).

Applied in State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979); State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980); State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007).

Cited in State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Blackwell, 142 N.C. App. 388, 542 S.E.2d 675, 2001 N.C. App. LEXIS 93 (2001).

§ 15A-1448. Procedures for taking appeal.

(a) Time for Entry of Appeal; Jurisdiction over the Case. —

(1) A case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal.

(2) When a motion for appropriate relief is made under G.S. 15A-1414 or G.S. 15A-1416(a), the case remains open for the taking of an appeal until the court has ruled on the motion. The time for taking an appeal as provided in subsection (b) shall begin to run immediately upon the entry of an order under G.S. 15A-1420(c)(7), and the case shall remain open for the taking of an appeal until the expiration of that time.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

(4) Repealed by Session Laws 1987, c. 624.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(b) How and When Appeal of Right Taken. — Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure.

(c) Certiorari. — Petitions for writs of certiorari are governed by rules of the appellate division. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 29; 1987, c. 624; 1989, c. 377, s. 5.)

OFFICIAL COMMENTARY

Most procedure for the appeal itself will be as provided in the rules of appellate procedure and not in statutory law. However, one appropriate area for statutory regulation is the question of timing of the taking of an appeal, for that relates to activity which must be conducted in the trial division.

Problems have arisen in the processing of appeals when post-trial motions are pending. The system here provides the usual (for North Carolina) 10-day period for taking an appeal, and provides that if a post-trial motion is made within 10 days after the trial there will be a period of not less than 10 days after the ruling on the motion in which to take an appeal. This is in accord with the North Carolina Rules of Appellate Procedure with regard to civil cases under Rule 3, but such an extension has not been incorporated in those rules with regard to criminal cases in Appellate Rule 4.

This section adds a further modification to the prior system. If giving notice of appeal of the case "divests the trial court of jurisdiction" (see State v. Grundler and State v. Jelly, 251 N.C. 177, 111 S.E.2d 1 (1959)) giving notice of appeal must wait until the determination of any post-trial motion. This section permits the defendant to give his notice of appeal, and yet retains the case in the trial court for the full 10-day period. This will insure a period during which matters may, if possible, be corrected at the trial level, without problem as to the timely notice of appeal. In addition to the full 10-day period, the right of the trial court to act in a case is extended for the period of time that a motion for appropriate relief is pending in the trial court. (G.S. 15A-1448(a)(2).)

Subsection (a)(4) is a legislative committee addition to the original proposal by the Commission. It establishes the date an appeal is "taken" as a matter of jurisdictional adjustment, i.e., jurisdiction to compute time does not vest in the appellate division until the conditions of subsection (a)(3) are met. In an effort to avoid the procedural impasse resulting from hopelessly backlogged court reporters' work loads in certain districts, the legislative committee made the time limitations for settling records on appeal, etc., begin to run from the *later* of the date jurisdiction is divested of the trial court *or* the date the transcript is delivered to the clerk of superior court.

This timing provision in subsection (a)(4) may be at variance with the current language of the Rules of Appellate Procedure. Cf. Rule 12 (a).

If no motion for relief is pending and the parties wish to expedite the processing of the appeal, they may pursuant to G.S. 15A-1448(a)(3)b file written consent that the case be transferred immediately to the appellate division without waiting for the 10 days to run. Similarly, if a motion for appropriate relief has been made, 30 days have passed, and no ruling has been made on the motion, the appealing party may file a written request that the case be transferred immediately to the appellate division. Of course the trial court would have no power to act once the case was transferred.

The appellant has free choice during the 10-day period. Thus, if appeal is entered and withdrawn, it may be entered again if time remains. To the same end, the statute provides that compliance with all or a portion of the judgment does not waive the right to appeal. There is provision for remitting fines which have been paid, but, in order to simplify collection and remittance procedures, the repayment may be delayed until the appeal is determined. The free right to enter appeal, withdraw it and reenter it, or to comply with a portion of the judgment and then enter the appeal are substantially more important in criminal cases than in civil cases. The litigants are frequently less sophisticated and the consequences of an unknowing waiver may be substantially more severe than loss of monetary damages or property rights.

Subsection (b) provides for oral notice of appeal in open court, and written notice of appeal to be filed with the clerk. No effort is made here to specify additional steps and the formalities of the filed notice. The contents of the notice of appeal, service of copies on other parties, and other procedural details with regard to the notice of appeal are left to the rules of the appellate division, which should be consulted.

CASE NOTES

A court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein. State v. Davis, 123 N.C. App. 240, 472 S.E.2d 392 (1996).

Trial Court Loses Jurisdiction to Settle Record after Notice of Appeal. — While the recorded judgment did not reflect the judgment rendered by the trial court in open court, the trial court lacked jurisdiction to correct its judgment after defendant had given notice of appeal and the record on appeal had been filed with the appellate court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297, 2000 N.C. App. LEXIS 892 (2000).

A motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297, 2000 N.C. App. LEXIS 892 (2000).

Section 15A-979(c) should not be read in conjunction with subdivision (a)(1) of this section. State v. Turner, 305 N.C. 356, 289 S.E.2d 368 (1982).

Subdivision (a)(1) of this section and G.S. 15A-979(c) need not be construed together to require that the prosecutor's certificate also be filed within 10 days of judgment. State v. Lay, 56 N.C. App. 796, 290 S.E.2d 405, cert. denied and appeal dismissed, 306 N.C. 390, 294 S.E.2d 216 (1982).

Failure of Trial Judge to Rule Within 10 Days. — There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under former subdivision (a)(4) of this section, which provided that, if no ruling had been made by the trial judge on a motion for appropriate relief within 10 days, the motion would be deemed denied. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980), appeal dismissed, 301 N.C. 723, 276 S.E.2d 285 (1981).

Motion Not Recognizable in Supreme Court. — At the time defendant's motion for appropriate relief was filed in the trial court the jurisdiction of the trial court had not been divested under subdivision (a)(3); the case, therefore, was not then pending in the appellate division, and the motion was not properly cognizable in the Supreme Court. State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993).

Loss of Jurisdiction to Rule on Motion for Appropriate Relief. — Summary denial of defendant's motion for appropriate relief (MAR) was vacated as a timely-filed appeal was pending when the MAR was filed, so the trial court lacked jurisdiction to rule on the MAR; the proper venue for filing the MAR would have been in the appellate court. State v. Williams, 177 N.C. App. 725, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief. State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978); State v. Craver, 70 N.C. App. 555, 320 S.E.2d 431 (1984); State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980); State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993).

§ 15A-1449. Security for costs not required.

In criminal cases no security for costs is required upon appeal to the appellate division. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

The requirement for security for costs in criminal appeals is eliminated by this section.

§ 15A-1450. Withdrawal of appeal.

An appeal may be withdrawn by filing with the clerk of superior court a written notice of the withdrawal, signed by the defendant and, if he has counsel, his attorney. The clerk must forward a copy of the notice to the clerk of the appellate division in which the case is pending. The appellate division may enter an appropriate order with regard to the costs of the appeal. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides a simplified means of withdrawal of an appeal. The notice is given to the Clerk of Superior Court. It is then the responsibility of the Clerk of Superior Court to notify the appellate division if the case has gone forward. No limitations are placed upon the right to withdraw the appeal other than that the notice, which must be written, must be signed by defendant and his counsel if he is represented, and of course, he may be ordered to pay costs. If the appeal is withdrawn, it is no longer pending and the stay pursuant to G.S. 15A-1451 is terminated.

§ 15A-1451. Stay of sentence; bail; no stay when State appeals.

(a) When a defendant has given notice of appeal:

(1) Payment of costs is stayed.

(2) Payment of a fine is stayed.
(3) Confinement is stayed only when the defendant has been released pursuant to Article 26, Bail.
(4) Probation or special probation is stayed.

(b) The effect of dismissal of charges is not stayed by an appeal by the State, and the defendant is free from such charges unless they are subsequently reinstated as a result of the determination upon appeal. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section carries forward in more detail the comments of prior G.S. 15-184 with regard to stay of costs and sentence when an appeal has been taken. Subsection (b) makes clear that if the State appeals from the dismissal of charges, the effect of the dismissal is not stayed during the pendency of the appeal. The defendant is free of the charge unless the State prevails upon the appeal and has the charges reinstated pursuant to the directive of the appellate division.

CASE NOTES

Stay of Probationary Sentence. — Trial court acted properly in imposing conditions of release upon a sentence of probation on defendant's convictions of third-degree sexual exploitation of a minor, G.S. 14-190.17A, which had been stayed pending appeal pursuant to G.S. 15A-1451(a)(4); the plain language of G.S. 15A-536 indicated that "release" meant "to set, or make free" from the supervision and control of the court, as well as from imprisonment, and to apply the statute only where the defendant was in or facing custody would lead to the absurd result that the court would have no oversight over defendants with probationary sentences on appeal. State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901, 2004 N.C. App. LEXIS 2021 (2004).

Despite a specific reference to probation in G.S. 15A-1451, and the absence of a corresponding reference to probation in G.S. 15A-1431, G.S. 15A-1431(e) provided that a defendant remained on pretrial release during an appeal from district court to superior court, so he or she was not also on probation; defendant's probation, imposed by a district court, did not start where defendant appealed to superior court, did not begin until he withdrew that appeal, and thus, a later violation report was timely filed. State v. Smith, 359 N.C. 618, 614 S.E.2d 279, 2005 N.C. LEXIS 635 (2005).

Cited in Allen v. Lowder, 875 F.2d 82 (4th Cir. 1989).

§ 15A-1452. Execution of sentence upon determination of appeal; compliance with directive of appellate court.

(a) If an appeal is withdrawn, the clerk of superior court must enter an order reflecting that fact and directing compliance with the judgment.

(b) If the appellate division affirms the judgment in whole or in part, the clerk of superior court must file the directive of the appellate division and order compliance with its terms.

(c) If the appellate division orders a new trial or directs other relief or proceedings, the clerk must file the directive of the appellate court and bring the directive to the attention of the district attorney or the court for compliance with the directive. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section recodifies and makes a more complete statement of the concepts of prior G.S. 15-186.

CASE NOTES

Resentencing Jurisdiction Absent Stay. — Trial court had jurisdiction to conduct a resentencing hearing where even though the defendant had petitioned for discretionary review under N.C. R. App. P. 15(a), nothing in the record indicated that he had sought a writ of supersedeas under N.C. R. App. P. 23(b) and absent such a stay, G.S. 15A-1452(c) required the superior court to comply with the appellate court's mandate. State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007).

§ 15A-1453. Ancillary actions during appeal.

(a) While an appeal is pending in the appellate division, the court in which the defendant was convicted has continuing authority to act with regard to the defendant's release pursuant to Article 26, Bail.

(b) The appropriate court of the appellate division may direct that additional steps be taken in the trial court while the appeal is pending, including but not limited to:

(1) Appointment of counsel.
(2) Hearings with regard to matters relating to the appeal.
(3) Taking evidence or conducting other proceedings relating to motions for appropriate relief made in the appellate division, as provided in G.S. 15A-1418. (1977, c. 711, s. 1.)

OFFICIAL COMMENTARY

This section provides for actions which necessarily must be taken at the trial level while an appeal is pending. Subsection (a) provides that the trial court may act with regard to bail without directive from the appellate division. As to other matters, the appellate division may direct additional steps in the trial court. Of particular note is subdivision (b)(3) which expressly authorizes the direction of hearings or other proceedings relating to motions for appropriate relief which now may be made in the appellate division in accordance with G.S. 15A-1418. See the commentary to that section.

CASE NOTES

A court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein. State v. Davis, 123 N.C. App. 240, 472 S.E.2d 392 (1996).

Cited in State v. Williams, 177 N.C. App. 725, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

§§ 15A-1454 through 15A-1459: Reserved for future codification purposes.

ARTICLE 92.

Innocence Inquiry Commission.

§ 15A-1460. Definitions.

The following definitions apply in this Article:

(1) "Claim of factual innocence" means a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and

for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.

(2) "Commission" means the North Carolina Innocence Inquiry Commission established by this Article.

(3) "Director" means the Director of the North Carolina Innocence Inquiry Commission.

(4) "Victim" means the victim of the crime, or if the victim of the crime is deceased, the next of kin of the victim. (2006-184, s. 1.)

Cross References. — As to the duties of the State Judicial Council, see G.S. 7A-409.1.

Editor's Note. — Session Laws 2006-184, s. 12, makes this article effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010.

The preamble to Session Laws 2006-184, provides: "Whereas, postconviction review of credible claims of factual innocence supported by verifiable evidence not previously presented at trial or at a hearing granted through postconviction relief should be addressed expeditiously to ensure the innocent as well as the guilty receive justice; and

"Whereas, public confidence in the justice system is strengthened by thorough and timely inquiry into claims of factual innocence; and

"Whereas, factual claims of innocence, which are determined to be credible, can most effectively and efficiently be evaluated through complete and independent investigation and review of the same; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2006-184, s. 11, provides: "The initial members of the North Carolina Innocence Inquiry commission shall be appointed not later than October 1, 2006. No claims of actual innocence may be filed with the Commission until November 1, 2006. No claims of actual innocence where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008."

Legal Periodicals. — For note, "All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission," see 56 Duke L.J. 1345 (2007).

§ 15A-1461. Purpose of Article.

This Article establishes an extraordinary procedure to investigate and determine credible claims of factual innocence that shall require an individual to voluntarily waive rights and privileges as described in this Article. (2006-184, s. 1.)

§ 15A-1462. Commission established.

(a) There is established the North Carolina Innocence Inquiry Commission. The North Carolina Innocence Inquiry Commission shall be an independent commission under the Judicial Department for administrative purposes.

(b) The Administrative Office of the Courts shall provide administrative support to the Commission as needed. The Director of the Administrative Office of the Courts shall not reduce or modify the budget of the Commission or use funds appropriated to the Commission without the approval of the Commission. (2006-184, s. 1.)

§ 15A-1463. Membership; chair; meetings; quorum.

(a) The Commission shall consist of eight voting members as follows:

(1) One shall be a superior court judge.

(2) One shall be a prosecuting attorney.

(3) One shall be a victim advocate.

(4) One shall be engaged in the practice of criminal defense law.

(5) One shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

(6) One shall be a sheriff holding office at the time of his or her appointment.

(7) The vocations of the two remaining appointed voting members shall be at the discretion of the Chief Justice.

The Chief Justice of the North Carolina Supreme Court shall make the initial appointment for members identified in subdivisions (4) through (6) of this subsection. The Chief Judge of the Court of Appeals shall make the initial appointment for members identified in subdivisions (1) through (3) of this subsection. After an appointee has served his or her first three-year term, the subsequent appointment shall be by the Chief Justice or Chief Judge who did not make the previous appointment. Thereafter, the Chief Justice or Chief Judge shall rotate the appointing power, except for the two discretionary appointments identified by subdivision (7) of this subsection which shall be appointed by the Chief Justice.

(b) The appointing authority shall also appoint alternate Commission members for the Commission members he or she has appointed to serve in the event of scheduling conflicts, conflicts of interest, disability, or other disqualification arising in a particular case. The alternate members shall have the same qualifications for appointment as the original member. In making the appointments, the appointing authority shall make a good faith effort to appoint members with different perspectives of the justice system. The appointing authority shall also consider geographical location, gender, and racial diversity in making the appointments.

(c) The superior court judge who is appointed as a member under subsection (a) of this section shall serve as Chair of the Commission. The Commission shall have its initial meeting no later than January 31, 2007, at the call of the Chair. The Commission shall meet a minimum of once every six months and may also meet more often at the call of the Chair. The Commission shall meet at such time and place as designated by the Chair. Notice of the meetings shall be given at such time and manner as provided by the rules of the Commission. A majority of the members shall constitute a quorum. All Commission votes shall be by majority vote. (2006-184, s. 1.)

Editor's Note. — Subsections (b) and (c) were codified as (a1) and (b) by Session Laws 2006-184, s. 1, and have been renumbered at the direction of the Revisor of Statutes.

Session Laws 2006-184, s. 8, provides: "In order to allow staggered terms of members of the North Carolina Innocence Inquiry Commission, as required by G.S. 15A-1464(a) as enacted by this act, the Commission members identified in G.S. 15A-1463(a)(1), (2), and (4) shall be appointed to initial terms of two years, the Commission members identified in G.S. 15A-1463(a)(3), (5), and (6) shall be appointed to initial terms of three years, and the Commission members identified in G.S. 15A-1463(a)(7) shall be appointed to initial terms of one year."

Session Laws 2006-184, s. 11, provides: "The initial members of the North Carolina Innocence Inquiry Commission shall be appointed not later than October 1, 2006. No claims of 'actual innocence' may be filed with the Commission until November 1, 2006. No claims of 'actual innocence' where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008."

§ 15A-1464. Terms of members; compensation; expenses.

(a) Of the initial members, two appointments shall be for one-year terms, three appointments shall be for two-year terms, and three appointments shall be for three-year terms. Thereafter, all terms shall be for three years. Members of the Commission shall serve no more than two consecutive three-year terms plus any initial term of less than three years. Unless provided otherwise by this act, all terms of members shall begin on January 1 and end on December 31.

Members serving by virtue of elective or appointive office, except for the sheriff, may serve only so long as the officeholders hold those respective offices. The Chief Justice may remove members, with cause. Vacancies occurring before the expiration of a term shall be filled in the manner provided for the members first appointed.

(b) The Commission members shall receive no salary for serving. All Commission members shall receive necessary subsistence and travel expenses in accordance with the provisions of G.S. 138-5 and G.S. 138-6, as applicable. (2006-184, s. 1.)

Editor's Note. — Session Laws 2006-184, s. 8, provides: "In order to allow staggered terms of members of the North Carolina Innocence Inquiry Commission, as required by G.S. 15A-1464(a) as enacted by this act, the Commission members identified in G.S. 15A-1463(a)(1), (2), and (4) shall be appointed to initial terms of two years, the Commission members identified in G.S. 15A-1463(a)(3), (5), and (6) shall be appointed to initial terms of three years, and the Commission members identified in G.S. 15A-1463(a)(7) shall be appointed to initial terms of one year."

§ 15A-1465. Director and other staff.

(a) The Commission shall employ a Director. The Director shall be an attorney licensed to practice in North Carolina at the time of appointment and at all times during service as Director. The Director shall assist the Commission in developing rules and standards for cases accepted for review, coordinate investigation of cases accepted for review, maintain records for all case investigations, prepare reports outlining Commission investigations and recommendations to the trial court, and apply for and accept on behalf of the Commission any funds that may become available from government grants, private gifts, donations, or bequests from any source.

(b) Subject to the approval of the Chair, the Director shall employ such other staff and shall contract for services as is necessary to assist the Commission in the performance of its duties, and as funds permit.

(c) The Commission may, with the approval of the Legislative Services Commission, meet in the State Legislative Building or the Legislative Office Building, or may meet in an area provided by the Director of the Administrative Office of the Courts. The Director of the Administrative Office of the Courts shall provide office space for the Commission and the Commission staff. (2006-184, s. 1.)

Editor's Note. — The second and third paragraphs were designated as subsections (b) and (c) at the direction of the Revisor of Statutes.

§ 15A-1466. Duties.

The Commission shall have the following duties and powers:

(1) To establish the criteria and screening process to be used to determine which cases shall be accepted for review.

(2) To conduct inquiries into claims of factual innocence, with priority to be given to those cases in which the convicted person is currently incarcerated solely for the crime for which he or she claims factual innocence.

(3) To coordinate the investigation of cases accepted for review.

(4) To maintain records for all case investigations.

(5) To prepare written reports outlining Commission investigations and recommendations to the trial court at the completion of each inquiry.

(6) To apply for and accept any funds that may become available for the Commission's work from government grants, private gifts, donations, or bequests from any source. (2006-184, s. 1.)

§ 15A-1467. Claims of innocence; waiver of convicted person's procedural safeguards and privileges; formal inquiry; notification of the crime victim.

(a) A claim of factual innocence may be referred to the Commission by any court, person, or agency. The Commission shall not consider a claim of factual innocence if the convicted person is deceased. The determination of whether to grant a formal inquiry regarding any other claim of factual innocence is in the discretion of the Commission. The Commission may informally screen and dismiss a case summarily at its discretion.

(b) No formal inquiry into a claim of innocence shall be made by the Commission unless the Director or the Director's designee first obtains a signed agreement from the convicted person in which the convicted person waives his or her procedural safeguards and privileges, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding all inquiry requirements of the Commission. The waiver under this subsection does not apply to matters unrelated to a convicted person's claim of innocence. The convicted person shall have the right to advice of counsel prior to the execution of the agreement and, if a formal inquiry is granted, throughout the formal inquiry. If counsel represents the convicted person, then the convicted person's counsel must be present at the signing of the agreement. If counsel does not represent the convicted person, the Commission Chair shall determine the convicted person's indigency status and, if appropriate, enter an order for the appointment of counsel for the purpose of advising on the agreement.

(c) If a formal inquiry regarding a claim of factual innocence is granted, the Director shall use all due diligence to notify the victim in the case and explain the inquiry process. The Commission shall give the victim notice that the victim has the right to present his or her views and concerns throughout the Commission's investigation.

(d) The Commission may use any measure provided in Chapter 15A of the General Statutes and the Rules of Civil Procedure as set out in G.S. 1A-1 to obtain information necessary to its inquiry. The Commission may also do any of the following: issue process to compel the attendance of witnesses and the production of evidence, administer oaths, petition the Superior Court of Wake County or of the original jurisdiction for enforcement of process or for other relief, and prescribe its own rules of procedure. All challenges with regard to the Commission's authority or the Commission's access to evidence shall be heard by the Commission Chair in the Chair's judicial capacity, including any in camera review required by G.S. 15A-908.

(e) While performing duties for the Commission, the Director or the Director's designee may serve subpoenas or other process issued by the Commission throughout the State in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.

(f) All State discovery and disclosure statutes in effect at the time of formal inquiry shall be enforceable as if the convicted person were currently being tried for the charge for which the convicted person is claiming innocence.

(g) If, at any point during an inquiry, the convicted person refuses to comply with requests of the Commission or is otherwise deemed to be uncooperative by the Commission, the Commission shall discontinue the inquiry. (2006-184, s. 1.)

Editor's Note. — Session Laws 2006-184, s. 11 provides: "The initial members of the North Carolina Innocence Inquiry Commission shall be appointed not later than October 1, 2006. No claims of 'actual innocence' may be filed with the Commission until November 1, 2006. No claims of 'actual innocence' where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008."

§ 15A-1468. Commission proceedings.

(a) At the completion of a formal inquiry, all relevant evidence shall be presented to the full Commission. As part of its proceedings, the Commission may conduct public hearings. The determination as to whether to conduct public hearings is solely in the discretion of the Commission. Any public hearing held in accordance with this section shall be subject to the Commission's rules of operation.

(a1) The Commission may compel the testimony of any witness. If a witness asserts his or her privilege against self-incrimination in a proceeding under this Article, the Commission chair, in the chair's judicial capacity, may order the witness to testify or produce other information if the chair first determines that the witness's testimony will likely be material to reach a correct factual determination in the case at hand. However, the Commission chair shall not order the witness to testify or produce other information that would incriminate the witness in the prosecution of any offense other than an offense for which the witness is granted immunity under this subsection. The order shall prevent a prosecutor from using the compelled testimony, or evidence derived therefrom, to prosecute the witness for previous false statements made under oath by the witness in prior proceedings. The prosecutor has a right to be heard by the Commission chair prior to the chair issuing the order. Once granted, the immunity shall apply throughout all proceedings conducted pursuant to this Article. The limited immunity granted under this section shall not prohibit prosecution of statements made under oath that are unrelated to the Commission's formal inquiry, false statements made under oath during proceedings under this Article, or prosecution for any other crimes.

(b) The Director shall use all due diligence to notify the victim at least 30 days prior to any proceedings of the full Commission held in regard to the victim's case. The Commission shall notify the victim that the victim is permitted to attend proceedings otherwise closed to the public, subject to any limitations imposed by this Article. If the victim plans to attend proceedings otherwise closed to the public, the victim shall notify the Commission at least 10 days in advance of the proceedings of his or her intent to attend. If the Commission determines that the victim's presence may interfere with the investigation, the Commission may close any portion of the proceedings to the victim.

(c) After hearing the evidence, the full Commission shall vote to establish further case disposition as provided by this subsection. All eight voting members of the Commission shall participate in that vote.

Except in cases where the convicted person entered and was convicted on a plea of guilty, if five or more of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction by filing with the clerk of court the opinion of the Commission with supporting findings of fact, as well as the record in support of such opinion, with service on the district attorney in noncapital cases and service on both the district attorney and Attorney General in capital cases. In cases where the convicted person entered and was convicted on a plea of guilty, if all of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction.

If less than five of the eight voting members of the Commission, or in cases where the convicted person entered and was convicted on a guilty plea less than all of the eight voting members of the Commission, conclude there is sufficient evidence of factual innocence to merit judicial review, the Commission shall conclude there is insufficient evidence of factual innocence to merit judicial review. The Commission shall document that opinion, along with supporting findings of fact, and file those documents and supporting materials with the clerk of superior court in the district of original jurisdiction, with a copy to the district attorney and the senior resident superior court judge.

The Director of the Commission shall use all due diligence to notify immediately the victim of the Commission's conclusion in a case.

(d) Evidence of criminal acts, professional misconduct, or other wrongdoing disclosed through formal inquiry or Commission proceedings shall be referred to the appropriate authority. Evidence favorable to the convicted person disclosed through formal inquiry or Commission proceedings shall be disclosed to the convicted person and the convicted person's counsel, if the convicted person has counsel.

(e) All proceedings of the Commission shall be recorded and transcribed as part of the record. All Commission member votes shall be recorded in the record. All records and proceedings of the Commission are confidential and are exempt from public record and public meeting laws except that the supporting records for the Commission's conclusion that there is sufficient evidence of factual innocence to merit judicial review, including all files and materials considered by the Commission and a full transcript of the hearing before the Commission, shall become public at the time of referral to the superior court. Commission records for conclusions of insufficient evidence of factual innocence to merit judicial review shall remain confidential, except as provided in subsection (d) of this section. (2006-184, s. 1; 2009-360, s. 1.)

Effect of Amendments. — Session Laws 2009-360, s. 1, effective July 27, 2009, added subsection (a1).

§ 15A-1469. Postcommission three-judge panel.

(a) If the Commission concludes there is sufficient evidence of factual innocence to merit judicial review, the Chair of the Commission shall request the Chief Justice to appoint a three-judge panel, not to include any trial judge that has had substantial previous involvement in the case, and issue commissions to the members of the three-judge panel to convene a special session of the superior court of the original jurisdiction to hear evidence relevant to the Commission's recommendation. The senior judge of the panel shall preside.

(b) The senior resident superior court judge shall enter an order setting the case for hearing at the special session of superior court for which the three-judge panel is commissioned and shall require the State to file a response to the Commission's opinion within 60 days of the date of the order.

(c) The district attorney of the district of conviction, or the district attorney's designee, shall represent the State at the hearing before the three-judge panel.

(d) The three-judge panel shall conduct an evidentiary hearing. At the hearing, the court may compel the testimony of any witness, including the convicted person. The convicted person may not assert any privilege or prevent a witness from testifying. The convicted person has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present shall be in writing.

(e) The senior resident superior court judge shall determine the convicted person's indigency status and, if appropriate, enter an order for the appointment of counsel. The court may also enter an order relieving an indigent convicted person of all or a portion of the costs of the proceedings.

(f) The clerk of court shall provide written notification to the victim 30 days prior to any case-related hearings.

(g) Upon the motion of either party, the senior judge of the panel may direct the attorneys for the parties to appear before him or her for a conference on any matter in the case.

(h) The three-judge panel shall rule as to whether the convicted person has proved by clear and convincing evidence that the convicted person is innocent of the charges. Such a determination shall require a unanimous vote. If the vote is unanimous, the panel shall enter dismissal of all or any of the charges. If the vote is not unanimous, the panel shall deny relief. (2006-184, s. 1.)

§ 15A-1470. No right to further review of decision by Commission or three-judge panel; convicted person retains right to other postconviction relief.

(a) Unless otherwise authorized by this Article, the decisions of the Commission and of the three-judge panel are final and are not subject to further review by appeal, certification, writ, motion, or otherwise.

(b) A claim of factual innocence asserted through the Innocence Inquiry Commission shall not adversely affect the convicted person's rights to other postconviction relief. (2006-184, s. 1.)

§§ 15A-1471 through 15A-1474: Reserved for future codification purposes.

§ 15A-1475. Reports.

Beginning January 1, 2008, and annually thereafter, the North Carolina Innocence Inquiry Commission shall report on its activities to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and the State Judicial Council. The report may contain recommendations of any needed legislative changes related to the activities of the Commission. The report shall recommend the funding needed by the Commission, the district attorneys, and the State Bureau of Investigation in order to meet their responsibilities under S.L. 2006-184. Recommendations concerning the district attorneys or the State Bureau of Investigation shall only be made after consultations with the North Carolina Conference of District Attorneys and the Attorney General. (2006-184, s. 9.)

Cross References. — As to the duties of the State Judicial Council, see G.S. 7A-409.1.

Editor's Note. — Session Laws 2006-184, s. 9, was codified as this section at the direction of the Revisor of Statutes.

ARTICLE 93 TO 99.

§§ 15A-1476 through 15A-1999: Reserved for future codification purposes.

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Except as provided in G.S. 15A-2004, upon conviction or adjudication of guilt of a defendant of a capital felony in which the State has given notice of its intent to seek the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f) of this section. Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. The court shall give appropriate instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1;

c. 682, s. 9; 1981, c. 652, s. 1; 1994, Ex. Sess., c. 7, s. 5; 1995, c. 509, s. 14; 2001-81, s. 1; 2001-346, s. 2.)

Cross References. — As to punishment for persons under the age of seventeen who are convicted of murder, see G.S. 14-17. As to prosecutorial discretion to try a defendant capitally or noncapitally for first degree murder, see G.S. 15A-2004.

Editor's Note. — This Article was enacted by Session Laws 1977, c. 406, s. 2. Section 6 of that act provided: "In the event that it is determined by the Supreme Court of North Carolina or by the Supreme Court of the United States that a sentence of death may not be constitutionally imposed for a capital offense for which the death penalty is provided by this act, the punishment for that offense shall be imprisonment in the State's prison for life." Section 7 of that act is a severability clause. Section 8 of that act provided: "The provisions of this act shall apply to murders committed on or after the effective date of this act."

Session Laws 1979, c. 682, s. 9, inserted "or a sex offense" near the middle of subdivision (5) of subsection (e). Section 12 of that act is a severability clause. Section 13 of that act provided: "All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency." Section 14 of that act provided: "This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 2001-81, s. 1, which amended this section, is effective July 1, 2001, and applicable to pending and future cases, except that the provisions of the act regarding the State's notice of intent to seek the death penalty do not apply to defendants indicted in capital cases before the effective date of the act.

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

For comment on proposals to balance interest of the defendant and State in the selection of capital juries, see 59 N.C.L. Rev. 767 (1981).

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For note on jury discretion in capital cases in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Campbell L. Rev. 451 (1983).

For comment on limitations upon the jury's discretion in capital punishment sentencing in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), see 19 Wake Forest L. Rev. 621 (1983).

For note discussing North Carolina's capital sentencing procedure, see 62 N.C.L. Rev. 833 (1984).

For 1984 survey, "Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy," see 63 N.C.L. Rev. 1122 (1985).

For 1984 survey, "The Improper Use of Prosecutorial Discretion in Capital Punishment Cases," see 63 N.C.L. Rev. 1136 (1985).

For 1984 survey, "The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases," see 63 N.C.L. Rev. 1146 (1985).

For symposium address on the death penalty in North Carolina, see 8 Campbell L. Rev. 1 (1985).

For article, "Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations," see 8 Campbell L. Rev. 71 (1985).

For article, "The 'Especially Heinous' Aggravating Circumstance In Capital Cases — The Standardless Standard," See 64 N.C.L. Rev. 941 (1986).

For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

For note on death qualification of jury prior to guilt phase under Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), see 66 N.C.L. Rev. 183 (1987).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

For note, "Overstepping Precedent? Tison v. Arizona Imposes the Death Penalty on Felony Murder Accomplices," see 66 N.C. L. Rev. 817 (1988).

For note, "Mercy Killing and Malice in North Carolina," see 66 N.C.L. Rev. 1160 (1988).

For note, "Sifting Through the Fallout of North Carolina's Death Penalty Jurisprudence: Getting Down to the Real McKoy," see 69 N.C.L. Rev. 1504 (1991).

For note, "State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate Punishment," see 72 N.C.L. Rev. 1672 (1994).

For note, "Arbitrariness and the Death Penalty in an International Context", see 45 Duke L.J. 611 (1995).

For article, "State v. McCarver: The Role of Jury Unanimity in Capital Sentencing", see 74 N.C.L. Rev. 2061 (1996).

For article, "Was the First Woman Hanged in North Carolina a 'Battered spouse?'", see 19 Campbell L. Rev. 311 (1997).

For article, "North Carolina's (f)(1) Mitigating Circumstance: Does It Truly Serve to Mitigate?," see 26 Campbell L. Rev. 1 (2004).

CASE NOTES

I. General Consideration.
II. Review of Judgment and Sentence.
III. Aggravating Circumstances.
  A. In General.
  B. Prior Convictions.
  C. Avoiding Arrest or Escaping Custody.
  D. Felony Murder.
  E. Especially Heinous, Atrocious, or Cruel Act.
  F. Risk of Death to More Than One Person.
  G. Course of Conduct.
  H. Judicial Officer or Witness.
IV. Mitigating Circumstances.
  A. In General.
  B. No Significant Prior Criminal Activity.
  C. Mental or Emotional Disturbance.
  D. Duress.
  E. Impaired Capacity.
  F. Age of Defendant.
  G. Aid in Apprehension of Another or Testimony on Behalf of Prosecution of Another Felony.

I. GENERAL CONSIDERATION.

***Editor's Note.** — Most of the opinions below were rendered prior to the 2001 amendment to this section by Session Laws 2001-81, and enactment of G.S. 15A-2004, giving the district attorney discretion as to whether to seek the death penalty for a capital case.*

Constitutionality. — For discussion of the constitutionality of the North Carolina death penalty statutes, see State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980); State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

The statutory scheme for determining the sentence in a capital case under this section is not unconstitutional on its face. State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982).

The death penalty statute is not unconstitutional on the ground that it constitutes cruel and unusual punishment, nor does the statute impermissibly extend the court's jurisdiction without a constitutional amendment in violation of N.C. Const., Art. IV, § 12, as subsection (d) of this section vests automatic review in the Supreme Court of North Carolina and provides standards and guidelines for review of the death sentence by the Supreme Court. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

The constitutionality of the death penalty statute has been repeatedly upheld. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L.

Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992); State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 468 U.S. 1227, 105 S. Ct. 28, 82 L. Ed. 2d 920 (1984) in light of State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The North Carolina Supreme Court reaffirmed its position that the North Carolina death penalty statute does not violate the U.S. Const., Amends. VIII and XIV or N.C. Const., Art. I, § 19 and 27. State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993), cert. denied, 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Subsection (d) of this section is not unconstitutional. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985), 510 U.S. 1171, 114 S. Ct. 1208, 127 L. Ed. 2d 556 (1994).

Subdivision (e)(9) is constitutional on its face. State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

The North Carolina capital murder scheme is not unconstitutional under Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), as permitting subjective discretion and discrimination in imposing the death penalty. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

The United States Supreme Court says the federal Constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first-degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification, and the North Carolina Supreme Court is not inclined to interpret the Constitution to require more. If prosecutors are to be "guided" in the exercise of this kind of discretion, it is the province of the legislature and not the Court to so provide. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985), 510 U.S. 1171, 114 S. Ct. 1208, 127 L. Ed. 2d 556 (1994).

The Supreme Court would decline to reconsider its prior holdings upholding the constitutionality of the death penalty statute. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

The North Carolina jury process in first degree murder cases is constitutional. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

This section is not unconstitutional. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 249, 102 L. Ed. 2d 235 (1988).

The North Carolina death penalty statute is neither unconstitutionally vague nor overbroad and is not applied in a discriminatory and discretionary manner. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Petitioner failed to establish that North Carolina's capital sentencing scheme violates the U.S. Constitution. Ward v. French, 989 F. Supp. 752 (E.D.N.C. 1997), aff'd, 165 F.3d 22 (4th Cir. 1998), cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 809 (1999).

North Carolina's sentencing scheme does not give the jury an option to exercise impermissible discretion or to administer the death penalty in an arbitrary and capricious manner. Ward v. French, 989 F. Supp. 752 (E.D.N.C. 1997), aff'd, 165 F.3d 22 (4th Cir. 1998), cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 809 (1999).

This section as it read prior to the 2001 amendment by Session Laws 2001-81 did not conflict with Article IV, Section 18 of the North Carolina Constitution; in other words, the district attorney's former lack of discretion as to whether to try a defendant capitally or noncapitally for first-degree murder did not impermissibly conflict with the prosecutor's constitutional duty to prosecute criminal actions on behalf of the state, although he did have broad discretion in a homicide case to determine whether to try a defendant for first-degree murder, second-degree murder, or manslaughter. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

The death penalty does not violate the International Covenant on Civil and Political Rights. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Construction with Other Law. — The court properly rejected the defendant's challenge to the jury instruction on the basis of the adequate and independent state procedural rule set forth in G.S. 15A-1419(a)(3) and not because it was statutorily obliged to do so by this section. Fisher v. Lee, 215 F.3d 438, 2000 U.S. App. LEXIS 14167 (4th Cir. 2000), cert. denied, 531 U.S. 1095, 121 S. Ct. 822, 148 L. Ed. 2d 706 (2001).

Rules of Evidence Inapplicable to Sentencing Proceedings. — In sentencing proceedings the Rules of Evidence do not limit the trial courts discretion over the scope of cross-examination because they do not apply. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997),

cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

Evidence Admissible. — A witness psychologist's report was admissible in a sentencing hearing after it was used to cross-examine another witness. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Because the jury had already heard during the guilt or innocence phase of defendant's trial that defendant was the one who shot the victim, the trial court did not err during the sentencing phase in permitting a police investigator to testify that one person stated to the investigator that the defendant had confessed to that person that the defendant had shot the victim. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002), cert. denied, 537 U.S. 1010, 123 S. Ct. 478, 154 L. Ed. 2d 412 (2002).

Inmate unsuccessfully claimed that allowing an agent to read from the state witness's statement without producing him as a witness at the re-sentencing phase violated his constitutional right to confront the witness, and the inmate claimed that the state was obligated to show that the witness was unavailable before he could have been denied an opportunity to cross-examine the inmate during the second sentencing hearing; G.S. 15A-2000(a)(3) clearly allowed testimony from the guilt phase of a capital trial to be used during the penalty phase. Call v. Polk, 454 F. Supp. 2d 475, 2006 U.S. Dist. LEXIS 68738 (W.D.N.C. 2006).

The holding in McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), did not invalidate North Carolina's capital sentencing statute or any part thereof; at most the decision invalidated only those jury instructions requiring unanimity on mitigating circumstances in a capital sentencing proceeding, and because the invalidated jury instructions amount only to trial error and do not arise from any deficiency inherent in the statute itself, the statute remains constitutional and in full force and effect. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

Death penalty statute does not violate constitutional right to privacy. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Procedure Held Constitutionally Adequate. — Procedure during sentencing phase, whereby the jury was instructed to determine (1) whether there were aggravating circumstances; (2) whether the aggravating circumstances were sufficient to warrant a death sentence; (3) whether there were mitigating circumstances; and (4) whether the aggravating circumstances outweighed the mitigating ones, satisfied all requirements to which defendant was constitutionally entitled. Rook v. Rice, 783 F.2d 401 (4th Cir.), cert. denied, 478 U.S. 1022, 106 S. Ct. 3315, 92 L. Ed. 2d 745 (1986).

There is no constitutional infirmity in the use of the word "duty" in jury instructions to explain the jury's responsibility to act after it has unanimously made the statutory findings during the sentencing phase of the trial. McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), cert. denied, 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009, 502 U.S. 922, 112 S. Ct. 334, 116 L. Ed. 2d 274 (1991).

The rights guaranteed by this section are anchored in the prohibition under U.S. Const., Amend. VIII against cruel and unusual punishment in that the statute requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

General statistical studies of the operation of the death penalty, showing that a person is more likely to be executed if the murder victim is white and the chance is more likely yet if the defendant is black, could not be used by defendant to show a violation of his rights under U.S. Const., Amends. VIII and XIV or under N.C. Const., Art. I, § 19. State v. Green, 329 N.C. 686, 406 S.E.2d 852 (1991).

Unanimity Requirement for Finding of Mitigating Factors Unconstitutional. — The unanimity requirement in North Carolina's capital sentencing scheme, which prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find, violates the federal Constitution by preventing the sentencer from considering all mitigating evidence. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Each juror must be allowed to consider all mitigating evidence in deciding whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death. Such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

But there is no constitutional requirement that a juror must consider a mitigating circumstance found by another juror to exist. What is constitutionally required is that jurors be individually given the opportunity to consider and give weight to whatever mitigating evidence they deem to be valid. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

A state may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding in the same case; therefore evidence recorded from defendant's prior trial was properly admitted where witness asserted his privilege against incrimination. State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995), cert. denied, 516 U.S. 1133, 116 S. Ct. 956, 133 L. Ed. 2d 879 (1996).

Discretion of District Attorney. — Prior to the 2001 amendment to this section and enactment of G.S. 15A-2004, while the district attorney had broad discretion to decide in a homicide case whether to try defendant for first-degree murder, second-degree murder, or manslaughter, he/she had no discretion whether to try defendant capitally or noncapitally for first-degree murder. State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998).

Duty of Prosecution. — The prosecutor has a duty to strenuously present the state's case, to use every legitimate means to bring about a just conviction and, in a capital case, that duty may be extended to present arguments for the sentence of death. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

Failure of District Attorney to Timely File Petition. — As a sanction for the district attorney's failure to timely file a petition for a pretrial conference pursuant to Gen. Rules. Prac., Rule 24, the trial court exceeded its authority by prohibiting the state from seeking the death penalty where defendant was charged with first-degree murder. State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998).

This section does not mandate the death penalty, and it does not limit the sentencer's consideration of any relevant information offered by the defendant. McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), cert. denied, 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009, 502 U.S. 922, 112 S. Ct. 334, 116 L. Ed. 2d 274 (1991).

Constitutionality of Instruction on Weighing of Factors. — Court's instructions that the jury must recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and if it found that the aggravating circumstances were sufficiently substantial to call for the death penalty when considered with the mitigating circumstances did not impair the jury's fair consideration of evidence in mitigation of the crime. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

G.S. 15A-2000(c) does not violate a defendant's constitutional rights. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Legislative Intent in Specifying Aggravating Circumstances. — By enacting specific aggravating circumstances to be considered in capital sentencing, the legislature intended that a jury having found one of those statutory aggravating circumstances to exist must give it some weight in aggravation when determining the appropriate sentence to recommend. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Georgia Statute Compared. — This section resembles in many respects that adopted by Georgia and found constitutional in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), primarily on the grounds that it reliably guides the sentencer's exercise of discretion in determining whether to impose the death penalty. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982).

Maryland Statute Compared. — North Carolina capital sentencing procedure differs significantly from Maryland's sentencing scheme which the Supreme Courts in Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) declared unconstitutional, and the North Carolina capital-sentencing procedure conforms with federal constitutional requirements. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Intent Requirement of Enmund v. Florida. — Under Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), which construed and applied U.S. Const., Amend. XIII, before he may be sentenced to death, a participant must have killed or attempted to kill or intended or contemplated that life would be taken. This requirement is met if the defendant intended or contemplated that lethal force would be used if it became necessary to effectuate the crime. State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), overruled on other grounds, State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

It is not necessary that a capital defendant be the only person who delivered fatal blows to the victim, in order for him to be executed. It is enough if the capital defendant is one of two or more who delivered fatal blows. State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

Purpose. — This section is drafted and implemented so as to preclude the arbitrary and capricious imposition of the death penalty upon any segment of the State's population. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Section 15A-1334—not a part of Article 100—has no application to capital sentencing proceedings which are conducted pursuant to G.S. 15A-2000. This, the only remnant of the common law right of allocution remaining in capital cases, is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

A charge of first-degree murder carries with it the possibility of a sentence of death and must therefore be, and is, subject to additional safeguards. State v. Strickland, 307 N.C. 274, 298 S.E.2d 645 (1983).

This Article does not create a new offense or add new elements to the crime of first-degree murder; the statutes merely set forth sentencing standards to guide the jury's discretion to the end that the death penalty will not be imposed arbitrarily or capriciously. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

The Fair Sentencing Act was inapplicable where the defendant was sentenced under this section for convictions of three counts of first-degree murder, and not under the Fair Sentencing Act. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

For discussion of factors governing interpretation of the death penalty statute, see State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Bifurcated Proceedings Constitutional. — The bifurcated trial proceedings of this section, in which the same jury determines both the guilt and punishment issues are constitutional. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

"Death Qualified" Jury Constitutional. — It is not unconstitutional to be tried by a "death qualified" jury. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

The use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to the death penalty is constitutional. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995), overruled on other grounds State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

"Death qualifying" the jury prior to the guilt determination phase does not result in a guilt prone jury which denies the defendant the right to a fair trial and fair sentencing and subjects him to cruel and unusual punishment in violation of U.S. Const., Amends. VI, VIII, and XIV. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

"Death qualifying" a jury prior to the guilt phase of a trial and permitting the same jury to hear both the guilt and penalty phases of a trial is not unconstitutional. State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983).

The current jury selection process in this

State in first-degree murder cases is constitutional. See State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

Defendant was not deprived of her right to a fair trial because her jury was "death qualified." State v. Spangler, 314 N.C. 374, 333 S.E.2d 722 (1985).

Supreme Court would decline to reconsider its holdings on the matter of death-qualifying jury. State v. Woods, 316 N.C. 344, 341 S.E.2d 545 (1986).

Jurors' affirmative response to the question "Is your view of the death penalty such that it would prevent or substantially impair your performing your sworn duties as a juror?" was a valid basis for allowing the prosecutor's challenge for cause, where potential jurors had been indoctrinated by the court and prosecution into the nature of their responsibilities. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Sentencing Hearing Would Otherwise Be Futile and Meaningless. — If capital cases could be tried by juries which included persons firmly opposed to the maximum prescribed penalty sought by the State, the separate sentencing hearing mandated by this section would almost certainly become a futile and meaningless exercise, contrary to the expressed will of the citizenry in the enactment of capital punishment legislation. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

It is not necessary for jurors to be given basic understanding of the death penalty process before they may be challenged for cause as a result of their answers to certain questions concerning the death penalty. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

A state may use its peremptory challenges to purge a jury of veniremen not excludable for cause under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1967), for scruples about the death penalty. Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

It was neither constitutionally nor otherwise improper for the prosecution to use its challenges to excuse potential jurors who were not excludable for cause but who expressed qualms or some hesitancy about their ability to impose the death penalty. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Jurors Properly Excused for Cause. — A trial court may excuse for cause a prospective juror whose views regarding the death penalty would prevent or substantially impair the performance of his duty as a juror, and thus where two potential jurors clearly expressed several times that they could not vote for the death penalty under any circumstances, the trial court properly could have concluded that their subsequent equivocation arose out of their desire to perform their duties as jurors according to the dictates of the law and excused them for cause. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Court's excusal of juror whose physician had determined that jury duty could cause complications with her pregnancy prior to the sentencing proceeding was not an abuse of discretion. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Trial court did not abuse its discretion by disqualifying and removing a juror once the court was alerted to an ongoing criminal investigation involving the juror, which investigation the court deemed to be sufficient to remove the juror. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Manner of Execution Not Relevant to Deliberations. — Since the manner of execution is irrelevant to the deliberations of the jury and to the ability of a prospective juror to serve, the court did its duty by allowing excusal for cause of a prospective juror who could not "vote for the death penalty without knowing how it was going to be executed." State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Same Jury Generally to Hear Both Phases of Trial. — Under this section, it is intended that the same jury should hear both phases of the trial unless the original jury is unable to reconvene. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

The prosecutor's statements regarding

the sentencing phase of defendant's first-degree murder trial, made during jury selection, simply referred to the conditional nature of bifurcated capital prosecutions mandated by this section, and nothing in the statements themselves suggested the prosecutor was attempting to place before the venire prejudicial matters by injecting his own beliefs or personal opinions. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Exchange of Jurors for Sentencing Phase Based on Their Convictions as to Death Penalty. — Subdivision (a)(2) of this section permits alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death penalty contravenes subdivision (a)(2) of this section, which contemplates that the same jury which determines guilt will recommend the sentence. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Allowing jurors opposed to capital punishment to serve during the guilt-innocence determination phase and then replacing them at the sentencing phase would violate subdivision (a)(2) of this section, which contemplates that the same jury which determines guilt will also recommend the sentence to be imposed. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Trial court acted properly in not permitting jurors who were opposed to the death penalty to sit as jurors in the guilt-innocence phase of defendant's trial. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Discretion of Court in Questioning of Jury. — Both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. However, the trial court is vested with broad discretion in controlling the extent and manner of the inquiry into prospective jurors' qualifications in a capital case. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Trial judge did not abuse his discretion in reopening the examination of a juror, and then excusing her for cause, when she stated that she could not, after reflection, impose the death sentence. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

Imposition of Penalty Not Mandatory. — The present North Carolina death penalty statutes are not mandatory in nature but instead provide for the exercise of guided discretion in the imposition of sentence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

Formerly No Discretion as to Whether Case Is Capital or Non-Capital. — Prior to the 2001 amendment to this section and the enactment of G.S. 15A-2004, the question of trying a first degree murder case as capital or non-capital was not within the district attorney's discretion. However, when the State had no evidence of any aggravating circumstance, the district attorney could so inform the court. In doing so, the district attorney was not exercising any discretion as to defendant's sentence, because a jury may not impose a death sentence in the absence of at least one aggravating factor. Rather, by bringing the absence of such factors to the attention of the trial judge, the district attorney was pursuing the laudable goal of avoiding needless judicial proceedings and concomitant waste of judicial resources. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

Findings of one judge, relating to whether a case should be tried as a capital case under this section, were not binding on another judge who had heard all the evidence in the case and had to determine the defendant's punishment under the Fair Sentencing Act. State v. Mancuso, 321 N.C. 464, 364 S.E.2d 359 (1988).

Announcement by State That It Will Not Seek Death Penalty. — In a first degree murder case, where the State wishes to announce that it will not seek the death sentence, the State may make its announcement at the close of the guilt phase, but this is not the only permissible moment. Any such announcement must be based upon a genuine lack of evidence to support the submission of any aggravating factors. However, there is nothing to prevent the State from making the announcement at the beginning of the trial. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

Jury's Consideration Not to Be Restricted. — The jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Jury Not Allowed to Disregard Circumstances. — Allowing the jury the discretionary power to completely disregard those circumstances specifically enumerated by the legislature and found from the evidence to exist — whether aggravating or mitigating circumstances — would return the sentencing proceedings in capital cases to the realm of unguided jury discretion, rendering any resulting death sentences constitutionally suspect. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Involvement of Co-Defendants. — That capital sentencing must focus on the individual defendant, his crimes, personal culpability, and mitigation, does not also mean that no mention may be made of a co-defendant actively involved at the scene of the crime. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Duty of Jury in Assessing Appropriateness of Penalty. — The deliberative process of the jury envisioned by this section is not a mere counting process. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. Nuances of character and circumstance cannot be weighed in a precise mathematical formula. At the same time, it would be improper to instruct the jury that they may disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Under subsection (b) of this statute, the jury is required to consider aggravating factors and mitigating circumstances and then to determine whether the defendant should be sentenced to death or imprisonment in the State's prison for life. These are the only alternatives allowed the jury. Other comments or notations on the verdict sheet are irrelevant. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Discretion of Jury. — Although the jury's sentencing discretion in a capital case is not totally eliminated, it is not unbridled as it must be exercised under the guidance of a carefully defined set of statutory criteria that allows the jury to take into account the nature of the crime and the character of the accused. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Through the exercise of guided discretion, juries in North Carolina are required to assess the appropriateness of imposing the death penalty upon a particular defendant for the commission of a particular crime. It is not the exercise of discretion but the exercise of unbridled discretion which is unconstitutional. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

By delineating various aggravating and mitigating circumstances, this section equips a jury with the tools it will require if it is to exercise the guided discretion which is constitutionally mandated. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

The jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983); State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Jury may not arbitrarily or capriciously impose or reject a sentence of death. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983); State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Felony May Support Both Mitigating and Aggravating Circumstance. — The trial court did not err by submitting the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity after having submitted the aggravating circumstance that the defendant had been previously convicted of a felony involving the use or threat of violence to the person. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Failure of Jury to Show Weighing of Mitigating and Aggravating Circumstances. — A writing returned by the jury which fails to specifically show that the jury has determined that the mitigating circumstances are insufficient to outweigh the aggravating circumstances found will not support a sentencing recommendation or sentence in a capital case. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Jury must recommend the death penalty if it makes the three findings necessary to support such a sentence under subsection (c) of this section: (1) The statutory aggravating circumstance or circumstances, which the jury finds beyond a reasonable doubt; (2) that the aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for imposition of the death penalty; and, (3) that the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

Expression of Jury Concurrence. — Subsection (b) of this section does not specify how or by what method juror concurrence and agreement should be expressed. It does not specifically require that the juror's assent be manifested by spoken word. Rather, the crucial aspect for consideration is whether there was a concurrence with the jury verdict, not the manner in which agreement is manifested. State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988).

Where a juror makes an affirmative physical act, such as nodding the head, as to the verdict, and there is no evidence that coercion or pressure was placed on the juror, such action by the juror meets the requirement of subsection (b) of this section. State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988).

Juror Expectations. — The trial court's reference to the possibility of a separate sentencing jury did not violate the defendant's rights under the Eighth Amendment by diluting the responsibility of the jury, nor was it misleading, although the better practice would be for the trial court to make no mention of a different jury at the preliminary stage of the trial. State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 2001 N.C. LEXIS 265 (2001), cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

Upon inquiry by the jury, trial court must inform jurors that inability to reach a unanimous verdict should not be their concern but should simply be reported to the court. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987), holding that failure to so instruct, combined with misleading instructions which probably conveyed the erroneous impression that a unanimous decision, either for death or for life imprisonment, was required, constituted plain error warranting a new sentencing hearing.

Reference to Statutory Provision Which Would Minimize Jurors' Role in Their Minds. — In the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. The matters which a jury may consider in the sentencing phase of a bifurcated trial are clearly set forth in subsections (e) and (f) of this section. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Suggestion to Jurors That Review Is Available to Correct Their Errors. — The rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Jury Intervention Required. — The death penalty statute does not permit a defendant to plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

A party moving for a new trial grounded upon misrepresentation by a juror during voir dire must show: (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; (3) and the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. State v. Buckom, 126 N.C. App. 368, 485 S.E.2d

319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998).

Argument by prosecutor that the only way the jury could prevent defendant from killing again was to give him the death penalty was not improper. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, 515 U.S. 1152, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

District Attorney's Reference to Parole Statute Was Error. — In a prosecution for murder, during the sentencing phase of a bifurcated trial, the district attorney's reference to the parole statute was erroneous. Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

When Instruction on Eligibility for Parole Required. — The United States Supreme Court has held that in a capital sentencing proceeding where the state law provides that a defendant sentenced to life imprisonment will not be eligible for parole, it is violative of due process to deny defendant's request for a jury instruction that under state law defendant, if sentenced to life imprisonment, would not be eligible for parole; however, this holding is limited to those situations where the alternative to a sentence of death is life imprisonment without possibility of parole. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Questioning of Prospective Jurors Regarding Parole. — Because defendant could have been eligible for parole, no questioning of prospective jurors during sentencing phase regarding parole eligibility was required to satisfy due process. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

The weight any circumstance may be given is a decision entirely for the jury. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Determination of Value and Weight of Evidence by the Jury. — Although a trial court did not specify statutory and nonstatutory mitigating factors in its jury instructions in defendant's capital murder case, the jury would determine the "value" and "weight" of the evidence pursuant to G.S. 15A-2000(F)(9), (b)2), (c)(3) during its deliberations. State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

A juror properly may give a nonstatutory circumstance no weight even if the juror finds the circumstance to exist. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Jury Decision Must Be Based on Considerations in Subsection (b). — Subsection (b) of this section requires the jury to deliberate and render a sentence recommendation based upon two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. This section specifically requires that the jury sentence recommendation be "based on these considerations," not on unbridled discretion. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Prerequisite to any jury decision imposing the death penalty the State must prove and the jury must find beyond a reasonable doubt at least one of the enumerated aggravating circumstances listed in subsection (e) of this section, and further, the jury must also find beyond a reasonable doubt: (1) the aggravating circumstances are "sufficiently substantial to call for the imposition of the death penalty"; and (2) the mitigating circumstances are "insufficient to outweigh the aggravating circumstances." State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Defense counsel acted improperly where he urged the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Individual Poll Required. — Trial court, in questioning the jury collectively and having all members of the jury respond collectively, failed to meet the statutory mandate that the jury be polled individually. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

The order and form of the issues to be submitted to the jury in capital trials should be substantially as follows: (1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? (2) Do you find from the evidence the existence of one or more of the following mitigating circumstances? (3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found? (4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Mathematical Approach Disapproved. — The jury is not required to assign a value to the aggravating circumstances, subtract from it the value of the mitigating circumstances, and then look to the remainder to determine if that value is sufficiently substantial to deserve the death penalty. Such a mechanical mathematical approach to the decision of life or death is disapproved. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991).

Thoughtful and full deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: It tends to prevent arbitrary and capricious sentence recommendations. State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), cert denied, 517 U.S. 1110, 116 S. Ct. 1332, 134 L. Ed. 2d 482 (1996).

What constitutes a reasonable time for jury deliberation in the sentencing stage should be left to the trial judge's discretion since the trial judge is in the best position to determine how much time is reasonable under the facts of a specific case. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Burden of Proving Aggravating or Mitigating Circumstances. — Each aggravating or mitigating circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Concession of Guilt and of Aggravating Factors by Defense Counsel. — Statements of defendant's lawyer during penalty phase of capital murder case which involved a concession of guilt and of the existence of two aggravating circumstances did not reflect errors so serious as to have deprived defendant of counsel in the sense of U.S. Const., Amend. VI. Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Defendant's statements to victim concerning his crimes against another victim, if relevant, were admissible pursuant to G.S. 8C-1, Rule 801(d) and were relevant because they tended to show that the murder was especially heinous, atrocious, or cruel and tended to show the murder was part of a cause of conduct. State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994), cert. denied, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994).

Jury Consideration of Failure to Reach Unanimous Verdict. — It is improper for the jury to consider what may or may not happen in the event it cannot reach a unanimous sentencing verdict. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Informing the jury of the effect of their failure to reach a unanimous verdict is not permitted. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Statement that a sentence of life imprisonment would be imposed upon the defendant in the event that the jury was unable to reach unanimous agreement on the proper sentence would be improper, because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed. This is true whether such a statement is read by counsel or is contained within the instructions of the trial court. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Refusal to So Instruct Not Error. — Refusing during the sentencing phase of a first-degree murder trial to instruct the jury that its failure to agree unanimously on the sentence within a reasonable time will result in the imposition of a sentence of life imprisonment is not error, as the jury's failure to agree upon a sentence within a reasonable time is not a proper matter for jury consideration. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

It is not error to fail or refuse to instruct the jury that a sentence of life imprisonment will be imposed upon defendant in the event that the jury is unable to reach unanimous agreement on the proper sentence. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

Denial of Motion to Impose Life Sentence After Seven Hours of Deliberation. — The trial court did not err in denying defendant's motion to impose a life sentence in a capital murder case after the jury had deliberated for seven hours where the jury was considering three separate cases, one of which required consideration of two aggravating and six mitigating factors; another required four aggravating and six mitigating factors; and the third required consideration of three aggravating and six mitigating factors. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction that the trial court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment would be tantamount to an open invitation for the jury to avoid its responsibility and to disagree. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Competent Evidence Permitted. — During a capital sentencing proceeding, the State must be permitted to present any competent evidence supporting the imposition of the death penalty. State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Evidence of Aggravating Circumstances. — The death penalty statute does not permit the State to recommend to the jury during the sentencing proceeding a sentence of life imprisonment when the State has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

Definition of a Capital Felony. — The General Assembly, when it defined capital felony under this section, meant a crime for which the defendant could receive the death penalty. State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994).

Instruction on Weighing Factors in Aggravation and Mitigation. — Instruction that if the jury found that aggravating circumstances outweighed mitigating circumstances, and that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, then it would be the jury's duty to recommend that defendant be sentenced to death is not erroneous. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Although evidence may support the existence of a nonstatutory circumstance, the jury may decide that it is not mitigating; therefore, the court did not err in denying defendant's requested instruction that if the jury found any nonstatutory mitigating circumstances, it must give them some mitigating value. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Jury Instructions Held Proper. — The appellate court rejected the defendants's contention that the trial court's instruction resulted in confusion and may have led to imposition of a death sentence on less than complete jury unanimity and held that the instruction was entirely consistent with the requirements of this section, where the court instructed the jury, pursuant to the pattern instruction, as follows: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?". State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Trial court's curative instruction to the jury following the prosecutor's comment at trial was sufficient, even though not made immediately after the prosecutor's comments, as the the trial court stated that the comment was improper, and the statement was followed by an instruction to the jury not to consider the failure of the accused to offer the accused as a witness. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Duty of Prosecutor. — The prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the ultimate penalty. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Prosecutor's Statements. — The defendant's constitutional rights under Article I, Sections 19, 23, and 27 of the North Carolina Constitution were not violated by the prosecution's argument in opposition to the "catchall" mitigating circumstance of this section that the jury should not give any mitigating value to the fact that his accomplice was not sentenced to death where the prosecution did not imply that the accomplice's sentence could be treated as a nonstatutory aggravating circumstance. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Trial court does not have the power to overturn a death sentence and is obligated to enter judgments consistent with the jury's unanimous recommendation that defendant be sentenced to death. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S.

1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Effect of Guilty Plea on Determination of Sentence. — The question of sentence in a capital case is to be determined in the same manner whether a defendant pleads guilty to the capital offense or is found guilty by a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

A defendant may not plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Conditional Guilty Plea Not Permitted. — In a capital case, the trial judge did not err in construing this section and G.S. 15A-2001 as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

When Refusal to Sanction Plea Negotiation Proper. — Where, in a capital case, there is evidence tending to show the existence of two aggravating factors, i.e., that the murder occurred in the course of a rape or attempted rape and that the murder was especially heinous, atrocious and cruel, the issue whether the death penalty should be imposed is thus necessarily one for the jury, and it would not be error for the trial court to refuse to sanction a proposed plea negotiation. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The proper order for the introduction of evidence of aggravating and mitigating circumstances is that the State first offer evidence of the statutory aggravating factors listed in subsection (e) of this section. Defendant then offers evidence of mitigating circumstances listed in subsection (f) of this section. Only then is the State entitled to offer evidence intended to rebut defendant's proffered mitigating circumstances. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Death Penalty Upheld for Felony Murder. — Supreme Court has repeatedly upheld the death penalty in felony murder cases. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

And Is Not Cruel and Unusual Punishment. — The specific contention that the imposition of the death penalty for felony murder constitutes cruel and unusual punishment has been rejected. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

And Legislature May Prescribe Death Penalty for Felony Murder. — Just as the legislature acts within its constitutional power in defining first-degree murder to include felony murder, it is also within its constitutional power to determine that first-degree murder, including felony murder, may be punished by death, providing that the death penalty statute itself is constitutional. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Rules of Evidence Not Altered. — The language of this section does not alter the usual rules of evidence or impair the trial judge's power to rule on the admissibility of evidence. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Section does not contain a statutorily mandated proscription against use of evidence necessary to prove element of offense as does G.S. 15A-1340.1 et seq. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

Evidence offered at sentencing must be pertinent and dependable, as in any proceeding, and, if it passes this test in the first instance, it should not ordinarily be excluded. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

What Evidence Admissible. — The capital punishment statute provides, in conformity with the constitutional mandates of U.S. Const., Amends. VIII and XIV, that any evidence may be presented at the separate sentencing hearing which the court deems "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Admissibility of Evidence Not Presented at Guilt Phase. — Evidence clearly proper for the jury to consider under the statute had it been presented at the guilt phase of the trial is not inadmissible simply because it was introduced at a later stage of the proceedings. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Lack of Deterrent Effect, Rehabilitation, and Manner of Execution Are Irrelevant. — Evidence offered by the defendant regarding the lack of any deterrent effect of the imposition of the death penalty, the rehabilitative nature of people who have committed even heinous crimes, and the manner of execution in North Carolina was properly excluded by trial court, as such evidence is irrelevant. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Testimony Is Subject to Cross-Examination. —As a general matter, the truthfulness of any aspect of any witness' testimony may be attacked on cross-examination. This basic rule applies to all trial proceedings, including both the guilt and sentencing phases in capital cases. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Instruction as to When Jury Must Recommend Death Penalty. — It is not error to instruct the jury that it must be recommended that defendant be sentenced to death if it finds that the aggravating circumstances outweigh the mitigating circumstances. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

The jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under subsection (c) of this section, and there is no constitutional infirmity in such an instruction. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

Jury instruction was not unconstitutional where it imposed on the jury a duty to return a recommendation of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction as to Evidence Admitted During Guilt Phase. — Instruction during sentencing phase that the jury could consider all evidence admitted during the guilt phase was specifically authorized by this section, and there was no error in the judge's failure to instruct the jury not to consider evidence of other murders brought out during the guilt phase, which evidence was relevant and did not create an undue risk of arbitrary imposition of the death penalty. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Instruction on Parole Eligibility. — Where under the law applicable at the time of defendant's trial, he would have been eligible for parole if given a life sentence, the trial court was neither required nor allowed to give an instruction on the issue of parole eligibility. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Instruction That Life Imprisonment was Presumptive Sentence. — With regard to defendant's conviction for capital murder, because defendant admitted that his assertion that life was the presumptive sentence was nothing more than defense counsel's contention of the law, the assertion was invited error, even if the appellate court found that the trial court's ruling refusing defendant's request to instruct the jury that life imprisonment was the presumptive sentence for first-degree murder unless and until the prosecution proved otherwise was erroneous, as defendant was unable to show prejudice. State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Competence of Counsel. — Although the death penalty is constitutionally different from other forms of punishment, the standard for measuring the competence of counsel does not vary. Rather, the fact that a defendant risks the death penalty is one fact among many relevant to the evaluation of whether counsel's representation was within the ordinary range of competence. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

The court rejected the defendant's claim that his trial counsel was ineffective in his presentation of expert testimony to support the voluntary intoxication defense, as well as the (f)(2) and (f)(6) mitigating circumstances. Fisher v. Lee, 215 F.3d 438, 2000 U.S. App. LEXIS 14167 (4th Cir. 2000), cert. denied, 531 U.S. 1095, 121 S. Ct. 822, 148 L. Ed. 2d 706 (2001).

Scope of argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings; consequently, when remarks of the district attorney during such argument, challenged on appeal, were not objected to at trial, the alleged impropriety must be glaring or grossly egregious for Supreme Court to determine that the trial judge erred in failing to take corrective action sua sponte. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

In a capital murder case, the court's failure to intervene ex mero motu in the district attorney's sentencing argument was not an abuse of discretion where the district attorney properly stated the law in arguing that the sentence was not purely a matter for the jury's discretion, even though the prosecutor read verses from the Bible which stated a murderer shall be put to death. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Prosecutor's argument that this section was a statute of judgment equivalent to the Biblical law that a murderer shall be put to death was not equivalent to saying that State law is divinely inspired, and was not so improper as to have mandated ex mero motu intervention by the trial court. State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987), cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1988).

Defendant Not Entitled To Make Both First and Last Final Argument. — While clearly providing the defendant with the opportunity to make the final argument at the penalty phase of the trial, neither subdivision (a)(4) nor any other statutory provision gave the defendant the right to make both the first and last arguments. Furthermore, even had this been error, the fact that the defendant received a life sentence rather than the death penalty made the error harmless. State v. Wilson, 315 N.C. 516, 330 S.E.2d 450 (1985).

Denial of Challenge for Cause Upheld. — With regard to defendant's conviction for capital murder, the appellate court was unable to say that the trial court abused its discretion in denying defendant's challenge for cause as to a juror who, based on defendant's contention would vote automatically for the death penalty in every first-degree murder case, because the trial court's extensive findings and explanation of its reasoning demonstrated that the trial court's decision was not arbitrary or without thought; the appellate court found that the trial court's lengthy passages regarding inquiry into the juror's disposition indicated that the trial court was attentively listening to the questions and the answers given during voir dire, and therefore the trial court did not abuse its discretion or act arbitrarily in denying defendant's challenge for cause. State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Defendant always has a statutory right to present the last or final argument during the closing arguments at the sentencing phase, without regard to whether he has presented evidence during that phase. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

Refusal to Permit Both Defense Counsel to Make Final Arguments as Prejudicial Error. — At the conclusion of the sentencing proceeding in capital murder case, the trial court erred in refusing to permit both counsel for defendant to address the jury during defendant's final argument. This deprived defendant of a substantial right and amounted to prejudicial error. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

Defendant Not Entitled to Testify Without Being Subjected to Cross-Examination or to Make Unsworn Statements. — The trial court's denial of the defendant's motion for allocution did not violate his rights under this section. State v. Ray, 137 N.C. App. 326, 527 S.E.2d 675, 2000 N.C. App. LEXIS 314 (2000).

Trial for Murder Previously Submitted as Aggravating Circumstance. — Principle of double jeopardy does not preclude trial of defendant for a murder which was submitted to the jury as an aggravating circumstance during the sentencing procedure in a prior trial for a different murder. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

For discussion of whether codefendants who are tried jointly should receive joint or separate sentencing trial, see State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Trial Court's Refusal to Impanel Second Jury Held Appropriate. — Where the trial jury was able to reconvene and decide the penalty issue of a capital murder case, the trial court's refusal to impanel a second jury was entirely appropriate and constitutionally permissible. Subdivision (a)(2) of this section only provides for separate juries to hear the two phases of a capital murder case if the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused. Brown v. Rice, 693 F. Supp. 381 (W.D.N.C. 1988), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998), rev'd on other grounds sub nom., Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Polling of Jury. — Dialogue between the trial judge and one juror showed that it was not unreasonable for trial counsel to accept the juror's assent to the death sentence without seeking clarification, because while the juror became emotional as a result of the death sentence, nothing in the juror's responses indicated that the jury foreman had misinterpreted the juror's assent or that the juror had changed the juror's mind since the jury deliberations; the juror gave no indication that her answer was misinterpreted while the other jurors were polled and nothing other than the juror's affidavit contradicted the clear showing of the juror's assent in the trial transcript. Rowsey v. Lee, 327 F.3d 335, 2003 U.S. App. LEXIS 7735 (4th Cir. 2003), cert. denied, 540 U.S. 991, 124 S. Ct. 484, 157 L. Ed. 2d 387 (2003).

Procedure followed by the trial court violated the provisions of G.S. 15A-2000(b) because the poll was not timely and because the intervening evidence heard by the jury of co-defendant's confession led to substantial and irreparable prejudice to defendant; accordingly, the trial court erred in denying defendant's motion for mistrial and he was entitled to a new sentencing proceeding. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Where defendants were being jointly tried for the same capital offense, when one defendant changed his plea to guilty, it was error for the trial to continue as both a sentencing proceeding as to one defendant and as a trial to determine the guilt or innocence of the other. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Sentences of death are subject to automatic review by the North Carolina Supreme Court. Ward v. French, 989 F. Supp. 752 (E.D.N.C. 1997), aff'd, 165 F.3d 22 (4th Cir. 1998), cert. denied, 526 U.S. 1124, 119 S. Ct. 1780, 143 L. Ed. 2d 809 (1999).

The trial judge's authority to rule on the admissibility of evidence is not impaired by the language of this section; therefore, the court properly sustained defense counsel's general question of "what kind of things [defendant] would talk with you about" on the ground of relevance and prohibited defense counsel from asking defendant's sister what effect being biracial had on him, since this question related to his thoughts and feelings of which his sister lacked personal knowledge and, in effect, would have elicited unreliable testimony. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

No Right to Sit Jurors. — In his murder trial, defendant had no right to seek to sit two jurors during the guilt-innocence proceeding who were opposed to imposing the death penalty under any circumstances and to substitute two alternate jurors during the penalty proceeding who were "death-qualified." G.S. 15A-2000(a)(2) permitted alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but did not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty, and the Supreme Court of North Carolina and the United States Supreme Court have held that the death qualification of a jury is not unconstitutional. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

In his murder trial, defendant had no right to seek to sit two jurors during the guilt-innocence proceeding who were opposed to imposing the death penalty under any circumstances and to substitute two alternate jurors during the penalty proceeding who were "death-qualified." Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who were unopposed to the death penalty, contravened G.S. 15A-2000(a)(2), which contemplated that the same jury that determined guilt also recommended the sentence. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Habeas Relief Was Denied Where Petitioner Did Not Prove His Counsel Was Ineffective. — Where a state prisoner, who was sentenced to death for committing first-degree murder, in violation of G.S. 14-17, argued that his attorneys were ineffective because they failed to adequately present mitigating evidence concerning his life history and his mental health, the prisoner was not entitled to federal habeas corpus relief because (1) the prisoner's sisters testified at sentencing about the prisoner's dysfunctional childhood; (2) the prisoner instructed the attorneys not to introduce further evidence of his background; and (3) a doctor testified at sentencing that the prisoner's mental disorders impaired his ability to control his behavior; furthermore, the prisoner could not demonstrate prejudice because the additional evidence identified by the prisoner was largely cumulative and the jury found that four severe aggravating circumstances under G.S. 15A-2000 outweighed any mitigating circumstances. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Applied in State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980); State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982); State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983); State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984); State v. Darden, 323 N.C. 356, 372 S.E.2d 539 (1988); State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991); State v. Fullwood, 329 N.C. 233, 404 S.E.2d 842 (1991); State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991); State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); State v. Lloyd, 329 N.C. 662, 407 S.E.2d 218 (1991); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991); State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995); State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995); State v. Campbell, 340 N.C. 612, 460 S.E.2d 144 (1995); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995); State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995); State v. Carter, 342 N.C. 312, 464 S.E.2d 272 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998); Sexton v. French, 163 F.3d 874 (4th Cir. 1998); State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999); Frye v. Lee, 89 F. Supp. 2d 693, 2000 U.S. Dist. LEXIS 2915 (W.D.N.C. 2000); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Cited in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Carter, 296 N.C. 344, 250 S.E.2d 263 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980); State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980); State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982); State v. Wilson, 304 N.C. 689, 285 S.E.2d 804 (1982); Hutchins v. Garrison, 724 F.2d 1425 (4th Cir. 1983); State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983); State v. Williams, 308 N.C. 47, 301 S.E.2d 335 (1983); State v. Hill, 308 N.C. 382, 302 S.E.2d 202 (1983); State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); State v. Jenkins, 311 N.C. 194, 317 S.E.2d 345 (1984); State v. McDonald, 312 N.C. 264, 321 S.E.2d 849 (1984); State v. Westmoreland, 314 N.C. 442, 334 S.E.2d 223 (1985); State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985); State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986); State v. King, 316 N.C. 78, 340 S.E.2d 71 (1986); State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986); State v. Miller, 316 N.C. 273, 341 S.E.2d 531 (1986); State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986); State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986); State v. Moore, 317 N.C. 275, 345 S.E.2d 217 (1986); State v. Blake, 317 N.C. 632, 346 S.E.2d 399 (1986); State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986); State v. Hager, 320 N.C. 77, 357 S.E.2d 615 (1987); State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987); State v. Forrest, 321 N.C. 186, 362 S.E.2d 252 (1987); State v. Hogan, 321 N.C. 719, 365 S.E.2d 289 (1988); State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988); State v. Johnson, 322 N.C. 288, 367 S.E.2d 660

(1988); State v. Loftin, 322 N.C. 375, 368 S.E.2d 613 (1988); State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989); State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989); State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989); State v. Groves, 324 N.C. 360, 378 S.E.2d 763 (1989); State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989); State v. Outlaw, 94 N.C. App. 491, 380 S.E.2d 531 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991); State v. McPhail, 329 N.C. 636, 406 S.E.2d 591 (1991); State v. Annadale, 329 N.C. 557, 406 S.E.2d 837 (1991); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992); State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992); State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992); State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992); State v. Pope, 333 N.C. 116, 423 S.E.2d 746 (1992); State v. Lightner, 108 N.C. App. 349, 423 S.E.2d 827 (1992); Noland v. Dixon, 808 F. Supp. 485 (W.D.N.C. 1992); State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993); State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993); State v. Sweatt, 333 N.C. 407, 427 S.E.2d 112 (1993); State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993); State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993); State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993); State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993); Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993); State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Sexton, 336 N.C. 321, 444 S.E.2d 879 (1994); State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994); State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994); State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994); State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (1995); State v. Ratliff, 341 N.C. 610, 461 S.E.2d 325 (1995); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State v. Montgomery, 341 N.C. 553, 461 S.E.2d 732 (1995); State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (1995); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995); State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995); State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996); State v. James, 342 N.C. 589, 466 S.E.2d 710 (1996); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996); State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996); State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996); State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996); State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (1996); State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996); State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (1996); State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996); State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996); State v. Roseboro, 344 N.C. 364, 474 S.E.2d 314 (1996); State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996); State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996); State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996); State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996); State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996); State v. Stroud, 345 N.C. 106, 478 S.E.2d 476 (1996); State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997); State v. Moody, 345 N.C. 563, 481 S.E.2d 629 (1997); State v. Meyer, 345 N.C. 619, 481 S.E.2d 649 (1997); State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997); State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997); State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997); State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997); State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997); State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997); State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997); State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997); State v. Cagle, 346 N.C. 497, 488 S.E.2d 535 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997); State v. Tucker, 347 N.C. 235, 490 S.E.2d 559 (1997); State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997); State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997); State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (1997); Keel v. French, 162 F.3d 263 (4th Cir. 1998); State v. Sanders, 347 N.C. 587, 496 S.E.2d 568 (1998); Green v. French, 143 F.3d 865 (4th Cir. 1998); Williams v. French, 146 F.3d 203 (4th Cir. 1998); Boyd v. French, 147 F.3d 319 (4th Cir. 1998); State v. Hoffman, 348 N.C. 548, 500 S.E.2d 718 (1998); State v. LaPlanche, 349 N.C. 279, 507 S.E.2d 34 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999); State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999); State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000); State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000); Sanders v. Easley, 230 F.3d 679, 2000 U.S. App. LEXIS 27203 (4th Cir. 2000); State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); Rose v. Lee, 252 F.3d 676, 2001 U.S. App. LEXIS 10698 (4th Cir. 2001); Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); Basden v. Lee, 290 F.3d 602, 2002 U.S. App. LEXIS 8634 (4th Cir. 2002); State v. Frogge, 359 N.C. 228, 607 S.E.2d 627, 2005 N.C. LEXIS 29 (2005); Buckner v. Polk, 453 F.3d 195, 2006 U.S. App. LEXIS 16062 (4th Cir. 2006); State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (2008); Golphin v. Branker, 519 F.3d 168, 2008 U.S. App. LEXIS 5033 (4th Cir. 2008).

II. REVIEW OF JUDGMENT AND SENTENCE.

Subsection (d) is not unconstitutional as an impermissible expansion of the Supreme Court's jurisdiction. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Purpose of Subsection (d). — Subsection (d) of this section serves as a check against the capricious or random imposition of the death penalty. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984).

Proportionality review serves as check against the random or arbitrary imposition of the death penalty. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

The intended ultimate emphasis of proportionality review under subdivision (d)(2) of this section is upon the independent consideration of the individual defendant and the nature of the crime or crimes which he has committed. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

The purpose of proportionality review is to serve as a check against the capricious or random imposition of the death penalty. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

A proportionality review is to be undertaken only in cases where both phases of the trial of a defendant have been found to be without error. Only then can the court have before it the true decision of the jury to which great deference should be accorded. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

For discussion of proportionality review, see State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The Supreme Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. The court has chosen to use all of these "similar cases" for proportionality review purposes. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Errors Under McKoy v. North Carolina — Standard of Review. — At least for all trials conducted after State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983) and before Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the Supreme Court will decline to require that a McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) error be reviewed under the plain error standard when the defendant failed to object at trial to the error, and will instead will apply N.C.R.A.P., Rule 2. State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990).

Same — State's Burden of Proof. — On appeal, the state must demonstrate that a McKoy error was harmless beyond a reasonable doubt because the error is of constitutional dimension. State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990), cert. denied, 489 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991).

Because McKoy error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369, is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

The harmless error analysis is to be applied to the review of a unanimity instruction found to be constitutionally erroneous under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990). State v. Hunt, 330 N.C. 501, 411 S.E.2d 806, cert. denied, 505 U.S. 1226, 112 S. Ct. 3045, 120 L. Ed. 2d 913 (1992).

McKoy Error Rarely Harmless. — It would be a rare case in which a McKoy error could be deemed harmless. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Proportionality Review Required. — Even though defendant made no argument that his sentence of death was disproportionate to his crimes of first-degree kidnapping and murder, second-degree burglary, and robbery with a dangerous weapon, North Carolina Supreme Court is required to conduct a proportionality review. State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996).

Although the North Carolina Supreme Court compares a case at bar with the cases in which it has found the death penalty to be proportionate, it will not undertake to discuss or cite all of those cases each time it carries out that duty. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Where there is evidence to support a mitigating circumstance on either of two grounds, and the jury is so instructed, an appellate court should not speculate as to which ground served as the basis of the jury's finding. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Effect of Victim Impact Evidence. — Admission of victim impact evidence was not plain error, where the murder victims' mothers testified how the murders affected them and their families, but there was no evidence that the jury based its death penalty decision on this testimony. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

Subdivision (d)(2) Protects Against Cruel and Unusual Punishment. — The review mandated by subdivision (d)(2) of this section provides a sufficient constitutional safeguard against the unconstitutional imposition of cruel and unusual punishment. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

The language of subdivision (d)(2) of this section is mandatory. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The responsibility placed upon the State by subdivision (d)(2) is as serious as any responsibility placed upon an appellate court. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

"Finding" Required by Subdivision (d)(2). — Subdivision (d)(2) of this section requires the Supreme Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases; it neither contemplates nor requires the court to make factual findings. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985), 510 U.S. 1171, 114 S. Ct. 1208, 127 L. Ed. 2d 556 (1994); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at Sink v. Moore, 267 N.C. 344, 148 S.E.2d 265 (1966) in light of Gray v. Clark, 9 N.C. App. 319, 176 S.E.2d 16 (1970); Sink v. Moore, 267 N.C. 344, 148 S.E.2d 265 (1966), vacated and remanded for further consideration at Lafayette Transp. Serv., Inc. v. County of Robeson, 283 N.C. 494, 196 S.E.2d 770 (1973) in light of Porter v. Suburban San. Serv., Inc., 283 N.C. 479, 196 S.E.2d 760 (1973).

Death sentence imposed upon defendant's conviction of the first-degree murder of his infant son was not excessive or disproportionate. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

While subdivision (d)(2) of this section uses the word "finding" in prescribing the Supreme Court's review of death sentences, a "finding of fact" as that term is generally understood is not contemplated. Rather, "finding" means a "determination" or a "conclusion." State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985), 510 U.S. 1171, 114 S. Ct. 1208, 127 L. Ed. 2d 556 (1994).

Where the court finds no error in the guilt and sentencing phases, it is required to review the record and determine: (1) Whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The fact that in one or more cases factually similar to the one under review a jury has recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, 513 U.S. 1198, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

The fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have consistently returned life sentences in factually similar cases, because the court independently considers the individual defendant and the nature of the crime or crimes which he has committed; therefore, single aggravating circumstance may outweigh a number of mitigating circumstances and may be sufficient to support a death sentence. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

Power of Review in Supreme Court. — Read together, subdivisions (d)(1) and (d)(3) of this section empower the Supreme Court of this State to review errors assigned in the trial and sentencing phases. When prejudicial error is found, the court must order a new sentencing hearing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Final determination of death sentence after initial proportionality review rests with the North Carolina Supreme Court, which uses the experienced judgments of its members to ultimately determine whether a death sentence is disproportionate. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Remand for Resentencing. — When the supreme court finds prejudicial error in a sentencing-phase jury instruction in a capital case, it remands the case for resentencing under subdivision (d)(3) and does not reach the question of whether the defendant's sentence of death should be overturned as arbitrary. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999).

Scope of Review. — The review function of the Supreme Court under subsection (d) of this section should be employed only in those instances where both phases of the trial of a defendant in a capital case have been found to be without error. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

In exercising its role in the statutory scheme, the Supreme Court must be sensitive not only to the mandate of the legislature but also to the constitutional dimensions of its review. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

Where there is evidence to support the aggravating factors relied upon by the State, the jury's balancing of aggravation and mitigation will not be disturbed unless it appears that the jury acted out of passion or prejudice or made its sentence arbitrarily. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

The supreme court is required to review the record and determine (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court bases its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

Supreme Court accords the utmost diligence and care in its review of capital cases. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Means for Implementing Review Not Specified. — Subdivision (d)(2) of this section does not require that the Supreme Court establish a particular means for implementing proportionality review. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

The fact that a defendant is sentenced to death while a codefendant receives a life sentence for the same crime is not determinative of proportionality. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999).

Subsection (d) of this section does not require records to be presented to the reviewing court indicating which mitigating factors, if any, the jury found during their deliberations. State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982).

Pool of Similar Cases Used for Comparison. — In comparing "similar cases" for purposes of proportionality review, the Supreme Court uses as a pool for comparison purposes all cases arising since the effective date of the capital punishment statute, June 1, 1977, which have been tried as capital cases and reviewed on direct appeal by the Supreme Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommen-

dation within a reasonable period of time. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983); State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

For purposes of proportionality review, the pool of similar cases includes all cases arising since the effective date of the capital punishment statute, June 1, 1977, which have been tried as capital cases and reviewed on direct appeal by the supreme court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation. The pool is further restricted to those cases that the court has found to be free of error in both phases of the trial. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Where case was similar to cases in which the death penalty has been affirmed, and dissimilar to cases holding the death penalty to be disproportionate and cases in which juries have recommended life sentences, sentence of death was not disproportionate. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

After comparing this case with other cases in the proportionality pool, focusing on the defendant and the crime, the sentence of death was neither excessive nor disproportionate. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Considering both the crime and defendant, as required by G.S. 15A-2000(d)(2), defendant's case was more factually similar to cases in which the death sentence was not disproportionate. Cases shared the following features with defendant's case: the defendant fatally shot an attendant during the perpetration of an armed robbery of a small business; there was no evidence indicating the defendant, at the time he entered the store, planned to kill the attendant; and the defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Citation to Every "Similar Case" Not Necessary. — The Supreme Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

District Attorney's Reading of Subsection (d) to Jury Was Error. — During the sentencing phase of a bifurcated prosecution for murder, it was error for the district attorney to read to the jury subsection (d) of this section, relating to the review of judgment and sentence by the Supreme Court. A reference to appellate review has no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence. More importantly such reference will, in all likelihood, result in the jury's reliance on the Supreme Court for the ultimate determination of sentence. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Review Held Sufficient. — A proportionately review which considers both the circumstances of the murder, the aggravating circumstances found by the jury and the mitigating circumstances submitted with those in other relevant cases satisfies constitutional requirements and adequately protects against arbitrary, capricious, excessive or disproportionate imposition of the death penalty. State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982).

Where evidence indicated that defendant snatched 4 year old from her yard, took her to his house, raped her, strangled her, and brutally beat her to death, the case fell within the category of first-degree murders for which the death penalty has been upheld as proportionate. State v. Kandies, 342 N.C. 419, 467 S.E.2d 67 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

The record fully supported the two aggravating circumstances found by the jury and there was no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (1996).

In conducting a proportionality review the Supreme Court did not find it necessary to extrapolate or analyze in its opinion all, or any particular number, of the cases in its proportionality pool. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The court determined that the sentence of death imposed was not disproportionate to the crime, because the jury's findings of three of the four aggravating circumstances submitted were supported by the evidence, and nothing in the record suggested that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002), cert. denied, 537 U.S. 1163, 123 S. Ct. 972, 154 L. Ed. 2d 900 (2003).

Trial court had no authority to engage in proportionality review, since that duty is reserved exclusively for the Supreme Court.

State v. Payne, 327 N.C. 194, 394 S.E.2d 158 (1990), cert. denied, 498 U.S. 1092, 111 S. Ct. 977, 112 L. Ed. 2d 1062 (1991).

Error in Instruction Without Effect on Sentence. — In light of trial court's entire instruction regarding defendant's impaired capacity, the jury's finding that defendant was under the influence of an emotional disturbance, and the brutality of the killing, the error in one sentence of the trial court's instruction had no probable effect on the outcome of the sentencing proceeding. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Instruction requiring unanimity in finding mitigating factors did not lead to imposition of sentence under arbitrary factor. Although the Supreme Court's decision in McKoy v. North Carolina, 494 U.S. —, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), condemned certain jury instructions with regard to sentencing and the need for unanimity concerning mitigating circumstances because of their potential for producing an arbitrary result, but where there was no showing that the potential for arbitrariness was actually realized or that defendant's death sentence resulted from arbitrariness, imposition of a life sentence was not required under subdivision (d)(2) of this section. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

Court did not err in permitting murder case to be tried capitally and in permitting death qualification of the jury on grounds that the evidence was insufficient to obtain either a murder conviction or the death penalty. State v. Moxley, 78 N.C. App. 551, 338 S.E.2d 122 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

No Prejudice Suffered from Improperly Admitted Testimony. — Because defendant received the minimum allowable sentence for conviction of first-degree murder, he necessarily suffered no prejudice in sentencing from the improperly admitted testimony of his co-conspirator. State v. Harris, 136 N.C. App. 611, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

Jury-Recommended Life Sentence Did Not Affect Capital Nature of Trial. — The fact that the jury recommended and the trial court entered a sentence of life imprisonment did not change the capital nature of that trial or his status as a capital defendant in that trial. Therefore, the unwaivable requirement of his presence applied at every stage of his trial and was violated by the trial court's private bench conferences with prospective jurors. State v. Johnston, 331 N.C. 680, 417 S.E.2d 228 (1992).

Facts Held to Support the Jury's Decision to Recommend a Sentence of Death. — State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 in light of 293 N.C. 740, 241 S.E.2d 513 (1977).

In light of the horrendous nature of the crimes perpetrated upon victim by defendant, who was found guilty of abducting, beating, raping and running over victim with an automobile, the death sentence was not excessive as applied to him. Rook v. Rice, 783 F.2d 401 (4th Cir.), cert. denied, 478 U.S. 1022, 106 S. Ct. 3315, 92 L. Ed. 2d 745 (1986); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Death sentence upheld where two coconspirators in a robbery/murder received life sentences, even though only one of them actually did the shooting, and where the jury found three aggravating factors as to the defendant. State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999).

Death sentence was upheld where defendant heinously murdered his eight-month-old son. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Death sentence upheld where the defendant shot his stepfather in the back with a shotgun and again in the neck as he lay on the ground, and where the defendant had been convicted of a felony involving a knife attack on a person in a wheelchair. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

The defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and the judgment of death recommended by the jury was not disturbed where defendant cold-heartedly and calmly planned to obtain the pesticide which he eventually put in his children's Kool-Aid, passed the blame on to his ex-girlfriend, and remained silent as they lay dying or deathly ill in the hospital. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

The imposition of the death penalty for the murder of defendant's aunt was proper where, after being taken into her home, he stole from her, then furtively waited for her in the home, shot her one time because he had "no more bullets;" then, when she attempted to reach the telephone, pulled the cord from the receptacle; and, when she tried to leave the house, took a meat cleaver from the kitchen and struck her with it ten or twelve times as he stood on top of her in the presence of her two foster children. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

On appeal from the trial court's judgment convicting defendant of first-degree murder and robbery with a firearm, the State Supreme Court conducted a proportionality review and held that evidence which showed that defendant forced a victim to get down on the victim's knees, shot the victim once with a shotgun, and returned several minutes later and shot the victim a second time was sufficient to sustain the trial court's judgment adopting a jury's recommendation that defendant be put to death. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Sentence Supported by Other Aggravating Factors Where One Factor Was Unconstitutionally Vague. — Defendant could not demonstrate a miscarriage of justice to excuse the application of the procedural bar of G.S. 15A-1419(a), where the instruction to defendant's sentencing jury on the aggravating factor that the murder was "heinous, atrocious, or cruel" was unconstitutionally vague, because defendant remained eligible for the death penalty based on the subdivision (e)(5) aggravating factor of this section on three circumstances'— defendant murdered the victim while in the process of kidnapping, robbing, and raping her. Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, 513 U.S. 1105, 115 S. Ct. 785, 130 L. Ed. 2d 678 (1995).

Death Penalty Not Appropriate. — Where a murder conviction was based solely upon the felony murder theory; it had only one aggravating circumstance, pecuniary gain; and the jury found as mitigating circumstances that defendant had no significant history of prior criminal activity, that defendant was under the influence of mental or emotional disturbance, that he confessed and cooperated upon arrest, that he voluntarily consented to a search of his motel room, car, home, and storage bin, and that he was abandoned by his natural mother at an early age; and since defendant also pleaded guilty during the trial and acknowledged his wrongdoing before the jury, the murder did not rise to the level of those cases in which the death penalty has been approved. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Death sentence imposed in a case where the defendant hired another person to murder the defendant's husband was disproportionate under G.S. 15A-2000(d)(2) because (1) the evidence supporting the pecuniary gain aggravating circumstance was weak, (2) there was evidence that the defendant considered stopping the murder immediately prior to its occurrence, (3) the defendant's codefendant, who actually fired the gunshots that killed the victim, received a life sentence without parole, and and (4) the jury's found three statutory mitigating circumstances and three nonstatutory mitigating circumstances. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Death Penalty Was Appropriate. — The defendant who was convicted of both felony murder and premeditated and deliberate murder received a fair trial and capital sentencing proceeding, free from prejudicial error, and defendant's death sentence was not excessive or disproportionate. State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

Jury's recommendation of death after the defendant beat the victim to death with a sledge hammer as the victim was trying to crawl away from the defendant was supported by three aggravating circumstances, significant prior criminal record, pecuniary gain, and especially heinous, atrocious, or cruel; therefore, the capital sentence was not disproportionate to other similar sentences. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Supreme Court of North Carolina determined, under a proportionality review pursuant to G.S. 15A-2000(d)(2), that defendant's sentences of death for commission of two murders were not disproportionate, given that the jury found that the aggravating circumstances in each case outweighed the mitigating factors; defendant had killed another person, had engaged in premeditation in that he continued to shoot at one of the victims after he was running away, and there was no mitigation found as to defendant's age or his being under the influence of mental or emotional disturbance, pursuant to G.S. 15A-2000(f)(7), (2). State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003), cert. denied, 541 U.S. 943, 124 S. Ct. 1670, 158 L. Ed. 2d 368 (2004).

Defendant's two first-degree murder convictions and capital sentence for one of the convictions was affirmed because the defendant received a fair trial and capital sentencing proceeding, free from prejudicial error; additionally, the death sentence in the case was not disproportionate. State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

Defendant's death sentence was proper, under G.S. 15A-2000(d)(2), because: (1) the record supported the aggravating circumstances found by the jury and upon which the death sentence was based; (2) the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant, because defendant's case was more similar to prior cases in which the death penalty was found proportionate than to cases in which it was found to be disproportionate, given the aggravating factors which the jury found. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Supreme Court conducted a proportionality review, pursuant to G.S. 15A-2000(d)(2), and found that defendant's sentence of death was not disproportionate based on evidence that, after the elderly victim invited defendant into his home, defendant grabbed the victim, choked him until he became unconscious, bound him, covered his face in tape, and left him to die from asphyxiation under a bed before defendant then ransacked the victim's home and left with cash, other personal items, and the victim's car. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Conviction for double murder was proper and two consecutive death sentences were not disproportionate. Jury found three aggravators, prior violent felony, especially heinous, atrocious, or cruel, and that the crime involved crimes against other persons, under G.S. 15A-2000(e)(3), (9), (11), outweighed no statutory mitigators. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Death penalty was upheld in defendant's conviction of murder for the stabbing death of the owner of a store during a robbery where the jury found all four of the aggravating circumstances submitted, three of which related to defendant's having been previously convicted of a felony involving the use or threat of violence to the person, the jury did not find the two submitted statutory mitigating circumstances to exist, and the jury found 12 of the 19 nonstatutory mitigating circumstances submitted; additionally, the case was not substantially similar to any of the cases in which the death sentence was found disproportionate. State v. al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005), cert. denied, — U.S. —, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006).

Evidence that defendant used both hands to pull open the pocket knife used to murder the victim, stabbed the victim, and physically restrained the victim from using the telephone to call for help before watching the victim bleed to death, was sufficient to support the proportionality of the death penalty. State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

There was no evidence that a death sentence was imposed under the influence of passion prejudice, or any arbitrary consideration, as contemplated by G.S. 15A-2000(d)(2). The record, transcripts, briefs and oral arguments fully supported the G.S. 15A-2000(e)(6) and (e)(11) aggravating circumstances found by the jury. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Death sentence was not excessive or disproportionate, noting that defendant violated the victim's home and committed a brutal murder by strangulation. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Death Penalty Held Appropriate. — Defendant convicted of two counts of first degree murder received a fair trial and capital sentencing proceeding; the evidence supported the aggravating circumstances found by the jury; and the sentences of death were neither disproportionate nor imposed under the influence of passion, prejudice or any other arbitrary factor. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

The death penalty was proper where the defendant knifed the victim to death in the shower of a prison facility after he failed to pay $17.00 owed for items charged at defendant's illegal canteen. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001); State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

The sentence of death was neither excessive nor disproportionate and the defendant, convicted of killing an 80 year-old lady after breaking into her home by hitting her over the head with a blunt object and leaving her to die in the nude on the floor of her bathroom, received a fair trial and capital sentencing proceeding, free of prejudicial error. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

Defendant's capital resentencing proceeding was fair, free of prejudicial error and not based on any undue influence of passion, prejudice or other arbitrary factor and his sentence was appropriate, where defendant had numerous previous convictions, including first-degree murder of his uncle, larceny, two counts of auto larceny, breaking and entering, several escapes from prison, and three counts of driving under the influence and he himself testified about several incidents of extreme violence with other prison inmates. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Where defendant was convicted of first-degree murder on the basis of premeditation and deliberation, the imposition of death was not imposed under the influence of any arbitrary considerations, the evidence fully supported the aggravating circumstance of prior felony convictions, and the sentence of death was not disproportionate. State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514, 1999 N.C. LEXIS 1000 (1999), cert. denied, 529 U.S. 1102, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000).

The defendant's sentence of death was held appropriate where one of the three victims was shot in his home and another was a 14-year-old boy who was shot five times after hearing the shots that killed the other two victims. State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 2001 N.C. LEXIS 265 (2001), cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

A capital sentence was appropriate where the defendant gave victim a severe beating and tied him up on the ground before victim died. State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001), cert. denied, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Supreme court, under G.S. 15A-2000(d)(2), reviewed death sentence imposed for first-degree murder in conjunction with kidnapping two persons and based on G.S. 15A-2000(e)(3), (9), (11) aggravators and found the death sentence not to be disproportionate and not to be excessive. State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

The death sentence was proper even though defendant's accomplice received only life imprisonment where defendant and his accomplice entered the victims' home dressed as ninjas, attacked and killed them with various martial arts weapons. State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Death sentence held excessive and disproportionate. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

In a robbery murder case which rested solely on a felony murder theory, where the jury found that the murder was "especially heinous," but also found one or more mitigating circumstances, and where defendant's accomplice had previously been given life imprisonment, as a matter of law the death sentence given to defendant was disproportionate within the meaning of this section, and the Supreme Court would therefore vacate same and order instead that defendant be sentenced to life imprisonment. State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

The North Carolina Supreme Court has never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

The court has never found disproportionality in a case in which the defendant was convicted of killing more than one victim. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Death Penalty Warranted. — The death penalty was not disproprotionate and the trial free of passion, prejudice, or any other arbitrary factor where defendant was convicted of first-degree murder based upon premeditation and deliberation, and under the felony murder rule as well as conspiracy to commit murder, conspiracy to commit kidnapping, first-degree burglary and first-degree kidnapping. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

The death sentence was upheld for defendant who choked, beat, raped, mutilated, and stabbed his victim to death. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Sentence Held Not Excessive or Disproportionate. — Where defendant deliberately sought out not one, but two, lone employees of business establishments in relatively isolated areas during the early morning hours when no one was around, robbed them at gunpoint, and then shot them to death at very close range with a shotgun before fleeing with money, sentence of death imposed was not excessive or disproportionate to the penalty imposed on similar cases, considering both the crime and the defendant. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Death sentence held not disproportionate within the meaning of subdivision (d)(2) of this section. State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Sentence of death held not disproportionate. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at Shelton v. Morehead Mem. Hosp., 76 N.C. App. 253, 332 S.E.2d 499 (1985) in light of 318 N.C. 76, 347 S.E.2d 824 (1986); Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986), vacated and remanded for further consideration at Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117 (W.D.N.C. 1989) in light of Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901; 307 N.C. 127, 297 S.E.2d 399 (1982), vacated and remanded for further consideration at Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901 in light of 307 N.C. 127, 297 S.E.2d 399 (1982), death sentence vacated, remanded for new capital sentencing proceeding,.

Death sentences imposed against defendant for three counts of murder were not disproportionate. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Defendant's violent history as well as his brutality and calculation in the killing and disfiguring of his victim's body and his total lack of remorse for the murder, as demonstrated by his further murders of victim's wife and her small child, fully supported the jury's recommendation of death. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the jury found the single aggravating factor that defendant had been previously convicted of another capital felony and found no mitigating circumstances, the death sentence imposed by the jury was held not disproportionate when compared to other cases involving a prior homicide conviction. State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where defendant was involved in two premeditated and deliberated first degree murders, jury found that defendant had been convicted previously of felony involving the use of violence to person — voluntary manslaughter of his wife, and where evidence at trial showed, therefore, that defendant had killed three people, death penalty recommendation was not excessive or disproportionate to penalty imposed in similar cases. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where jury found premeditation and deliberation on defendant's part, victim was defendant's father, attack on victim was unprovoked, and defendant displayed no remorse for his act, the case rose to the level of murders in which court had approved death sentence upon proportionality review. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The death sentence was not excessive or disproportionate, considering both the crime and the defendant where the case included (1) a murder of a wife preceded by many years of physical abuse and threats to her; (2) fear on the part of the victim; (3) a calculated plan of attack by the defendant; (4) a senseless and brutal stabbing in front of other people, found to be "especially heinous, atrocious, or cruel" by the jury; (5) a period of time in which the victim suffered great physical and psychological pain before death; and (6) a distinct failure by the defendant to exhibit remorse after the killing, and where the jury found only one statutory mitigating circumstance, that the crime was committed while the defendant was under the influence of mental or emotional disturbance. State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994).

Death penalty upheld where defendant offered companionship to a small, trusting woman but then took her to a secluded place, where he sexually assaulted her, raped her, and brutally beat, tortured, stabbed, and strangled her until she was dead. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Where the jury found only one aggravating circumstance, that the murder was committed for pecuniary gain, and nine mitigating circumstances, the death penalty was not disproportionate. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, 515 U.S. 1152, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

Imposition of death penalty for robbery-murder of store clerk upheld on proportionality review. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

In robbery-murder case in which defendant had been previously convicted of murder in another state several years earlier and of armed robbery committed one week prior to, death sentence was not disproportionate. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

The sentence of death recommended by the jury and ordered by the court was not disproportionate. State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996), cert. denied, 519 U.S. 901, 117 S. Ct. 254, 136 L. Ed. 2d 180 (1996).

Sentence of death not disproportionate where defendant bound, tortured, and stabbed defendant in the presence of her 14 month old child and left her to bleed to death. State v. Woods, 345 N.C. 294, 480 S.E.2d 647 (1997), cert. denied, 522 U.S. 875, 118 S. Ct. 194, 139 L. Ed. 2d 132 (1997).

Sentence of death held not disproportionate where defendant stabbed his girlfriend to death in front of her two sons. State v. McNeill, 346 N.C. 233, 485 S.E.2d 284 (1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998).

Death penalty not disproportionate where defendant killed the victim by intentionally setting her on fire and watching her burn, showed no remorse, and appeared in full control of his mental and physical condition. State v. Tyler, 346 N.C. 187, 485 S.E.2d 599 (1997), cert. denied, 522 U.S. 1001, 118 S. Ct. 571, 139 L. Ed. 2d 411 (1998).

Death sentence appropriate where victim was only sixteen years old, she was at home, sick and alone, when defendant attempted to break into the house, she was kidnapped and driven around for at least two hours before she was taken to an isolated area where she was raped, choked, and stabbed to death and before defendant killed the victim, but just after he raped her, he placed her in the trunk of his car while he dug her shallow grave. State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133 (1997).

Where defendant had been found guilty of multiple murders, all of women whom he strangled, a sentence of death was not disproportionate. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Where defendant killed the 17-year-old victim in her home, the victim was the mother of his infant son, defendant assaulted with intent to kill the victim's 15-year-old brother, and defendant knew the victims and their family, the death sentence was not disproportionate. State v. Gregory, 348 N.C. 203, 499 S.E.2d 753 (1998), cert. denied, 525 U.S. 952, 119 S. Ct. 382, 142 L. Ed. 2d 315 (1998).

Where defendant raped the 11-year old female victim in her home and then kidnapped and killed her and repeatedly stabbed the brother of the victim, a sentence of death was not disproportionate. State v. Billings, 348 N.C. 169, 500 S.E.2d 423 (1998).

The death sentence was properly imposed where the defendant shot and killed three people, and wounded two others, at the business from which he was fired, he randomly shot at people and into doors as he walked through the building, and after the defendant finished shooting, he stood in the doorway of the building smoking a cigarette. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

The death sentence was warranted for a robbery/murder, where the defendant shot and killed a jewelry store employee during a robbery, the jury found the three aggravating circumstances that the defendant was convicted previously of a violent felony, that the crime was committed for pecuniary gain, and that the crime was part of course of conduct including other violent crimes, and the jury found no mitigating circumstances. State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999).

Death sentence upheld where the jury specifically found that the murder was committed against a law enforcement officer engaged in the performance of his official duties. State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1013 (1999).

The death penalty was not disproportionate for the defendant's conviction of the premeditated murder of his wife, where there was a long history of abuse, the shooting occurred in the victim's home, and the defendant had shot and killed his previous wife. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Where (1) defendant was convicted of first-degree murder of one victim under the theory of premeditation and deliberation; (2) defendant shot second victim directly in the face at close range; (3) defendant showed no remorse for brutal murder and castration of first victim; and (4) defendant murdered both victims in their homes, sentences of death were neither excessive nor disproportionate. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Where defendant shot former wife and her date in a restaurant after months of premeditation, and expressed regret about running "out of bullets," the record supported the aggravating circumstances found by the jury and the death sentence was not arbitrary, disproportionate, or excessive. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883 (1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Where evidence showed that defendant murdered first victim in her home before robbing her, then lured second victim to that location and interrupted his strangling of her to make her perform oral sex on him before finally killing her, the court concluded that the record supported the aggravating circumstances found by the jury and the imposition of capital punishment was not arbitrary, disproportionate or excessive. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

The defendant's trial was free of prejudicial error where the death penalty was neither disproportionate nor arbitrarily imposed, was not unconstitutional as applied, and where the aggravating circumstance was supported by evidence. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

The death penalty was not disproportionate where defendant was convicted of nine counts of first-degree murder. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350

(2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

The death penalty was not excessive or disproportionate in case involving the premeditated murder of an elderly woman in her home. The fact that defendant raped the victim in her own bed while she was dead or in her "last breath of life" elevated the brutality. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

The defendant convicted for murdering his invalid bedridden stepmother by stabbing her numerous times while robbing and killing his father received a fair trial and capital sentencing proceeding, free from prejudicial error, and the sentence of death recommended by the jury and entered by the trial court was not disproportionate. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893, 2000 N.C. LEXIS 357 (2000), cert. denied, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000).

The defendant's trial and capital sentencing proceeding were fair and free of prejudicial error. The sentence was based on properly supported aggravating circumstances, was entered without influence of passion, prejudice or any other arbitrary factor, and was neither excessive nor disproportionate where the evidence indicated that the victim, defendant's wife, suffered before she died, and that she was conscious during at least part of her attack; her hands were discolored and swollen; the left hand had 12 separate broken bones, and the right hand had similar injuries which were defensive-type wounds received while the victim was conscious as she tried to ward off blows to her head. Furthermore, she suffered six to eight individual contusions to the left side of her head, and six to eight abrasions on the back of her neck, with associated bruises. She also sustained 50 to 75 discrete blows to the head, as well as a hole in her skull resulting from a blow with a hammer. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

Jury's finding of two distinct aggravating circumstances submitted was supported by the evidence, and nothing in the record suggested defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; defendant killed the victim in the victim's home and defendant was convicted based on premeditation, deliberation, and under the felony murder rule. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Defendant's sentencing proceeding was fair and free of prejudicial error and the sentence of death was neither excessive nor proportionate where he planned the stabbing and burning of his grandmother and nephew. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

The sentence of death was neither excessive nor disproportionate where defendant gained entrance to victim's apartment by asking to use the phone, then demanded money at knife point and raped her before stabbing her 60 times, and finally set fire to the apartment to cover up the evidence. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Appellate court reviewed defendant's sentence under G.S. 15A-2000(d)(2) and found that (1) the evidence fully supported the aggravating circumstance found by the jury; (2) there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) the sentence of death was not disproportionate to other cases; thus, it affirmed defendant's sentence of death. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Death penalty was not disproportionate where defendant killed two men on the same day in the course of one attempted and one successful robbery, one murder was premeditated, and defendant had a juvenile conviction for what would have been a felony crime of violence had defendant been an adult. State v. Leeper, 356 N.C. 55, 565 S.E.2d 1, 2002 N.C. LEXIS 551 (2002).

During the Supreme Court of North Carolina's proportionality review in defendant's appeal from his conviction for first-degree felony murder and his sentence to death, the sentence was not deemed excessive or disproportionate to the penalty imposed in similar cases, based on defendant's brutality in committing the killing and his attempted perpetration of a rape of the victim; the victim was brutally beaten, defendant's attack on her was dehumanizing, the victim was conscious during much of the attack, which took place over a period of time, and the nature and extent of the blows inflicted were mutilating. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

The North Carolina Supreme Court has never found a death sentence disproportionate in a double-murder case. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Death sentence was not disproportionate in a case involving multiple murders. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Death sentences, imposed for two murders which defendants planned over a period of at least nine hours, apparently to avenge the loss of some jewelry the victim allegedly had taken from a relative of the defendants, were not excessive or disproportionate to the penalties imposed in similar cases. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995) cert. denied, 516 U.S. 994, 116 S. Ct. 529, 133 L.E.2d 435 (1995).

The court found that this case was not substantially similar to any case in which the Court had found the death penalty disproportionate in that none of those cases involved a double murder. State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (1996).

Death sentences were not excessive or disproportionate in double murder. State v. Conner, 345 N.C. 319, 480 S.E.2d 626 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997).

Sentence of death held proportionate where defendant kidnapped two boys and locked them in the trunk of his car while he murdered their father, then held them in an attic for 8 hours and murdered them. State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997), cert. denied, 523 U.S. 1097, 118 S. Ct. 1583, 140 L. Ed. 2d 797 (1998).

When compared to other cases in which the death penalty had been judged appropriate, defendant's death penalty sentences were not disproportionate, considering his efforts to conceal the crimes and his lack of remorse. State v. May, 354 N.C. 172, 552 S.E.2d 151, 2001 N.C. LEXIS 943 (2001), cert. denied, 535 U.S. 1060, 122 S. Ct. 1923, 152 L. Ed. 2d 830 (2002).

Death penalty was not disproportionate where defendant was found guilty of killing and robbing a victim, and the jury found that three of the four aggravating circumstances applied. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

Sentence Not Imposed Under Influence of Passion, Prejudice or Other Arbitrary Consideration. — The record fully supported the aggravating circumstances found by the jury in defendant's first-degree murder trial. Further, there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895, reh'g denied, 512 U.S. 1278, 115 S. Ct. 26, 129 L. Ed. 2d 924 (1994).

Where facts reveal that defendant, using an assault rifle, gunned down a totally defenseless elderly woman after she had already given him all the money from cash register in family run grocery store, and the jury found the existence of various aggravating circumstances, including the fact that defendant had previously been convicted of a felony involving the use or threat of violence to the person, the death sentence was not imposed under the influence of passion, prejudice or other arbitrary considerations in violation of this section. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

The evidence supported the aggravating circumstances found by the jury; the sentence was entered absent passion, prejudice or any arbitrary factor, and the sentence of death was not excessive or disproportionate as a matter of law. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Life Sentence Mandatory Where Death Sentence Held Excessive and Disproportionate. — Where the court held as a matter of law that the death sentence imposed was disproportionate within the meaning of this section, the statute required that the court sentence defendant to life imprisonment in lieu of the death sentence. The language of the statute is mandatory, and the court had no discretion in determining whether the death sentence should be vacated. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

New Sentence Hearing Required. — Where the trial court's instructions and the verdict form required the jury to find unanimously the existence of each of eleven submitted mitigating circumstances, two of which were statutory, the mental or emotional disturbance circumstance, subdivision (f)(2), and the impaired capacity circumstance, subdivision (f)(6), and the jury failed to find unanimously any of the mitigating circumstances submitted, although there was substantial evidence to support at least some, if not all, of these circumstances, including those defined by statute, defendant was entitled to a new sentencing hearing. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

Illustrative Cases. — The record, transcript, and briefs in this case fully support the aggravating circumstances found by the jury and the defendant's sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor nor was it disproportional. State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000), cert. denied, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000).

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and the death sentence was not disproportionate where the jury convicted defendant on the basis of premeditation and deliberation and under the felony murder rule and the defendant committed the murder while on pretrial release pending a separate murder trial.

State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001).

Habeas Corpus Relief. — The defendant who claimed that his counsel was ineffective for failing to put forth available evidence that would support the mitigating circumstance that he aided in the apprehension of another capital felon, as recognized by G.S. 15A-2000(f)(8), was not entitled to habeas corpus relief because the state MAR court's denial of defendant's ineffectiveness of counsel claim was not contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Bacon v. Lee, 225 F.3d 470, 2000 U.S. App. LEXIS 22231 (4th Cir. 2000), cert. denied, 532 U.S. 950, 121 S. Ct. 1420, 149 L. Ed. 2d 360 (2001).

Habeas Corpus Relief Denied. — Where a jury found two aggravating factors under G.S. 15A-2000(e)(5) and (11) based on the fact that each of two murders was committed in conjunction with the other murder, a prisoner was not entitled to federal habeas corpus relief from death sentences imposed in connection with his state convictions for first-degree murder because there was no reasonable probability that, but for counsel's failure to present mitigating evidence under G.S. 15A-2000(f)(2), (6), and (7) regarding the prisoner's mental health and character, at least one juror would have found that the mitigating circumstances outweighed the aggravating circumstances for purposes of G.S. 15A-2000(b) and (c)(3). The mental health evidence was equivocal, and the evidence of the prisoner's alcoholism could have been viewed as detracting from the mitigating circumstances of immaturity and youthfulness; furthermore, the additional mitigating evidence was substantially duplicative of evidence already presented to the jury. Bowie v. Branker, 512 F.3d 112, 2008 U.S. App. LEXIS 38 (4th Cir. 2008).

Claim of Ineffective Assistance of Counsel Failed. — In spite of the inmate's proclamations of innocence, he unsuccessfully claimed that defense counsel was ineffective as counsel should have presented a domination defense during trial and at re-sentencing. Call v. Polk, 454 F. Supp. 2d 475, 2006 U.S. Dist. LEXIS 68738 (W.D.N.C. 2006).

Trial Court had No Authority to Impose a Life Sentence. — In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the trial court was correct in its conclusion that it lacked authority to impose a life sentence in the case at the time the defendant made his motion for a mistrial following an inconsistency arising between the verdict and the responses of jurors during the polling process, as no evidence suggested that the jury could not agree and the jury had given no indication that it was having trouble reaching a sentencing recommendation following the direction to continue deliberations. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

Not Unconstitutionally Vague. — The aggravating circumstances listed in this section are not so vague as to violate due process or to allow a jury arbitrarily and capriciously to impose the death penalty. State v. Rook, 304 N.C. 394, 284 S.E.2d 437 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982), remanded for resentencing, 317 N.C. 474, 346 S.E.2d 405 (1986).

Constitutionality of Considering Pecuniary Gain. — The fact that pecuniary gain may be considered as an aggravating circumstance in a robbery-murder case does not constitute a violation of U.S. Const., Amend. VIII. State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986).

Jury instruction regarding capital felony committed for pecuniary gain to support submission of aggravating circumstance under subdivision (e)(6) of this section did not violate defendant's due process and fair trial rights under N.C. Const., Art. I, § 19 and 23; although gun may have been intended for his personal use, it had pecuniary value. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Double Jeopardy Considerations. — Imposition of death penalty in the defendant's second trial did not violate double jeopardy or Ring because the jury in the first trial had found at least one statutory aggravator and the jury in the second trial had also found at least one statutory aggravator. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

The Supreme Court has never found the death penalty to be disproportionate for a convicted murderer of multiple victims; in fact, that defendant is a multiple killer is a heavy factor to be weighed against the defendant. State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995).

Necessity of Aggravating Factors for Death Sentence. — Pursuant to G.S. 15A-2000(c), a defendant may not receive a sentence of death in the absence of an aggravating circumstance. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Death sentence imposed upon defendant was not disproportionate as the evidence of the kidnapping, robbery, and murder of the two victims supported the jury's finding of the existence of four aggravating circumstances and the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

A defendant is not constitutionally entitled to an enumeration of aggravating factors to be used against him; statutory notice as contained in subsection (e) of this section is sufficient. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

State May Only Rely on Subsection (e) Circumstances. — The factors enumerated in this section are not elements of the offense but rather are guidelines defining the parameters of the jury's discretion in determining punishment. The only aggravating circumstances upon which the State may rely are enumerated in subsection (e) of this section. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

The only aggravating circumstances on which the State may rely are enumerated in subsection (e) of this section and this statutory notice is sufficient to meet the constitutional requirements of due process. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

The aggravating circumstances which may be considered during the sentencing phase in a capital case are limited to the 11 listed in subsection (e) of this section. State v. Edgerton, 86 N.C. App. 329, 357 S.E.2d 399, rev'd on other grounds, 328 N.C. 319, 401 S.E.2d 351 (1991).

The prosecutor may not argue an aggravating factor not supported by the evidence or not included in the statutory list of aggravating factors found in subsection (e). State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

There are four statutory aggravating circumstances which, standing alone, the North Carolina Supreme Court has held sufficient to sustain death sentences, and the aggravator in (e)(3) is among them. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

A jury may not base its sentencing recommendation on an improper aggravating factor. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987).

Notice of State Evidence in Support of Aggravating Circumstances. — Defendant is not entitled to notice of the evidence which the State intends to offer in support of and to prove aggravating circumstances under subsection (e) of this section. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Where the defense counsel was afforded the opportunity, at a time prior to the sentencing hearing, to ascertain the evidence upon which the State would rely through an examination of the district attorney's entire file, the prosecution has satisfied fully the defendant's right to discover evidence under G.S. 15A-903, however, the discovery procedure does not require the State to enumerate specifically the aggravating circumstances upon which it will rely in seeking the death penalty in the sentencing phase. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Subsection (e) of this section gives sufficient notice to meet the constitutional requirements of due process, and a defendant is not entitled to notice of the evidence the State intends to offer in support of and to prove aggravating circumstances. State v. Edgerton, 86 N.C. App. 329, 357 S.E.2d 399, rev'd on other grounds, 328 N.C. 319, 401 S.E.2d 351 (1991).

Defendant's Right to Rebut State's Evidence of Aggravating Circumstances Was Violated. — When the State offered, as evidence of defendant's prior conviction for assault with a deadly weapon inflicting serious injury, an aggravating factor under G.S. 15A-2000(e)(3), the testimony of the victim of that crime, defendant's right to rebut the State's evidence was violated when defendant was not allowed to ask the witness about the contents of an alleged affidavit signed by the witness absolving defendant of responsibility for that crime, therefore defendant was entitled to a new sentencing hearing, but not to a new trial. State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Confrontation Rights Violated Where Witness Who Testified as to Aggravating Circumstances Was Not Present at Sentencing. — In a capital murder case, defendant's confrontation rights were violated where there was insufficient evidence to support a conclusion that the State employed good-faith efforts to contact and produce a witness at sentencing whose prior testimony regarding aggravating circumstances was presented via transcript. State v. Nobles, 357 N.C. 433, 584

S.E.2d 765, 2003 N.C. LEXIS 830 (2003).

Indictment Need Not List Aggravating Circumstances. — There is no statutory or case law which requires an indictment in a death case to list the aggravating circumstances upon which the State will rely in seeking the death penalty. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985); State v. Dixon, 321 N.C. 117, 361 S.E.2d 562 (1987).

Because the Fifth Amendment grand jury requirement does not apply to state prosecutions, state-court murder indictments are not required to allege the aggravating circumstances to be presented against capital defendants. State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003).

A prosecutor during jury voir dire should limit references to aggravating factors, including the underlying felonies listed in this section, to those of which there will be evidence and upon which the prosecution intends to rely. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

The State's disclosure of its desire to present aggravating circumstances not specifically listed under this section did not require the court to intervene ex mero motu where the prosecutor did not misstate the law or ask the jury to consider aggravating circumstances which were not included in this section and where the trial court properly instructed the jurors and cautioned them to apply the law as given, "not as you think it is or as you might like it to be." State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Error for State to Agree Not to Submit Circumstances. — It was error for the state, via a plea bargain, to agree not to submit aggravating circumstances which could be supported by the evidence. State v. Case, 330 N.C. 192, 410 S.E.2d 57 (1991).

Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance. State v. Case, 330 N.C. 192, 410 S.E.2d 57 (1991).

Trial court may not require State to declare which aggravating factors it intends to rely on at the punishment phase, since subsection (e) of this section sets forth the only aggravating factors the State may rely upon in seeking the death penalty. The notice provided by this section is sufficient to satisfy the constitutional requirements of due process. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

Prior Capital Felony and Prior Crime of Violence Aggravators Compared. — That the G.S. 15A-2000(e)(3) aggravating circumstance of previously convicted of a felony involving the use or threat of violence to the person was requested and submitted in lieu of the G.S. 15A-2000(e)(2) aggravating circumstance of previously convicted of another capital felony, the integrity of the capital sentencing scheme requiring that if an aggravating circumstance could be supported by the evidence, the State was to submit it, was not at violated. State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

When Multiple Aggravating Circumstances May Be Submitted. — There is no error in submitting multiple aggravating circumstances, provided that the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

The trial court properly submitted to the jury as aggravating circumstances both that the murder was committed during the course of a felony (burglary), and that the murder was part of a course of conduct which involved commission of other crimes of violence against other persons. The trial court properly instructed the jury not to consider the same evidence as the basis of more than one aggravating circumstance, that different evidence supported each aggravating circumstance, and that the two circumstances were not inherently duplicative. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Substantial separate evidence supported the submission of jury instructions regarding aggravating circumstances under both subdivision (e)(5) of this section (defendant murdered one victim while engaged in the murder of another) and subdivision (e)(11) of this section (defendant murdered one victim while engaged in the commission of malicious castration on another). State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Multiple Factors Improper. — Where the trial court submitted to the jury as statutory aggravating circumstances whether a murder was committed for pecuniary gain, and whether the murder was committed while defendant was engaged in the commission of a burglary it was improper for the trial court to submit two aggravating circumstances supported by the same evidence and defendant was entitled to a new capital sentencing proceeding. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

In defendant's trial on two counts of first-degree murder, the trial court erred by instructing jurors that they had to find defendant committed murder for personal gain, as an aggravating factor, if they found that he was committing robbery with a dangerous weapon when the person who lived in the house and one of defendant's accomplices were shot. State v. Jones, 357 N.C. 409, 584 S.E.2d 751, 2003 N.C. LEXIS 828 (2003).

Submission of Multiple Factors Upheld. — As the circumstance of violent course of conduct directed the jury's attention to the factual circumstances of defendant's crimes, while the circumstance of witness elimination required the jury to consider not defendant's actions but his motive in shooting a man in a defenseless posture, there was no error in submitting both of these aggravating circumstances to the jury. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Where the State presented distinct evidence that defendant committed both robbery and kidnapping against the victim during the course of a murder, the trial court properly submitted the subdivision (e)(5) circumstance twice. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

The trial court did not err in submitting both statutory aggravating circumstances that the murder was committed while defendant was engaged in the commission of an armed robbery, G.S. 15A-2000(e)(5), and that it was committed for pecuniary gain, G.S. 15A-2000(e)(6), because separate, independent evidence supported submission of both of the aggravating circumstances, as the evidence demonstrated that defendant stole the victim's vehicle for transportation, not to sell it. State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002), cert. denied, 537 U.S. 1163, 123 S. Ct. 972, 154 L. Ed. 2d 900 (2003).

Defendant's claim that the aggravating circumstances of commission of kidnapping, pecuniary gain, and commission of other crimes of violence, that were submitted to the jury, were based on the same evidence and were inherently duplicitous was denied as the evidence of the stealing of the victims' car, the theft of the victims' jewelry, and the double homicide independently supported the different aggravating circumstances without impermissible double-counting. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

With regard to defendant's convictions on two counts of first-degree murder, the trial court did properly instructed the jury to consider only the theft of the firearms, credit cards, and checks in the robbery committed by defendant in determining whether the G.S. 15A-2000(e)(6) pecuniary gain circumstance was present and to not consider the vehicle theft in making that determination; as to the G.S. 15A-2000(e)(5) aggravator, the trial court instructed the jury to consider only the evidence related to the theft of the truck. Therefore, the trial court properly submitted both aggravating circumstances to the jury. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Only Statutory Circumstances May Be Considered. — A jury considering the sentence in a capital case in North Carolina may consider only statutory aggravating circumstances. Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983), cert. denied, 467 U.S. 1210, 104 S. Ct. 2401, 81 L. Ed. 2d 357, rehearing denied, 468 U.S. 1227, 105 S. Ct. 28, 82 L. Ed. 2d 920 (1984).

Poisoning Not Aggravating Circumstance. — The act of poisoning itself makes a killing first-degree murder, the fact that the poison is administered in small doses over an extended period of time thereby causing excruciating and prolonged pain and suffering was not essential to prove the offense and was properly submitted as an aggravating circumstance. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

The prosecution must be permitted to present any competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty, so as to avoid an arbitrary or erratic imposition of the death penalty. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Bad reputation or character is not listed in subsection (e) as an aggravating circumstance, and the State may not offer evidence of the defendant's bad character in its case in chief. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Evidence of Violence Despite Stipulation to Same. — The prosecution may establish the use or threat of violence to the person in the commission of a prior felony by the testimony of witnesses, notwithstanding defendant's stipulation of the record of conviction, even where defendant was prepared to stipulate not just to the existence of convictions, but also to the fact that each involved the use or threat of violence. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Vague Heinousness Instruction Was Harmless Error. — Appellate court conducting harmless error review raised by habeas corpus petition concluded that had the jury been properly instructed it would have found that murder was especially heinous, atrocious, or cruel and would have imposed the death penalty; thus, the constitutional error that resulted from the jury weighing an unconstitutionally vague heinousness instruction did not have a substantial and injurious influence in determining the jury's verdict. Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, 513 U.S. 1105, 115 S. Ct. 785, 130 L. Ed. 2d 678 (1995).

Trial court's instruction to jury relieved the State of its burden to prove each element of this section's aggravating circumstances and constituted plain error, entitling defendant to a new capital sentencing proceeding. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Perjury may no longer constitute a nonstatutory aggravating factor in North Carolina, effective in all sentencing hearings commencing on or after the certification date of the opinion at hand, including the resentencing of defendant. State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

Rule in State v. Vandiver Not to Apply Retroactively. — The rule in State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1980), which holds that perjury may not constitute a nonstatutory aggravating factor in a sentencing decision is not to apply retroactively. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Use of Evidence Necessary to Prove Element of Offense. — This section does not contain a statutorily mandated proscription against the use of evidence necessary to prove an element of the offense as does G.S. 15A-1340.1 et seq. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

Aggravating Factors Not Unduly Emphasized by Separate Findings. — There is no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Test of When Aggravating Circumstance Erroneously Submitted. — Whether there is a reasonable possibility that the evidence complained might have contributed to the conviction is the test which should be applied when one of the aggravating circumstances listed in subsection (e) of this section is erroneously submitted by the court and answered by the jury against the defendants. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

The harmless error test should be applied when one of the aggravating circumstances listed in this section is erroneously submitted by the court and answered by the jury against the defendant. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981), cert. denied, 456 U.S. 932, 102 S. Ct. 1985, 72 L. Ed. 2d 450 (1982).

It is error to submit the underlying felony as an aggravating circumstance during the sentencing phase of the trial for a capital crime when felony murder is the theory under which defendant was convicted. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Failure to Submit Not Structural Error. — Trial court's failure to submit an aggravating circumstance is not structural error. State v. Polke, 361 N.C. 65, 638 S.E.2d 189, 2006 N.C. LEXIS 1297 (2006).

Test for Prejudicial Error in Submission of Aggravating Circumstances to Jury. — Where there is a reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were sufficiently substantial to justify imposition of the death penalty, the test for prejudicial error has been met. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987) vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

Need for Deterrence and That Lesser Sentence Would Depreciate Seriousness May Not Be Considered. — It is error for the trial judge to find as aggravating factors that the sentence imposed was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to the character or conduct of the offender. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Life Sentence Proper Absent Any Aggra-

vating Circumstance. — Where State failed to produce evidence of an aggravating circumstance in either the guilt determination phase or the sentencing phase, the trial court properly imposed a life imprisonment sentence without the intervention of the jury at the sentencing phase of the trial. State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982).

Redundant Aggravating Factors in Robbery-Murder Case. — In the particular context of a premeditated and deliberate robbery-murder where evidence is presented that the robbery was attempted or effectuated for pecuniary gain, the submission of both the aggravating factors enumerated in subdivisions (e)(5) and (e)(6) is redundant and should be regarded as surplusage. Therefore it is error to submit both of these aggravating factors to the jury. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987) vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

In trial for first-degree murder and common-law robbery, where all the evidence suggested that defendant committed the robbery for pecuniary gain, i.e., to resell a ring and radio for cash, submission of both subdivisions (e)(5) and (e)(6) of this section in aggravation was duplicative and constituted error. Moreover, in view of the fact that jury deliberations regarding sentencing lasted two full days, indicating that the jury did not reach a unanimous recommendation of a sentence of death easily, the sentence of death would be set aside and the case remanded for a new capital sentencing hearing. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Instruction on Pecuniary Gain Sufficient. — The trial court properly instructed the jury that it had to find that defendant murdered for the purpose of pecuniary gain in order to find the (e)(6) aggravating circumstance. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

With regard to defendant's conviction for capital murder, the trial court did not err by failing to intervene during the prosecution's penalty proceeding closing argument when the prosecutor began to discuss how defendant's crime was committed for money as it was proper for the jury, under the facts of this case, to consider defendant's motive for pecuniary gain in the commission of the murder since robbery with a dangerous weapon was an aggravating circumstance; further, it was not an abuse of discretion for the trial court to allow for illustrative purposes a chart that stated that armed robbery during a premeditated murder was an aggravating factor, as the chart made a correct statement of the law. State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Instruction on Pecuniary Gain Insufficient. — Jury instruction that omitted the requirement that defendant have had the intent to obtain something of value at the time of the killing in order for the jury to find pecuniary gain to be an aggravating circumstance under G.S. 15A-2000(e)(6) was erroneous; error required remand for a new sentencing proceeding since there was a reasonable probability that, had the error not been committed, the jury might have reached a difference result. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

An assault on a woman with intent to commit rape is an act exhibiting violence with the intent to commit a subsequent act of violence; as such it is, as a matter of law, an offense involving the use or threat of violence to the person. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence of Sexual Offense. — Although some photographs were gruesome, they were relevant to illustrate the circumstances of the killing and tended to establish that the murder was committed during the commission of a sexual offense; accordingly, the trial court did not err in admitting these photographs into evidence. State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996), cert. denied, 522 U.S. 824, 118 S. Ct. 84, 139 L. Ed. 2d 41 (1997).

Evidence held sufficient to support finding of murder for pecuniary gain. See State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Malicious Castration. — Substantial evidence showing that defendant engaged in a violent felony, malicious castration, while committing murder, supported an aggravating circumstances jury instruction under this section. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Where the evidence showed that defendant broke and entered decedent's home with the intent to steal, and there was no evidence that the burglary was motivated by some impulse other than pecuniary gain, the evidence was sufficient to support a finding of the pecuniary gain aggravating circumstance. State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996), cert. denied, 519 U.S. 875, 117 S. Ct. 196, 136 L. Ed. 2d 133 (1996).

Aggravating factors found by the jury against the defendant included five aggravating circumstances, including that the murder was committed during the commission of a first-degree kidnapping, G.S. 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, G.S. 15A-2000(e)(9); either of G.S. 15A-2000(e)(5), (e)(9) were sufficient, standing alone, to sustain a death sentence. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Aggravating Factors Supported Death Sentence. — There was support in the record of defendant's rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant, pursuant to G.S. 15A-2000(d)(2). The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant's commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

Sentence of death for first-degree murder was proportional to the offense where the evidence supported a finding that defendant committed the murder for the purpose of avoiding lawful arrest and the evidence showed that defendant twice beat the victim into an unconscious state, needlessly stabbed the victim over 50 times, and left the victim's three-year-old grandson alone in the residence after the murder, making it highly probable that the child would awaken to find the victim dead on the living room floor, half naked in a pool of blood with knives protruding from the victim's body. State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007).

Evidence Supported Multiple Aggravating Circumstances. — The record supported the jury's finding of aggravating circumstances that the capital felony (murder) was committed during the commission of a felony (burglary) (subdivision (e)(5)), was especially heinous, atrocious, or cruel (subdivision (e)(9)), and was part of a course of conduct which included other crimes of violence committed by the defendant against additional victim (subdivision (e)(11)). Nothing in the record suggested that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Evidence was held sufficient for the jury to find defendant guilty of all charges, including first-degree felony murder of a woman coworker, and to find the G.S. 15A-2000(e)(5), (6), and (9) aggravating factors (during a robbery, for pecuniary gain, and especially heinous, atrocious, or cruel). State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

There was sufficient and substantial evidence to support the jury's conclusion that (1) a victim's murder was committed while a defendant was engaged in the commission of a first-degree kidnapping under G.S. 15A-2000(e)(5), based upon the taking of the vicitm's car, and (2) that the murder was committed for pecuniary gain under G.S. 15A-2000(e)(6), based upon the taking of the victim's money (but not based on the taking of the victim's car to eliminate "double counting"). State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Record supported aggravating circumstances where the State introduced certified copies of judgments showing defendant's prior convictions for common law robbery and second-degree kidnapping sufficient to support the G.S. 15A-2000(e)(3) aggravating circumstance; the record indicated that defendant stole various items from the victim's residence, including groceries, a VCR, a game console, jewelry, a coin collection, clothes, and an ATM card, supporting the G.S. 15A-2000(e)(5) aggravator; and the murder was the type for which the G.S. 15A-2000(e)(9) aggravator was appropriate. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Arson. — Substantial evidence showing that victim was murdered while defendant was engaged in the commission of arson, supported an aggravating circumstances jury instruction under this section. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

No evidence was needed to prove that dwelling was "occupied" for purposes of the arson statute, G.S. 14-58, where the burning of a downstairs apartment, after the murder of that apartment's tenant, and the murder of an upstairs victim were parts of a continuous transaction. State v. Parker, 350 N.C. 411, 516

S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

After a thorough review of the transcript, record on appeal briefs, and oral arguments of counsel, the Supreme Court concluded that the evidence supported the jury's finding that each of the aggravating circumstances in subdivisions (e)(9), (e)(10), and (e)(11) existed; that nothing in the record suggested that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995).

Off-Duty Law Enforcement Officers. — Subdivision (e)(8) appropriately includes duly sworn law enforcement officers in uniform performing off-duty, secondary law enforcement related duties, when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public. State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997), cert. denied, 507 U.S. 1038, 113 S. Ct. 1866, 123 L. Ed. 2d 486 (1993).

Murder of Law Enforcement Officer. — The murder of a law enforcement officer engaged in the performance of his official duties differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public, the body politic, and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The aggravating circumstance, found in subdivision (e)(8) of this section, reflects the General Assembly's recognition of the common concern that the collective conscience requires the most severe penalty for those who flout our system of law enforcement. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The trial court correctly submitted to the jury the aggravating circumstance that the murder was committed against a law enforcement officer while engaged in the performance of his official duties, even though the defendant argued that the officer was killed after making an illegal entry into the defendant's home to arrest the defendant. State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1013 (1999).

Same — Prosecutor's Argument. — It was not improper for the district attorney to argue that the jury should consider the bravery of the law enforcement officers who captured the defendant before he could go into the jurors' homes or rob or hurt someone, that the widow of the deceased highway patrolman had done her painful duty by coming to court each day to see that justice was done, that the law enforcement officers across the State expected the jury to do its duty, and that unless the jury did its duty by recommending death, the jurors would be telling law enforcement officers that their lives and services were without value. Since one of the aggravating circumstances to be considered in determining whether to impose the death penalty is that the person killed was a law enforcement officer in the performance of his official duty, this argument was proper to focus the jurors' attention on this aggravating factor. It was not an appeal to the jury to impose the death penalty because that was what was desired by the public, an argument which is improper. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

State's Argument of Victim's Perceptions Properly Admitted. — Since arguments addressing the victim's perceptions as defendant shot him were relevant to the G.S. 15A-2000(e)(9) aggravator, the State's argument was proper and the trial court had no grounds to intervene ex mero motu. State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

Two Aggravating Circumstances Found by Jury. — Defendant's death sentence was proportionate, pursuant to G.S. 15A-2000(d)(2). The jury found two aggravating circumstances, that the murder was committed while defendant was committing a first-degree burglary, as contemplated by G.S. 15A-2000(e)(5), and the murder was especially heinous, atrocious, or cruel under G.S. 15A-2000(e)(9). State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

B. Prior Convictions.

Constitutionality. — The "prior violent felony" aggravating factor is not unconstitutionally vague and overbroad or so inscrutable that a jury is not given sufficient guidance concerning the relevant factors about defendant and the crime which he was found to have committed. State v. Brown, 320 N.C. 179, 358 S.E.2d 1,

cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Effective Date. — Juvenile records may be examined and used in sentencing for subsequent, criminal proceedings, provided the crime for which the defendant is being sentenced was committed on or after May 1, 1994; that the juvenile adjudication was prior to that date is immaterial. State v. Leeper, 356 N.C. 55, 565 S.E.2d 1, 2002 N.C. LEXIS 551 (2002).

The "previously convicted" language in subdivision (e)(2) includes capital felonies committed before the events out of which the murder charge arose, even though the conviction came after those events, so long as the conviction precedes the capital sentencing proceeding in which it forms the basis of the subdivision (e)(2) aggravating circumstance. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Court Did Not Usurp Jury's Role in Determining Mitigation. — The trial court did not err by assuming the jury's duty to determine whether defendant's history was significant for mitigating purposes; rather, the trial court listed defendant's prior criminal activity, which was supported by the evidence, and asked that the jury determine the significance of this activity. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

A pardoned prior conviction may not be considered as an aggravating factor during sentencing absent revocation of the pardon by the governor. State v. Clifton, 125 N.C. App. 471, 481 S.E.2d 393 (1997), cert. granted, 346 N.C. 182, 486 S.E.2d 200 (1997), discretionary review improvidently allowed, 347 N.C. 391, 493 S.E.2d 56 (1997).

The reasoning that an increased punishment for a current offense due to a prior pardoned conviction is not punishment for the prior pardoned offense is a legal fiction that conflicts with logic and the administrative duties of the governor; thus, trial court infringed upon the prerogatives of the governor by finding that defendant's prior conviction constituted an aggravating factor. State v. Clifton, 125 N.C. App. 471, 481 S.E.2d 393 (1997), cert. granted, 346 N.C. 182, 486 S.E.2d 200 (1997), discretionary review improvidently allowed, 347 N.C. 391, 493 S.E.2d 56 (1997).

Defendant's conviction under military law of attempted rape was a conviction for a prior felony involving at minimum the "threat of violence." State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Subdivision (e)(3) of this section includes felonies which were committed through the use or threat of violence to the person, regardless of whether violence was an element of the offense. McDougall v. Rice, 685 F. Supp. 532 (W.D.N.C. 1988).

Under subdivision (e)(3), a prior felony can be either one which has as an element the use or threat of violence to the person, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but as to which the use or threat of violence to the person was actually involved. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Subdivisions (e)(5) and (e)(3) Compared. — Subdivision (e)(5) of this section differs from subdivision (e)(3) in that it guides the jury's deliberation upon criminal conduct of the defendant which takes place "while" or during the same transaction as the one in which the capital felony occurs, whereas subdivision (e)(3) of this section deals with prior conduct. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(3) Refers to Acts Prior to Present Charge. — The "previously convicted" language used by the legislature in subdivision (e)(3) of this section refers to criminal activity conducted prior to the events out of which the charge arose. To decide otherwise would lead to unnecessary duplication within the statute, for subdivision (e)(5) of this section enumerates those felonies which occur simultaneously with the capital felony which the legislature deems worthy of consideration by the jury. It would be improper, therefore, to instruct the jury that this subdivision encompassed conduct which occurred contemporaneously with or after the capital felony with which the defendant is charged. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

It will be determined that defendant "had been previously convicted of a felony involving the use or threat of violence to the person" when the prior violent felony occurred before the date the capital defendant committed murder and the capital defendant is convicted of the violent felony at some point prior to the capital trial; the emphasis is on the date of the prior violent felony, not on the date of conviction. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

When Subdivision (e)(3) Instruction Proper. — It would be improper to instruct the jury upon the factor enumerated in subdivision (e)(3) of this section when there is no evidence which tends to show a felony conviction. Also, the felony for which the defendant has been convicted must be one involving threat or use of violence to the person. It cannot, under this provision, be a crime against property. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(3) of this section requires that there be evidence that: (1) defendant had been convicted of a felony, (2) the felony for which be was convicted involved the "use or threat of violence to the person," and (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. If there is no such evidence, it would be improper for the court to instruct the jury on this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When the State establishes that a defendant of a capital offense was convicted of a felony which involved the use or threat of violence to the person and the conduct upon which this conviction was based occurred prior to the event out of which the capital offense arose, the aggravating circumstance listed in subdivision (e)(3) of this section must be submitted to the jury, and the State need not in fact show him to have acted violently in the previous felony rather than merely showing a previous felony involving violence. State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981).

For purposes of subdivision (e)(3) of this section, a prior felony can be either one which has as an element of the involvement of the use or threat of violence to the person, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991).

Subdivision (e)(3) of this section contains the word "involving," which indicates an interpretation much more expansive than one restricting the jury to consider only felonies having the use or threat of violence to the person as an element. Crimes that do not have violence as an element may be committed by the use or threat of violence. By using "involving" instead of language delimiting consideration to the narrow class of felonies in which violence is an element of the offense, the legislature intended the prior felony in subdivision (e)(3) of this section to include any felony whose commission involved the use or threat of violence to the person. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991).

Trial court's submission of the G.S. 15A-2000(e)(3) aggravating circumstance to the jury was not error because the defendant was convicted of six qualifying violent felonies and the defendant's trial for two capital murders took place after the date of the conviction. State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

Must Show Prior Convictions Were Felonies. — Where it was not at all clear which, if any, of the prior convictions offered to impeach defendant in his trial for first-degree murder were felonies, the convictions were not admissible for the purpose of establishing the aggravating circumstance set out in subdivision (e)(3) of this section. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Capital Felony Based on Non-Capital Case Appropriately Used as Aggravating Factor. — Although defendant pled guilty to first-degree murder and, under the now repealed G.S. 15-162.1, his case was not a "capital case," the crime of first-degree murder was still a "capital felony" and could be used in his subsequent capital case as an aggravating factor pursuant to this section. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Evidence Offered in Support of (e)(3) Instruction. — Expert's testimony regarding defendant's wife's death offered to rebut the defendant's line of questioning and to establish the existence of (e)(3) aggravating circumstances was harmless beyond a reasonable doubt. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Offense of voluntary manslaughter fell within this section and that evidence supported trial court's instruction that the death of defendant's wife, who was thrown from a bridge while under the influence of narcotics, involved an inherently violent act. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

It is the duty of the trial court to determine whether a rational jury could conclude that a defendant had no significant history of prior criminal activity. Then, once the trial court makes such a determination, the mitigating circumstance must then be submitted to the jury, which must decide for itself whether the evidence is sufficient to constitute a significant history of criminal activity, thereby precluding a finding of that circumstance. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Photographs and other evidence of defendant's prior murder conviction was held admissible to establish the subdivision (e)(3) aggravating circumstance, since the testimony and photographs illustrated the significant injury that was inflicted on the victim of the prior murder, thereby demonstrating the violence used to commit the felony. State v. King, 353

N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001).

Acts Sufficient to Show Use or Threat of Violence. — The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting involve the "use or threat of violence to the person" within the meaning of subdivision (e)(3). State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Trial court did not abuse its discretion in allowing testimony regarding the circumstances surrounding defendant's prior conviction of second-degree kidnapping; the trial court determined that evidence concerning the alleged domestic violence and rapes was necessary to show that the victim was terrorized by defendant and that her fear was well founded at the time of the actual kidnapping. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

It is not necessary to show that the use or threat of violence is an element of a prior felony in order for a prior felony to be used in support of the aggravating circumstance described in subdivision (e)(3) of this section, as in order to substantiate this aggravating circumstance, it is enough to cite a prior felony in which the commission of the felony simply involved use or threat of violence. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction Under Subdivision (e)(3) Held Proper. — Court's instruction, that voluntary manslaughter is crime involving use of violence to the person, did not amount to plain error where defendant did not offer evidence that killing of his former wife did not involve use of violence of the person and where voluntary manslaughter usually — probably always — involves violence to person within meaning and intent of subdivision (e)(3) of this section. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the defendant shot to death a woman and a small child in a bed in a home, the evidence fully supported the aggravating circumstances found by the jury of defendant having been previously convicted of a felony involving the use or threat of violence to the person and defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. Therefore, the death sentence was not disproportionate. State v. Brown, 357 N.C. 382, 584 S.E.2d 278, 2003 N.C. LEXIS 834 (2003), cert. denied, 540 U.S. 1194, 124 S. Ct. 1447, 158 L. Ed. 2d 106 (2004).

Proof of Prior Felony Under Subdivision (e)(3). — The most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records, and the testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which the defendant was convicted involved the use or threat of violence to the person; however, if the defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the State should be permitted to offer such evidence as it has to overcome defendant's denials. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Where defendant testified he had been convicted of common law robbery within the last ten years, and the State offered criminal records illustrating the conviction, and the robbery victim there testified that defendant used violence in the commission of the robbery, there was substantial evidence that defendant had been convicted of a felony which involved the use or threat of violence to the person and that the felony occurred prior to the murders at issue. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Summary paragraph from a certified foreign judgment was properly admitted to support the State's submission of an aggravating circumstance under G.S. 15A-2000(e)(3); a court clerk testified that the documents were signed and certified in a manner verifying their authenticity, and the documents were also admissible under the rules concerning self-authenticating documents. State v. Carroll, 356 N.C. 526, 573 S.E.2d 899, 2002 N.C. LEXIS 1265 (2002), cert. denied, 539 U.S. 949, 123 S. Ct. 2624, 156 L. Ed. 2d 640 (2003).

Methods of Proof. — Prior convictions may be proved by stipulation or by original certified copy of the court record, not that they must be. The statute does not preclude other methods of proof. State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983).

Evidence of a defendant's prior conviction for attempted second-degree rape consisting solely of the judgment against the defendant for that offense satisfies the state's burden of proving the aggravating circumstance that a defendant had been previously convicted of a felony involving the use or threat of violence to the person. State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Submission of the prior violent felony aggravating circumstance upheld where the State provided certified copies of prior judgments showing one count of accessory after the fact to murder and two counts of accessory after the fact to assault with a deadly weapon with intent to kill. State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999).

The preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

The State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record of conviction. We hold that the testimony of the circumstances of a prior killing was admissible in the penalty phase of a murder defendant's trial. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Testimony by a store clerk that the defendant previously had threatened her with a gun and forced her to give him money was admissible in support of the aggravating circumstance that the defendant had been convicted of a prior violent felony involving the use or threat of violence, even though the defendant stipulated to his conviction in that case. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Testimony from a previous victim whom the defendant raped years earlier was admissible in support of the G.S. 15A-2000(e)(3) aggravating instruction at the defendant's sentencing for capital murder as the victim's testimony served to illuminate the circumstances surrounding the prior violent felony committed by the defendant. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Notice of Prior Crimes. — The provisions of subdivision (e)(3) of this section, and defendant's own personal knowledge of his criminal history provide defendant with adequate notice of what crimes might be presented as aggravating circumstances. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Effect of Introduction of Prior Conviction. — Although the introduction of the record of the prior conviction establishes a prima facie case where the prior felony has the use or threat of violence as an element and could support a peremptory instruction, it is not conclusive upon the jury. Where violence is not an element of the felonious offense, the introduction of the record of conviction would not create a prima facie case. In either event, the State cannot be deprived of an opportunity to carry its burden of proof by the use of competent, relevant evidence. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991).

Evidence of Prior Conviction in Another State. — Upon the conviction of first-degree murder, evidence that defendant was convicted for the crime of rape in Virginia in 1969 and was sentenced to 10 years in prison was admissible at the sentencing phase to support the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the persons." State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Previous Conviction of a Felony in Another State. — Because there was no death penalty in Virginia at the time the defendant pled guilty to first-degree murder in that state, that crime was not punishable by death and was not a capital felony as defined in subdivision (a)(1); therefore, the state's evidence did not support the finding of the aggravating circumstance that the defendant had previously been convicted of another capital felony, and a new capital sentencing proceeding was required. State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994).

Additional Evidence in Support of Stipulations Under Subdivision (e)(2). — Under subdivision (e)(2) of this section both sides are allowed to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Proof of a no contest plea and final judgment entered thereon constitute a conviction and may be properly found to be an aggravating circumstance. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

A no contest plea may not be used to aggravate a crime so as to sustain a death sentence under subsection (e) of this section. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

The state may not be limited to the introduction of the record of a prior conviction when attempting to prove a circumstance in aggravation, whether or not defendant has stipulated to the record of conviction. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Testimony Not Excessively In-Depth or Prejudicial. — Testimony concerning a prior armed robbery conviction was not excessively in-depth or prejudicial. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Testimony of Alleged Prior Rape Held Admissible. — Testimony of an alleged prior rape victim that defendant raped her and threatened to rape and kill her daughter three months prior to the present rape charge was offered in response to defendant's request that the court consider the mitigating circumstance that defendant had no significant history of prior criminal activity and was, therefore, properly admissible. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Erroneously Submitted Evidence Held Harmless. — Any error in submitting kidnapping charges to the jury was harmless in light of the robbery conviction also submitted, and because there was no reasonable possibility the sentencing recommendation would have differed since the jury also found the G.S. 15A-2000(e)(5) and (9) aggravators. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Prior Attempted Rape Conviction. — The trial court did not err in submitting evidence of defendant's prior conviction of attempted rape and instructing the jury that attempted rape is a crime of violence as a matter of law. Green v. French, 978 F. Supp. 242 (E.D.N.C. 1997), aff'd, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525 U.S. 1090, 119 S. Ct. 844, 142 L. Ed. 2d 698 (1999).

Guilty Plea to Second-Degree Murder. — Where the record established that defendant had pled guilty to second-degree murder and had been sentenced to imprisonment of not less than 22 nor more than 28 years, defendant's prior offense thus involved the unlawful killing of another human being with malice, and was therefore among the most serious of the many felonies involving the use or threat of violence to the person. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Postmortem photographs of prior murder victim were properly admitted to support the existence of the aggravating circumstance that defendant had been previously convicted of a felony involving the use of violence to a person. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

Prosecutor's Argument Regarding Prior First-Degree Murder Held Proper. — The prosecutor's argument that "no aggravating circumstance anywhere in the United States demands the death penalty like a prior first-degree murder" was not improper and did not warrant the court's ex mero motu intervention. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Prior Manslaughter Conviction. — The probative value of defendant's prior conviction for involuntary manslaughter was not outweighed by its prejudicial effect in a capital murder case and was, therefore, clearly admissible as an aggravating factor in the sentencing phase of defendant's trial where defendant admitted the conviction and stipulated to it. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The murder defendant's California conviction for involuntary manslaughter qualified as a prior violent felony under this section and thus as an aggravating circumstance supporting imposition of the death penalty, even though the conviction occurred 22 years before. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Where defendant admitted his prior conviction for involuntary manslaughter and stipulated to it, the evidence of the conviction is clearly admissible in the sentencing phase of defendant's trial as an appropriate method of establishing a subdivision (e)(3) aggravating factor. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The admission of photographs of defendant's victims in prior murders was relevant to support the existence of the subdivision (e)(2) aggravating circumstance, that defendant had been previously convicted of another capital felony. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Photographs of Prior Violent Crime. — A photograph depicting blood in a victim's grocery store, which resulted from a head injury defendant inflicted on the victim when he struck him with a gun during the robbery, and the accompanying testimony were relevant to support the existence of the aggravating circumstance that defendant had been previously convicted of a felony involving the use of violence to the person. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Defendant was not prejudiced by the admission of evidence of dynamiting convictions, where the court instructed the jury not to consider it and where there was uncontradicted evidence that the defendant had committed armed robbery to support the finding of an aggravating circumstance. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Failure to Submit Limiting Instruction Not Plain Error. — In a murder prosecution, where testimony and photographic exhibits of a prior murder were properly admitted into evidence during the sentencing phase, and it was appropriate for the jury to consider the evidence of the prior murder in finding the course of conduct aggravating circumstance, the trial court's failure to submit a limiting instruction to the jury did not rise to the level of plain error entitling defendant relief. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Use of the pattern jury instruction for subdivision (e)(2) in effect at the time of the trial, rather than the instruction in effect at the time of the offense, did not constitute an ex post facto violation since the state of the law, as applicable to defendant, had not changed, and the instruction was merely altered to conform to the law. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Circumstances Supported by Different Evidence. — The trial court's submission of (e)(4) and (e)(5) was not error as the evidence underlying these circumstances was not the same: the (e)(4) circumstance was based on the evidence that the murder itself was affected for the purpose of avoiding lawful arrest; the (e)(5) circumstance was based on the evidence that the murder occurred during the commission of a kidnapping. Because these circumstances were supported by different evidence, they cannot be considered redundant. State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994).

Evidence Admissible to Prove Circumstances of Prior Felony. — The State properly could introduce search warrant and supporting affidavit into evidence during the sentencing proceeding to prove the circumstances of a prior felony conviction. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

The court properly allowed the jury to consider defendant's conviction for assault with a deadly weapon inflicting serious injury which came after the events of this case for a violent felony which was committed prior to the events of this case of capital murder. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

Sentence Upheld. — Death sentence was not disproportionate where defendant ambushed and shot down an unarmed victim with an illegal machine gun, and defendant had previously been convicted of a felony involving the use of violence to the person. State v. Wooten, 344 N.C. 316, 474 S.E.2d 360 (1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1270, 137 L. Ed. 2d 348 (1997).

C. Avoiding Arrest or Escaping Custody.

Scope of Factor. — The language in former G.S. 15A-1340.4(a)(1)b, like that in subdivision (e)(4) of this section, was intended to include situations where defendant's motivation in committing the second offense was to avoid subsequent detection and apprehension for the underlying crime; it is not to be limited solely to situations where defendant committed the second offense in an effort to avoid an immediate arrest or to escape from custody. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

Not Every Killing Has Effect of Avoiding Arrest. — Subdivision (e)(4) of this section on its face is unambiguous, but it must be construed properly so that instructions on the aggravating circumstances will only be given the jury in appropriate cases. In a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest. It is not accurate to say, however, that in every case this "purpose" motivates the killing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

When Submission of Factor Is Proper. — Submission of the aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest has been upheld in circumstances where a murder was committed to prevent the murder victim from capturing defendant, and where a purpose of the killing was to eliminate a witness. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

The "lawful arrest" referred to in subdivision (e)(4) need not be the defendant's own arrest. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

When Submission of Factor is Proper. — Submission of the G.S. 15A-2000(e)(4) aggravating circumstance is proper where the trial court finds substantial, competent evidence in the record from which the jury can infer that at least one of defendant's purposes for a killing was the desire to avoid subsequent detection and apprehension for a crime. State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109, 2002 N.C. LEXIS 24 (2002), cert. denied, 537 U.S. 845, 123 S. Ct. 178, 154 L. Ed. 2d 71 (2002), cert. denied, — N.C. —, 619 S.E.2d 859 (2005).

Mere Fact of Death Insufficient to Invoke This Factor. — Before the trial court can instruct the jury on the aggravating circumstance in subdivision (e)(4) of this section, there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime. The mere fact of a death is not enough to invoke this factor. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981), cert. denied, 456 U.S. 932, 102 S. Ct. 1985, 72 L. Ed. 2d 450 (1982).

The isolated fact that a killing occurred during the commission of a felony is not sufficient to justify the submission of the aggravating circumstance set out in subdivision (e)(4) of this section. There must be evidence from which the jury could infer that at least one of the purposes which motivated the killing was defendant's desire to avoid or prevent a lawful arrest or effect an escape. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

While the fact that a killing was committed to avoid a lawful arrest may be a proper aggravating factor where there is competent evidence that the killing was committed for this purpose, such fact must be supported by evidence to that effect. Thus, it was not properly submitted where the only evidence relied upon to support this factor was the killing itself. State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), overruled on other grounds, State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

The aggravating circumstance of witness elimination may be presented to the jury only when evidence in addition to the mere fact of death is presented in support of it. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Statement by Defendant Not Essential. — While a statement made by defendant prior to shooting to the effect that fear of arrest was a motivating factor could be adduced in evidence to support the factor of witness elimination, such statements are not essential to establish this aggravating circumstance. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Statement Held Not to Raise Inference That Defendant Was Avoiding Lawful Arrest. — Defendant's statement that defendant wanted to leave store parking lot at a slow rate of speed so as not to attract attention, which statement by the defendant occurred after the killing, did not raise a reasonable inference that at the time of the killing defendant killed for the purpose of avoiding lawful arrest. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Murdering Witness to Avoid Arrest. — To put before the jury the aggravating circumstance that the killing was committed to avoid arrest. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at Hildebrand v. Southern Bell Tel. & Tel. Co., 219 N.C. 402, 14 S.E.2d 252 (1941) in light of Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964), overruled in part.

Where the State's witness testified that he and defendant schemed to kill the victim to prevent her from exposing their involvement in her husband's death, and the evidence presented made it clear that they then killed the victim's daughter to prevent her from identifying them as the men who had murdered her mother, that aggravating factor was properly submitted to the jury. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Murdering a Law Enforcement Officer. — It was not error to submit aggravating circumstances to a jury on both committing murder to avoid apprehension for a crime, under G.S. 15A-2000(e)(4), and murdering a law enforcement officer performing his official duty, under G.S. 15A-2000(e)(8), because one circumstance deals with defendant's purpose and the other deals with the factual circumstance of defendant's crime, i.e., that he killed a

law enforcement officer. State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109, 2002 N.C. LEXIS 24 (2002), cert. denied, 537 U.S. 845, 123 S. Ct. 178, 154 L. Ed. 2d 71 (2002), cert. denied, — N.C. —, 619 S.E.2d 859 (2005).

Evidence was sufficient to support a rational jury's finding that one of defendant's purposes for killing the victim was to eliminate a witness whom he thought would report him to the authorities where the defendant had made a statement to the police investigators to that effect and his girlfriend testified that he said that "he wasn't for sure about [whether the victim would say anything] . . ." State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

Testimony indicating that instead of wearing a mask during the robbery the defendant planned to kill the victim, whom he knew from his place of work, constituted sufficient, substantial evidence to support submission of this aggravating circumstance. State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001).

The aggravating circumstance of avoiding arrest or escaping from custody was found where no evidence showed that shooting murder victim either posed a threat to the defendant or tried to resist the robbery, defendant shot the victim from behind from close range with a .44 caliber gun, and the victim was on the ground at the time of the shooting. State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002).

Prosecutor's Insinuations Held Improper. — The prosecutor's insinuations in argument at the close of the sentencing phase of defendant's capital case that victim was killed in order to prevent her from identifying the perpetrators of the robbery were improper, where the prosecution presented absolutely no evidence whatsoever which showed that victim's killing was motivated by a desire to eliminate a potential witness, and where such a contention was not a reasonable inference from the facts which were introduced. State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986).

Use of Motive Not Element of Crime. — The motive of defendant, who was convicted of first degree murder based not on the felony murder rule but on the theory that he aided and abetted a premeditated and deliberated killing, was to avoid arrest, and since avoiding arrest is not an element of aiding and abetting a killing, the merger rule did not preclude its use as an aggravating circumstance. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Evidence Supported Aggravating Circumstances. — The trial court properly allowed the jury to consider and find two related aggravating circumstances where the evidence in support of the aggravating circumstance under subdivision (e)(4) indicated that defendants were motivated by the desire to avoid arrest for stealing a vehicle and where there was also evidence in support of a finding under subdivision (e)(8) that the first trooper was performing an official duty when he stopped the defendant on I-95 for not wearing a seat belt and then learned of defendants' theft and that the deputy was also performing an official duty when he arrived on the scene to provide assistance to a fellow officer. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

D. Felony Murder.

When Subdivision (e)(5) Instruction Proper. — Instruction on the provision of subdivision (e)(5) of this section is appropriate only when the defendant is convicted for first-degree murder upon the theory of premeditation and deliberation. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Where a jury convicts a defendant of first-degree murder under the theory of premeditation and deliberation and under the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted to the jury by the trial court as an aggravating circumstance under G.S. 15A-2000(e)(5). State v. Robinson, 355 N.C. 320, 561 S.E.2d 245, 2002 N.C. LEXIS 330 (2002), cert. denied, 537 U.S. 1006, 123 S. Ct. 488, 154 L. Ed. 2d 404 (2002).

Instruction Inappropriate. — The trial court's instruction regarding the (e)(5) aggravating circumstance was erroneous as it failed to submit the essential timing element to the jury—the murder occurred while a felony was taking place or during a felony—but its error was not a reversible one violating his constitutional rights. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Type of Felony. — Nothing in the wording of this section hints at a legislative intent that, to be used as an aggravating circumstance, the prior felony conviction must have involved an intentional use of or a threat of violence to another person. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, 513 U.S. 1198, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

The submission of the aggravating factor that the killing was committed during an armed robbery was erroneous, where the theory of premeditation and deliberation was not properly before the jury, and defendant was properly convicted only on the theory of felony murder. State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), overruled on other grounds, State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

When a defendant is convicted of first-degree murder solely under the theory of felony murder, submission of the underlying felony as an aggravating circumstance is error; proof of the underlying felony is an essential element of the State's proof of felony murder thus, the underlying felony cannot provide a basis for additional punishment. State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996).

When a defendant is convicted of first degree murder based on both premeditation and deliberation, and felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as aggravating circumstance. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the jury convicts a defendant of first-degree murder based solely on the felony murder rule, it is error for the court to submit the underlying felony as one of the aggravating circumstances defined by subdivision (e)(5); however, when a defendant is convicted of first-degree murder based on both premeditation and deliberation and the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as an aggravating circumstance. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

Defendant Convicted Under the Theory of Premeditation and Deliberation. — When a murder is committed during one of the felonies enumerated in subdivision (e)(5) and a defendant is convicted solely under the theory of premeditation and deliberation, the other felony may properly be admitted as an aggravating circumstance. State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996).

When defendant was convicted of first-degree murder both under the theory of premeditated and deliberate murder and under the theory of felony murder, and his premeditated and deliberate murder conviction was vacated for instructional error, the underlying felony supporting the remaining felony murder conviction could not be used to submit an aggravating circumstance to the jury under G.S. 15A-2000(e)(5). State v. Millsaps, 356 N.C. 556, 572 S.E.2d 767, 2002 N.C. LEXIS 1251 (2002).

Murder for Pecuniary Gain. — In a prosecution for the first-degree murder of a storekeeper during the perpetration of an armed robbery and the first-degree murder of an innocent bystander who had pulled up to the store to purchase gas, the trial court properly submitted to the jury during the sentencing phase of the trial the aggravating circumstances as to whether the bystander was murdered for "pecuniary gain" although the evidence showed that the money had already been obtained from the storekeeper at the time the bystander was shot, since the murder of the bystander was apparently committed in an effort to eliminate a witness to the robbery, and the jury could find that both murders were committed for the purpose of permitting the defendants to enjoy pecuniary gain. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Considering the totality of the evidence, there were ample facts to support the conclusion that defendant's motive for the murder was pecuniary gain and the trial court did not err in submitting pecuniary gain as a possible aggravating circumstance. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

The evidence sufficiently supported the submission of the pecuniary gain aggravating circumstance in the murder of a restaurant employee where the State presented evidence that the victim had obtained a roll of quarters from her employer as she left work the night of her murder, the investigator testified that he was unable to find them when he searched her home, and defendant admitted taking the quarters from the victim's apartment in his statement to police which was given in redacted form to the jury. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

The court upheld the following instruction: "A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for committing it, or as a result of the death of the victim," in spite of defendant's claim that the instruction allowed the jury to find the existence of the aggravating circumstance in a situation where the defendant obtained money or something of value as a result of the murder rather than where the defendant committed the murder for the purpose of obtaining the money or valuable thing. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Evidence held sufficient to show the subdivision (e)(6) aggravating circumstance. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

In a death penalty case, the evidence the jury relied on to find an aggravating circumstance under G.S. 15A-2000(e)(5), for committing a murder in the course of a kidnapping, was not impermissibly duplicative of the evidence relied on to find the aggravating circumstance under G.S. 15A-2000(e)(6), that the murder was committed for pecuniary gain, because the first aggravating circumstance concerned the circumstances of the crime, while the second aggravating circumstance concerned defendant's motive. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

In the face of strong evidence suggesting a murder was committed for pecuniary gain, as contemplated by G.S. 15A-2000(e)(6), the court could not say that defense counsel's brief concession to the existence of the pecuniary gain aggravating circumstance before shifting focus to a lengthy discussion of the mitigating circumstances was objectively unreasonable or that, had counsel not so conceded, the jury probably would have returned a sentence of life imprisonment. Thus, defendant's Sixth Amendment ineffective assistance of counsel claim failed. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

G.S. 15A-2000(e)(6) pecuniary gain aggravating circumstance instruction was not plain error where the trial court instructed the jurors to find the pecuniary gain circumstance if they determined that when defendant killed a victim he intended or expected to obtain money or other things of value that could have been valued in money as a result of the victim's death. The instruction did not simply direct that if the jury found robbery with a dangerous weapon, then the jury would find the pecuniary gain aggravating circumstance, and it did not remove from the jury the requirement that it find the murder was motivated by a hope or expectation of pecuniary gain. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

In light of a holding that a G.S. 15A-2000(e)(6) pecuniary gain aggravating circumstance instruction was not plain error and because defendant, in his appellate brief, acknowledged that the instruction was essentially consistent with the pattern instructions, the court rejected defendant's argument that defense counsel's failure to object to the instruction or to request a special instruction constituted ineffective assistance of counsel. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Prosecutor's remarks as to the G.S. 15A-2000(e)(6) pecuniary gain aggravating circumstance were not so grossly improper that the trial court erred by failing to intervene ex mero motu. The prosecutor distinguished between what the State contended about pecuniary gain on the one hand and what the jury had to find about pecuniary gain on the other hand; additionally, the prosecutor told the jurors they should look to the trial court for explanation and instruction on the aggravating circumstances. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

In the face of strong evidence suggesting a murder was committed for pecuniary gain, as contemplated by G.S. 15A-2000(e)(6), the court could not say that defense counsel's brief concession to the existence of the pecuniary gain aggravating circumstance before shifting focus to a lengthy discussion of the mitigating circumstances was objectively unreasonable or that, had counsel not so conceded, the jury probably would have returned a sentence of life imprisonment. Thus, defendant's Sixth Amendment ineffective assistance of counsel claim failed. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Murder While Committing Rape. — Because the jury had to hear evidence concerning the offense in order to consider the aggravating circumstance of whether the capital felony was committed while the defendant was engaged in the commission of a rape, the prosecutor's questions which did not refer specifically to the circumstance were relevant to sentencing. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Murder While Committing Kidnapping and Rape. — Since the State presented distinct evidence that defendant committed both rape and kidnapping against the victim during the course of the capital felony, the trial court properly twice submitted the aggravating circumstance that the murder was committed during the course of a rape or a kidnapping. State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Murder While Committing Burglary and Rape. — The trial court did not err when it instructed the jury that it could consider as separate aggravating circumstances whether the murder was committed in the course of a burglary and whether the murder was committed in the course of a rape where the evidence showed that defendant broke into the victim's home at night with the intent to steal her television and that he returned later, entered the victim's bedroom and raped her. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Defendant Found Guilty of First-Degree Burglary. — The prosecutor did not misstate the law and impermissibly lessen the state's burden of proof by telling the jurors that since they had found defendant guilty of first-degree burglary, they also found the existence of the aggravating circumstance in subdivision (e)(5) of this section. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

The evidence of robbery with a dangerous weapon was sufficient for the trial court to submit it as an aggravating circumstance where the wallet—containing a driver's license and other papers, but no money—was found lying open in front of the victim's body. Inside the wallet were a drop and a smear of blood which the defendant admitted could have come from his hand but which he could not explain given the fact that he claimed not to have taken the money until after cleaning up and disposing of the murder weapon and bloody clothes, supporting a reasonable inference that defendant removed the money immediately after the murder. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893, 2000 N.C. LEXIS 357 (2000), cert. denied, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000).

Murder as Evidence of Burglary. — The evidence supported the submission of burglary as an aggravating circumstance where the state's evidence that defendant killed the victim after he entered the mobile home was substantial evidence that he had the intent to commit murder when he entered the mobile home. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Defendant's actions in killing a man to facilitate the rape of a woman were sufficiently aggravated to support the death sentence; the evidence indicated the fatal shot was fired with cold-blooded calculation and even the defendant's own witness was afraid defendant might shoot him, and although there were numerous mitigating circumstances, only three were statutory and much of defendant's mitigating evidence related to his conduct after he was in jail and to his relationship with family and close friends. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Closing Argument Appropriate. — The prosecutor's statements about the victim being killed in his home served to inform the jury about the aggravating circumstance that "the capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of . . . burglary," and not some other circumstance not listed in this section. State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

Evidence Held Sufficient. — Evidence was sufficient to support finding of aggravating circumstance of commission of murder while defendant was engaged in armed robbery; witness testified that defendant went to his father's house carrying a shotgun, he returned with a good-sized wad of money belonging to his father, which he later counted as fourteen hundred dollars, and defendant returned from his father's house covered with blood and told witness he had beaten his father to death using the shotgun. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Either the G.S. 2000(e)(5) aggravating circumstance or the G.S. 2000(e)(11) aggravating circumstance, standing alone, is sufficient to support a sentence of death. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Murder of the defendant's other victim was properly used to support submission of the G.S. 15A-2000(e)(11) aggravating circumstance to the jury. State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

Trial court did not err, pursuant to G.S. 15A-2000(e)(5), in allowing the jury to find as aggravating circumstances that a murder was committed during a kidnapping and that the murder was committed during a robbery because the evidence showed that, after the elderly victim invited defendant into his home, defendant grabbed the victim, choked him until he became unconscious, bound him, covered his face in tape, and left him to die from asphyxiation under a bed before defendant then ransacked the victim's home and left with cash, other personal items, and the victim's car. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Disjunctive Instruction Based on Two Theories Upheld. — The trial court did not err by using a disjunctive instruction for two theories in support of one aggravating circumstance under subdivision (e)(5) where the jury could have found the aggravating circumstance to exist if the jury found defendant guilty of either armed robbery of a car or of robbery of the police officer's weapon; unanimity on one of the two charges was not required. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Two Aggravating Circumstances to Each of Three Murders. — G.S. 15A-2000(d)(2) there was support in the record of defendant's rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant's commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

Murder of Police Officer While in the Performance of His Duties. — In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the sentence of death was not disproportionate, excessive or influenced by passion, prejudice, or any other arbitrary factor since the evidence showed that despite the kneeling victim's pleas for mercy, the defendant fatally shot him multiple times. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

E. Especially Heinous, Atrocious, or Cruel Act.

Factor Is Constitutional. — Submission of the sufficiently clear statutory aggravating circumstance of subdivision (e)(9) of this section, that the capital felony is "especially heinous, atrocious, or cruel," in appropriate cases, is constitutional. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

On appeal from defendant's convictions for first-degree murder and robbery with a firearm, the State Supreme Court held that G.S. 15A-2000(e)(9) was constitutional, and that the trial court had not erred in asking the jury to consider whether facts showing that defendant had shot a victim twice in the face with a shotgun and taken the victim's car and other personal property showed that the murder committed by the defendant was especially heinous, atrocious, or cruel. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Heinous, atrocious, or cruel aggravating circumstance under G.S. 15A-2000(e)(9) was argued to be unconstitutionally vague and overbroad, and that that vagueness could not be cured through appellate narrowing after Ring; although the issue was not raised in the lower court so as to be properly addressed on appeal, the highest court found the issue to be in the public interest, addressed the issue to further develop its jurisprudence under N.C. R. App. P. 2, and determined that the circumstance was constitutional under the Sixth Amendment because (1) the pattern jury instructions included language approved by the Court that narrowed the definition of the circumstance, and (2) the appellate review of the circumstance as submitted to the jury did not make the appellate court a "co-finder of fact" with the jury. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Several types of murders meet the especially heinous, atrocious, or cruel criteria of G.S. 15A-2000(e)(9): one type includes killings physically agonizing or otherwise dehumanizing to the victim; a second type includes killings less violent but conscienceless, pitiless, or unnecessarily torturous to the victim, including those which leave the victim in her last moments aware of but helpless to prevent impending death; a third type exists where the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder; the length of time during which the victim fears for his life may qualify as especially heinous, atrocious, or cruel criteria despite any brevity. State v. Hooks, 353 N.C. 629, 548 S.E.2d 501, 2001 N.C. LEXIS 670 (2001), cert. denied, 534 U.S. 1155, 122 S. Ct. 1126, 151 L. Ed. 2d 1018 (2002).

Defendant's statements that a murder was satanically motivated could show depravity of mind and were, thus, properly admitted for the jury's consideration in determining the existence of the G.S. 15A-2000(e)(9) aggravating circumstance. State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002), cert. denied, 537 U.S. 1163, 123 S. Ct. 972, 154 L. Ed. 2d 900 (2003).

And Not Unconstitutionally Vague. — The aggravating circumstances of an "especially heinous, atrocious or cruel" murder set forth in subdivision (e)(9) of this section is not unconstitutionally vague when interpreted to permit the imposition of the death penalty based on such factor only in those situations where the evidence showed that the murder was committed in such a way as to amount to a conscienceless or pitiless crime which was unnecessarily torturous to the victim. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981); Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, 513 U.S. 1105, 115 S. Ct. 785, 130 L. Ed. 2d 678 (1995).

The aggravating factor of especially heinous, atrocious or cruel is not unconstitutionally vague on its face as construed and applied in North Carolina and under the Due Process Clause of U.S. Const., Amend. XIV. State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 342 (1985).

Aggravating circumstance found in G.S. 15A-2000(e)(9), stating that a murder was especially heinous, atrocious, or cruel, is not overbroad. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Propriety of Submitting Factor Depends on Surrounding Facts. — An issue concerning the propriety of the submission of the aggravating factor under subdivision (e)(9) of this section is resolved according to the peculiar surrounding facts of the capital case under consideration. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

To submit the aggravating factor under subdivision (e)(9) to a jury, the capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. The defendant's acts must be characterized by excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in a first-degree murder case. State v. Stanley, 310 N.C. 332, 312 S.E.2d 393 (1984).

Aggravating factor that the killing was especially heinous, atrocious or cruel is appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Aggravating circumstance that murder was "especially heinous, atrocious or cruel" may be found when the killing demonstrates an unusual depravity of mind on the part of the defendant, beyond that normally present in first-degree murder. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

A finding that this aggravating circumstance exists is only permissible when the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

The aggravating factor that the killing was especially heinous, atrocious or cruel is properly submitted where there is evidence that the killing involved a prolonged death or was committed in a fashion beyond that necessary to effect death. State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), overruled on other grounds, State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

Consideration of Evidence. — In determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance, the appellate court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999).

For purposes of determining the sufficiency of the evidence to support the submission of the subdivision (e)(9) aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the facts. State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998),

cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

Vagueness Cured. — The jury instruction on the statutory aggravating circumstance of "especially heinous, atrocious, or cruel," given pursuant to this section, although similar to one previously struck down, was not unconstitutionally vague because it was accompanied by a limiting instruction—defining the level of brutality or torture to the victim—which provided sufficient guidance to the jury. Frye v. Lee, 235 F.3d 897, 2000 U.S. App. LEXIS 33754 (4th Cir. 2000), cert denied, 533 U.S. 960, 121 S. Ct. 2614, 150 L. Ed. 2d 769 (2001).

Vagueness Not Cured. — District court's grant of habeas relief was affirmed because the North Carolina Supreme Court on direct appeal did not cure the unconstitutionally vague sentencing instruction in a capital murder case on the aggravating factor relating to an "especially heinous, atrocious or cruel" murder. Smith v. Dixon, 996 F.2d 667 (4th Cir. 1993).

Multiple Acts of Same Offense. — Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to whether the offense charged was especially heinous, atrocious or cruel. State v. Mancuso, 321 N.C. 464, 364 S.E.2d 359 (1988).

Subdivision (e)(9) Not Applicable to Every Homicide. — While every murder is, at least arguably, heinous, atrocious, and cruel, subdivision (e)(9) of this section is not intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984).

The submission of subdivision (e)(9) of this section is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily torturous to the victim. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1185, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Although every murder may be characterized as heinous, atrocious, and cruel, this aggravating factor is not to be applied in every first-degree murder case, but only in cases in which the first-degree murder committed was especially heinous, especially atrocious, or especially cruel. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Although every murder may be characterized as heinous, atrocious, or cruel, the General Assembly has made it clear that this aggravating circumstance may be found only in cases in which the first-degree murder committed was either especially heinous, especially atrocious, or especially cruel. For example, a finding that this statutory aggravating circumstance exists is permissible only when the level of brutality involved exceeds that normally found in first-degree murder or when the first-degree murder in question was conscienceless, pitiless or unnecessarily torturous to the victim. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

It Is Limited to Acts During Capital Felony. — Limiting application of subdivision (e)(9) of this section to acts done to the victim during the commission of the capital felony itself is an appropriate construction of the language of this provision. Under this construction, subdivision (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

And Is Not a "Catchall" Provision. — Subdivision (e)(9) of this section may not be employed as a "catchall" provision which could be submitted when there is no evidence of other aggravating circumstances. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Whether death was immediate or delayed is relevant to whether the crime was especially heinous, atrocious or cruel. State v. Mancuso, 321 N.C. 464, 364 S.E.2d 359 (1988).

And Section Is Inapplicable Where Death Is Immediate. — In accordance with the dictates of U.S. Const., Amend. VIII, the court has adhered to the position that the aggravating circumstance of subdivision (e)(9) of this section does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L.

Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Victim Choked to Death. — A jury could reasonably infer that as the breath of life was choked out of the victim, she experienced extreme anguish and psychological terror. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996).

Death by Poison. — Where the State's testimony showed that defendant coldly and designedly planned and carried out the murder of his child, and attempted to murder his other two children, their mother, and his ex-girlfriend, using pesticide to poison them, the record fully supported the aggravating circumstances found by the jury: the crime was especially heinous, atrocious, or cruel, pursuant to subdivision (e)(9) of this section, part of a course of conduct in which defendant engaged, and which included the commission by defendant of other crimes of violence against another person or persons, pursuant to subdivision (e)(11) of this section. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Considerations for submitting the heinous, atrocious, or cruel aggravating circumstance to the jury include (1) those that are physically agonizing or otherwise dehumanizing to the victim, and (2) those that are less violent but involve the infliction of psychological torture. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

There are two types of murder which would warrant the submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. One type involved killings which are physically agonizing for the victim or which were in some other way dehumanizing. The other type consists of those killings which are less violent, but involve infliction of psychological torture by leaving the victim in his last moments aware of but helpless to prevent impending death. State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984).

Facts as a Whole Must Be Considered. — The cruelty and brutality of a particular crime is determined by looking at the facts as a whole. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

The North Carolina Supreme Court declined to limit the definition of an especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death. The court upheld the submission of this aggravating circumstance even though the evidence did not establish at what point during a brutal attack the victim's death occurred. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Evidence Showed Victim's Awareness of But Helplessness to Prevent Impending Death. — Sufficient evidence existed to support the submission of the aggravating circumstance under subdivision (e)(9) to the jury in defendant younger brother's murder trial where the co-defendant older brother shot the trooper, causing him to become incapacitated and allowing the younger brother to shake himself free of his grasp and retrieve the trooper's pistol, after which he then shot the trooper multiple times as he lay on the ground moaning; the fact that the trooper had the presence of mind to attempt to grab the defendant after he had been shot was evidence that he was aware of his fate and unable to prevent impending death. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

The victim's murder was especially heinous, atrocious, or cruel where defendant beat victim and tied him up on the ground before his death. State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001), cert. denied, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Evidence Not Limited to Physical Injury or Torture. — The North Carolina Supreme Court has declined to limit the interpretation of an especially heinous, atrocious, or cruel murder to one which involves only physical injury or torture prior to death or to physical injury alone in any event. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Evidence used to show premeditation and deliberation as a basis for conviction of first-degree murder may also be used to show, for purposes of this section, that the murder was especially heinous, atrocious, and cruel. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Evidence depicting the slow and agonizing demise of victim while petitioner stood by for days, never telling family or medical personnel of the cause of his illness when his life could have been saved, and that she watched him suffer horribly, fully supported submission of "especially heinous, atrocious, or cruel" aggravating circumstance. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Where deceased died as a result of being battered to death by what can only have been a prolonged series of blows, blows with a cast-iron skillet so severe as to fracture her skull, neck, jaws, and collarbone and to cause her skull to be pushed into her brain, the severity and the brutality of the numerous wounds inflicted amply justified submission of this aggravating circumstance to the jury. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

That death is not instantaneous does not alone make a murder especially heinous, atrocious or cruel. State v. Stanley, 310 N.C. 332, 312 S.E.2d 393 (1984).

Excessive Level of Brutality. — There are two of the types of murders which are conscienceless, pitiless, or unnecessarily, tortuous to the victim or which demonstrate an unusual depravity of mind on the part of the defendant: (1) those that are physically agonizing or otherwise dehumanizing to the victim, and (2) those that are less violent but involve the infliction of psychological torture. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence of a victim's begging for his life is, like torture, one factor for jury consideration in determining whether a murder is especially heinous, atrocious, or cruel. However, it is not necessarily a determinative factor. Nor does this factor alone always necessitate a finding that a murder was especially heinous, atrocious, or cruel. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Conscienceless, Pitiless Act. — The evidence was sufficient to support submitting the aggravating circumstances in subdivision (e)(9) to the jury. Evidence that defendant shot victim because her crying made him nervous was evidence that in killing her, he acted in a conscienceless, pitiless manner. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

No Authority to Avoid Statutory Scheme in Proper Case. — In a prosecution for first-degree murder, where there was evidence which tended to show the especially heinous, atrocious, and cruel manner in which the victim was clubbed to death, an aggravating circumstance listed in subsection (e)(9) of this section, the presiding judge, district attorney, and defense counsel had no legal authority whatsoever: (1) to announce that the State would not seek the death penalty, (2) to agree to make no motions concerning the death penalty, (3) to eliminate voir dire examinations of jurors with respect to the death penalty, (4) to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment, or (5) by consent to fix the punishment at life imprisonment should the jury convict defendant of murder in the first degree. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980), decided prior to the 2001 amendment by Session Laws 2001-81 and the enactment of § 15A-2004.

A jury may infer that manual strangulation involves the infliction of psychological torture as, manual strangulation, by its very nature, may require a continued murderous effort on the part of the assailant for a period of up to four to five minutes, during which time the victim is rendered helpless, aware of impending death, but utterly incapable of preventing it. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Humiliating and Debasing Action. — When a murder takes place during the perpetration of a violent sexual assault upon the victim, it is unusually humiliating and debasing. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Commentary by Prosecutor Held Appropriate. — In a death penalty case, when, at sentencing, the prosecutor asked the jury to consider the victim's thoughts while he was being kidnapped, this was a proper request, and it was not a request for the jury to impermissibly consider the exact same evidence to find the aggravating circumstance under G.S. 15A-2000(e)(5), for committing the murder in the course of a kidnapping, and the aggravating circumstance under G.S. 15A-2000(e)(9), for committing the murder in an especially heinous, atrocious, or cruel manner. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Defendant's claim that during closing arguments, the prosecutors made comments in violation of G.S. 15A-1230(a), suggesting that they knew about other murders that were less egregious than the killing committed by defendant, and that those comments represented the improper personal opinions and extra-record knowledge of the prosecutors, lacked merit and did not amount to gross impropriety, as the comments were within acceptable comments under G.S. 15A-2000(e)(9); the prosecutors drew reasonable inferences about the degree of brutality that defendant displayed in committing the murder and they explained those inferences to the jury for purposes of a finding that the killing was "especially heinous, atrocious, or cruel." State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Inappropriate Commentary by Prosecutor. — Where prosecutor declared that it was "pathetic" that consideration of the "especially heinous, atrocious or cruel" statutory aggravating circumstance requires the jury "to decide that some murders — can you believe this? — are worse than others," the prosecutor's unobjected-to commentary, while inappropriate, was not so grossly improper as to require the trial court to intervene ex mero motu; any resulting effect of such comments was de minimis in light of the fact that the jury was told at all times it must follow the law and that the law required that the first-degree murders be especially heinous, atrocious or cruel for this circumstance to exist. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Use of the word "brutal" in defense counsel's opening arguments did not amount to an admission of an aggravating circumstance, presumably G.S. 15A-2000(e)(9), that the capital felony was especially heinous, atrocious, or cruel; describing a murder as "brutal" did not satisfy the legal standard in the G.S. 15A-2000e(9) aggravator that the capital felony was "heinous, atrocious, or cruel," much less "especially" so. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Age as a Factor to Be Weighed. — Jury could properly consider the age of victim in determining the weight of the aggravating circumstance that the act was especially heinous, atrocious or cruel. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Defendant as Child Victim's Caretaker. — Evidence that the defendant repeatedly beat and abused the two-year old murder victim while she was in the defendant's care supported submission of the especially heinous, atrocious, or cruel aggravating circumstance, where the defendant had assumed the role of primary care giver to the child. State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

Victim's Age and Existence of Parental Relationship as Factor. — Evidence of the victim's age and the existence of a parental relationship between the victim and defendant may be considered in determining the existence of the especially heinous, atrocious, or cruel aggravating circumstance, as does evidence that the defendant was the primary caregiver of the infant. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999).

Evidence supported the jury's findings that defendant acted with cruelty when he killed his wife with a shotgun while his stepson was sitting next to her, and then shot his stepson with the same shotgun shortly thereafter, and the state supreme court affirmed the trial court's judgments finding defendant guilty of two counts of first-degree murder and imposing the death penalty for each conviction. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Expert Testimony. — Expert medical testimony was admissible as evidence of the aggravating circumstance that the defendant's murder of his infant son was especially heinous, atrocious, or cruel in that the evidence attempted to quantify and qualify the infant's injuries for the jury. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Closing Argument of Prosecutor Properly Allowed. — Trial court properly allowed segment of the closing argument in which the prosecutor stated that the evidence supported inferences that: (1) the victim was alive as defendant bludgeoned her, (2) the victim was alive when defendant inserted tree limb in her rectum, and (3) defendant twisted the stick in the rectum as he inserted it; the argument sought to give the jury a complete picture of the merciless nature of the crime. It did not encourage the jury to find the murder especially heinous, atrocious, or cruel simply on the basis of the sex offense but rather on the basis of the overwhelming brutality of the crime. State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995), cert. denied, 516 U.S. 1079, 116 S. Ct. 789, 133 L. Ed. 2d 739 (1996).

Evidence Held Sufficient. — Evidence that defendant robbed Zip Mart convenience store and forced the clerk to accompany him in her car to a secluded area approximately five miles away, where she was shot six times, that victim's hands had been bound, and that the principal cause of death was a gunshot wound to the right central lower back, but that the victim may have lived as long as 15 minutes after being shot, although she would have gone into shock during the last phases of life and would have lost consciousness in the later stages of shock, was sufficient to support submission of the aggravating factor that the murder was especially heinous, atrocious or cruel to the jury. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Evidence held sufficient for trial judge to find that victims endured psychological and physical suffering beyond that normally present in a second degree murder, and thus to find as an aggravating factor that the murders were especially heinous, atrocious, or cruel. State v. Miller, 316 N.C. 273, 341 S.E.2d 531 (1986).

Evidence clearly revealed that defendant's acts upon the victim were characterized by excessive brutality, physical pain and psychological suffering not normally present in a first-degree murder case. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Evidence of the nature of the fatal wounds inflicted and the victim's lingering death supported the jury's finding of the existence of the "especially heinous" circumstance. State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

The aggravating factor that a murder was especially heinous, atrocious or cruel, was not improperly submitted to the jury, where evidence was elicited which tended to show that defendant beat victim with an iron pipe, stuffed her mouth with a rag to stop her screaming, straddled her body, grabbed her by the throat and dragged into the bathroom where he forced her head under the water in a half-filled tub and held it there while she struggled desperately for her life. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court did not err in submitting as an aggravating circumstance that murder was especially heinous, atrocious or cruel where witness testified that defendant grabbed victim around her neck, pulled out a knife and forced her into a bedroom, demanded her food stamps, choked her until she lost consciousness, then told witness to get his rifle from next door, and when she did, he shot the victim. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court did not err in submitting this aggravating circumstance because the facts of the case supported its submission where defendant's killing of his own child violated the unique bond parents feel for their own children and was a denial of the normal parental need to protect one's own children and where evidence tended to show that the infant was struggling for his life while suffocating in earthen grave. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Evidence supported a finding that the level of brutality exceeded that normally found in first-degree murder cases and that it was pitiless and unnecessarily torturous to the victim and was an especially "heinous, atrocious, or cruel" murder, where the evidence, taken in the light most favorable to the State, tended to show an extremely brutal attack consisting of 27 separate gunshot entrance wounds. Two gunshot wounds to the left forehead had been inflicted from extremely close range, and wounds to the face and chest occurred before the victim died. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

Submission of an aggravating circumstance was proper where the victim, a 78-year-old man who had undergone heart surgery and suffered a ruptured appendix, while practically helpless, temporarily fended off defendant's attack, but ultimately suffered stab wounds in the chest area, abrasions on the face, bruises and lacerations around the mouth, and bruises and incisions on the forearm, and where there was testimony that the victim could have lived up to 10 minutes after sustaining the stab wounds. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Evidence was sufficient to support a finding that a first-degree murder was especially heinous, atrocious or cruel, where both victims were unable to defend themselves due to extreme intoxication when the defendant began beating them severely with his fists, where they remained helpless as he took a claw hammer from the car and proceeded to beat each helpless victim mercilessly about the head and torso with the hammer, causing numerous lacerations, bruises, skull fractures and areas of hemorrhaging and where the victims were found in pools of blood, with pieces of flesh, skull and brain matter scattered about their bodies. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consider-

ation at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where the jury found the capital felony was committed while the defendant was engaged in the commission of the crime of first degree burglary and the capital felony was especially heinous, atrocious and cruel, the evidence presented at trial showed that defendant broke down the door and entered the victim's home around 3:00 a.m. and brutally stabbed her in front of her daughter and her mother who tried to stop him and defendant then proceeded to drag her out of the front door and into the driveway while continuously stabbing, hitting, and kicking her, the evidence clearly supported the jury's finding of each of these aggravating circumstances. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), cert. denied, 513 U.S. 1098, 115 S. Ct. 768, 130 L. Ed. 2d 665 (1995).

Where the jury found a single aggravating circumstance but found no mitigating circumstance, specifically rejected the impaired capacity circumstance, and where the murder was particularly brutal and the defendant showed no remorse, the death sentence was not excessive or disproportionate, considering both the crime and the defendant. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

When a murderer attacked an elderly victim by surprise and beat his brains out of his head by repeated blows of an axe handle without the slightest sign of provocation, it may be said that there is an inference that the murder was conscienceless and pitiless. Evidence that defendant committed a similar set of murders just six weeks later, after a boastful discussion of his murderous capabilities, was further evidence of a lack of pity for defendant's victims. Thus, the facts suggest a depravity of mind on the part of the killer not easily matched by even the most egregious of slayings, as well as a level of brutality that exceeds that ordinarily present in the first degree murders. State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994), cert. denied, 514 U.S. 1020, 115 S. Ct. 1366, 131 L. Ed. 2d 222 (1995).

Where defendant was convicted of three first-degree murders and the record established a cold-blooded, calculated course of conduct on the part of defendant which amounted to a wanton disregard for the value of human life, the two death sentences were not excessive or disproportionate, considering both the crimes and defendant. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Death sentence held appropriate where the murder victim was a defenseless four-month-old baby who was left in the care of defendant at the time of the murder and the injuries inflicted upon the child were numerous, going beyond what would be necessary to kill the victim, and brutal. The child suffered bruises all over her body, including bruises on her neck, bruises on her arms, ears, torso, and legs, and both of the child's arms and legs were broken. State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995), cert. denied, 517 U.S. 1123, 116 S. Ct. 1359, 134 L. Ed. 2d 526 (1996).

Sentence of death was not disproportionate where defendant wrapped two belts around 92-year-old Reverend's neck, beat the Reverend in the face with a glass bottle and, with a double-edged razor blade, sliced the Reverend's arms, 17 inches on one arm and 14 inches on the other. State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995), cert. denied, 516 U.S. 1161, 116 S. Ct. 1048, 134 L. Ed. 2d 194 (1996).

Where the victim, who suffered for hours before being killed, was hog-tied, tied to a tree, beaten and interrogated before being killed, there was enough evidence to establish that the murder was especially heinous, atrocious, and cruel. State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996), cert. denied, 519 U.S. 1131, 117 S. Ct. 992, 136 L. Ed. 2d 873 (1997).

Court held that the imposition of the death penalty was not aberrant or capricious where the murder was committed for pecuniary gain and was especially heinous, atrocious, or cruel. State v. Williams, 343 N.C. 345, 471 S.E.2d 379 (1996), cert. denied, 519 U.S. 1061, 117 S. Ct. 695, 136 L. Ed. 2d 618 (1997).

Death penalty held not disproportionate where the defendant was convicted of killing two individuals, and multiple aggravating circumstances existed, one of which was the especially heinous, atrocious, or cruel nature of the murder. State v. Cole, 343 N.C. 399, 471 S.E.2d 362 (1996), cert. denied, 519 U.S. 1064, 117 S. Ct. 703, 136 L. Ed. 2d 624 (1997).

Especially heinous, atrocious, and cruel aggravating circumstances existed and death penalty was appropriate where defendant raped seven-year-old girl while smothering her with a pillow, it took ten to twenty minutes for the victim to die and she would have been conscious for three to seven minutes, and her three-year-old brother watched. State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997), cert. denied, 522 U.S. 837, 118 S. Ct. 111, 139 L. Ed. 2d 64 (1997).

Sentence of death held proportionate where defendant raped and murdered adult victim, then awoke and murdered her two children. State v. Richmond, 347 N.C. App. 412, 495 S.E.2d 677 (1998).

The evidence was sufficient to support the submission of the especially heinous, atrocious, or cruel aggravating circumstance, where the large, powerful stepfather of a two-year-old, 30-pound girl beat her to death with numerous blows to the head, neck, and abdomen, and her resulting injuries went well beyond what was necessary to kill her. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999).

The death sentence was neither excessive nor disproportionate, where the defendant pled guilty to first-degree murder based on the theory of premeditation and deliberation and under the felony murder rule, and the evidence showed that he repeatedly beat and raped the 83-year old victim while trying to steal money to buy more crack cocaine. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Where the evidence, although not conclusive, was sufficient for a jury to find that not only was the victim alive when her taxicab was set on fire, but that she was aware of her impending death, the trial court did not err in submitting this aggravating circumstance to the jury. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

The defendant's murder of his wife was especially heinous, atrocious, or cruel where he chased and rammed her car, returned to the parking lot once the police officer had left, shot her in the back, got back into his car, shot her again, and left her helpless on the ground and where, while being chased by defendant, the victim said to the 911 operator, "my husbands [sic] trying to kill me," and, "Oh please God. Oh please I don't want to die now," in spite of his contention that his actions were not calculated to cause the victim unnecessary fear and that he took only the actions necessary to carry out his goal of killing her. State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S. Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005).

The aggravating circumstance of G.S. 15A-2000(e)(9) was found where defendant, after arguing with victim over defendant's missing shirt and his search of victim's apartment, told the victim that he would "f—k him up," pulled a gun, shot the victim four times, and kicked, pistol-whipped, and taunted the victim who was down. State v. Hooks, 353 N.C. 629, 548 S.E.2d 501, 2001 N.C. LEXIS 670 (2001), cert. denied, 534 U.S. 1155, 122 S. Ct. 1126, 151 L. Ed. 2d 1018 (2002).

Aggravating circumstance of G.S. 15A-2000(e)(9) was properly submitted for the jury's consideration as the murder the defendant committed was violent and depraved where the defendant beat the victim to death by 14 blows to the head with a sledge hammer while the victim tried to crawl away because the victim would not loan the defendant more money than the victim already had loaned the defendant so that the defendant could support a drug habit. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Sufficient evidence existed to submit the aggravating circumstance that murders were especially heinous, atrocious, or cruel under G.S. 15A-2000(e)(9), where defendant and his fellow gang members (1) followed two women in their car, (2) pinned the women's car at a dead end street, (3) forced the women to get into the trunk of their car, (4) drove the women to another location, (5) discussed how to murder the women while standing by the trunk, (6) drove the women to a secluded place, (7) shot one woman in the back of the head, and (8) shot the other woman in the back of the head after she begged him not to cut her throat with a knife he was holding; the killing was dehumanizing, involved the infliction of psychological torture because the victims were aware of but helpless to prevent impending death, and demonstrated an unusual depravity of mind. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Evidence was sufficient to support the aggravating factor of the murder involving an especially heinous, atrocious, or cruel act where it was shown that the victim, an 89-year old woman, (1) was kidnapped from her own home, repeatedly beaten, and placed in the trunk of her own car to await most certain death, (2) fought to free herself from the trunk of her car, only to have the trunk lid repeatedly slammed down upon her, (3) was trapped in her car for hours, helpless and obviously in fear for her life, (4) struggled and fought for her life, ultimately losing the fight and dying alone in the trunk of her own car, which a defendant had set on fire. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Trial court did not err, pursuant to G.S. 15A-2000(e)(9), in allowing the jury to find as an aggravating circumstance that a murder was was especially heinous, atrocious, or cruel, when the evidence showed that, after the elderly victim invited defendant into his home, defendant grabbed the victim, choked him until he became unconscious, bound him, covered his face in tape, and left him to die from asphyxiation under a bed before defendant then ransacked the victim's home and left with cash, other personal items, and the victim's car. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

State presented sufficient evidence, including the multiplicity of gun shots inflicted in rapid succession, defendant's disregard of the victim's plea for life, the victim's realization she was about to be killed, and defendant's calmness and lack of regret, to support submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. State v. McNeill, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006).

Supreme Court of North Carolina upheld the imposition of the death penalty with regard to the double homicide committed by defendant of the two individuals who had ever shown him any affection and concern; defendant's sentence was not disproportionate considering he brutally beat both of them with a wrench and then mercilessly fired bullets into their skulls for monetary gain. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Evidence Held Insufficient. — Where one wound was inflicted, to the jugular vein, and victim walked approximately 45 feet and collapsed, losing consciousness soon after the wound was inflicted, finding that murder was especially heinous, atrocious or cruel was not sufficiently supported by the evidence. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

The Performance of Court and of Defense Counsel Held Adequate. — The court's instruction regarding the aggravating circumstance that "the capital felony was especially heinous, atrocious, or cruel" was adequately limited to guide the jury, and the defendant's counsel was not constitutionally deficient for failing to challenge the instruction on direct appeal since, given the gruesome facts underlying the murder, the result would not have been different if the counsel had challenged it. Fisher v. Lee, 215 F.3d 438, 2000 U.S. App. LEXIS 14167 (4th Cir. 2000), cert. denied, 531 U.S. 1095, 121 S. Ct. 822, 148 L. Ed. 2d 706 (2001).

Instruction Under Subdivision (e)(9) Held Proper. — The trial court properly submitted to the jury the aggravating circumstances as to whether the first-degree murder of a storekeeper was "especially heinous, atrocious or cruel" where the State's evidence showed that the storekeeper, after opening his cash register in response to defendants' demands, begged for his life and that one defendant mercilessly shot him to death. However, the trial court erred in submitting the aggravating circumstance as to whether the death of an innocent bystander was "especially heinous, atrocious or cruel" where the State's evidence showed that one defendant, as he was running from the store, shot and killed the bystander who had pulled up to purchase gas, there was no unusual infliction of pain or suffering on the victim, and the brutality of the killing did not exceed that normally present in a case of first-degree murder. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a prosecution for murder, the trial court should have submitted to the jury during the sentencing phase of a first-degree murder trial the aggravating circumstance as to whether the crime was "especially heinous, atrocious or cruel" where the evidence tended to show that the victim was stripped from the waist down before she was murdered; her hands were tied behind her back and her brassiere was tied around her neck; she was marched at knife point by her assailant into nearby woods where she was forced to lie on the ground; and she was beaten before she was murdered. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

It was not error for the trial judge to instruct the jury that they could find from the evidence that the murder was especially heinous, atrocious and cruel despite defendant's argument that the evidence did not support this aggravating circumstance because the victim, with a blood alcohol level of .29, was so intoxicated that she must have been practically anesthetized against the torture of the 37 stab wounds inflicted with a pocket knife by the defendants. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

The evidence supported the aggravating circumstances that the killing was especially heinous, atrocious or cruel, where it showed that defendant had assaulted his victim on two previous occasions; that on the night of the killing defendant "coattailed" the victim, constantly following her and her companion, and would not allow them to leave the nightclub without him; and that when victim left nightclub defendant followed her and when he had the opportunity pounced on her not once but twice, wounding her the first time and cutting her throat the second time, causing her to drown in her own blood. This evidence supported a finding that the level of brutality exceeded that normally found in first degree murder cases and that it was pitiless and unnecessarily torturous to the victim. State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988).

Where jury instruction in a capital murder case stated in part: "This murder must have been a consciencelessness [sic] or pitiless crime which was unnecessarily torturous to the victim," the jury received adequate guidance concerning the meaning of the "especially heinous, atrocious, or cruel" aggravating circumstance; therefore, the verdict was not subjective and arbitrary. State v. Fullwood, 323 N.C. 371, 373

S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Trial court's submission of instructions regarding aggravating circumstance, pursuant to this section, that murder was especially heinous, atrocious, or cruel did not violate the defendant's rights to due process nor result in cruel and unusual punishment, nor was the language unconstitutionally vague. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

The trial court's charge did not constitute an impermissible expression of opinion on the evidence where the court referred to the circumstance as "alleged." State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Trial court did not err in instructing the jury as to the especially heinous, atrocious, or cruel aggravating circumstance in a case where defendant was also convicted of kidnapping and armed robbery; the record contained a wealth of evidence supporting the aggravating circumstance that surmounted a challenge to any alleged inadequacies in the trial court's limiting instruction; further, the evidence did not overlap with other evidence showing that defendant took the victim's car by use of a deadly weapon and transported the victim to a remote area against the victim's will for the purpose of inflicting serious bodily harm. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

In a death penalty case, the evidence the jury relied on to find an aggravating circumstance under G.S. 15A-2000(e)(5), for committing a murder for in the course of a kidnapping, was not impermissibly duplicative of the evidence relied on to find the aggravating circumstance under G.S. 15A-2000(e)(9), that the murder was especially heinous, atrocious, or cruel, because separate evidence was relied on to prove each circumstance, and the jury was instructed not to rely on the same evidence to find more than one aggravating circumstance. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Instruction Held Improper. — In a first-degree murder case the trial court, during the sentencing phase of the trial, erred in instructing the jury to consider as an aggravating circumstance whether the murder was especially heinous, since the evidence tended to show that defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive and then fled; the victim lingered for 12 days and then died from the gunshot wounds; and this was heinous but not "especially heinous" within the meaning of that term as used in subdivision (e)(9) of this section. State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981).

Trial court erred in finding that shooting of defendant who died from four gunshot wounds was an especially heinous, atrocious, and cruel aggravating circumstance. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Submission Not Prejudicial Where Factor Not Found. — While there was sufficient evidence to submit the circumstance that the murder was "especially heinous, atrocious or cruel" to the jury, even if there were not, defendant could have suffered no prejudice as a result of the submission where the jury answered that this aggravating circumstance was not present. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Instruction Not Based on Combined Actions of Two Defendants. — Evidence did not support defendant's assertion that trial court's instructions impermissibly allowed the jury to find the existence of the statutory aggravating circumstance for victim's murder based upon the combined actions of defendant and co-defendant. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

No Distinction Made as to Accessory Before the Fact. — The court rejected the defendant's contention that the submission of the especially heinous, atrocious, or cruel aggravating circumstance violated his rights under the North Carolina and United States Constitutions because it impermissibly allowed the jury to find the existence of an aggravating circumstance based solely upon his codefendants' actions; although defendant was not present when his nephew and his grandmother who adopted him were stabbed and burned to death, defendant admitted to planning the murders and enlisting his codefendants to perform them. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

Evidence of Racial Motivation. — The jury could properly consider defendant's note, which was drafted in the court room and confiscated in the prison holding area during the jury selection phase of the trial, when determining if the murder of the police officer was especially heinous, atrocious or cruel, where the note contained references to “the beast” and “Babylon,” which were interpreted at trial to mean “the police” and “Caucasian-run America,” respectively; the note was evidence that the murders were racially motivated. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Two Aggravating Circumstances to Each of Three Murders. — There was support in the record of defendant’s rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant’s commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

Felony Murder Supported By Aggravating Circumstances. — There was support in the record of defendant’s rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant’s commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

With regard to the use of the “especially heinous, atrocious, or cruel aggravating circumstance in the court did not err in overruling defendant’s objections to the use of that aggravating circumstance as set forth in G.S. 15A-2000(e)(9), even though he claimed that it was unconstitutionally vague and failed to narrow the class of persons eligible for the death penalty, the Supreme Court of North Carolina had already held that the subject aggravating circumstance was constitutional. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

F. Risk of Death to More Than One Person.

Burden of Proof Not Shifted by Deadly Weapon Instruction. — The trial court’s instruction did not create a mandatory presumption that shifted the burden of persuasion to the defendant on the subdivision (e)(10) aggravator, where the trial court instructed the jurors that the carbine rifle used during the capital murder defendant’s shooting spree constituted a deadly weapon as a matter of law, regardless of the weapon’s use; the fact that a deadly weapon is used is not enough to support a finding that this aggravator exists. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Equal Protection Clause was not violated when court applied felony murder rule and punished defendant more severely by sentencing him to death because more victims were harmed as authorized by G.S. 15A-1340.16(d)(8) and subdivision (e)(11) of this section. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999), aff’d in part, rev’d in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

Evidence that defendant fired a semiautomatic rifle several times into a crowd of several persons supported a finding of the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. State v. Carver, 319 N.C. 665, 356 S.E.2d 349 (1987).

Use of a Shotgun. — A shotgun in its normal use may be considered a weapon hazardous to the lives of more than one person as those words are used in subdivision (e)(10) of this section. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Use of Weapon Normally Hazardous to More Than One Person. — Evidence was sufficient to support the jury’s finding that the defendant knowingly created a great risk of death to more than one person by use of a weapon which would normally be hazardous to the lives of more than one person. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Shooting Spree as Endangering Several Lives. — The evidence supported submission of the aggravating circumstance that the defendant knowingly created great risk of death to more than one person by means of a weapon or device that normally would be hazardous to the lives of more than one person, where there was evidence that the defendant killed three people and wounded two others during a shooting spree at the business from which he was fired, and also that he randomly fired shots as he walked down the hall, thus endangering the lives of everyone in the building. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

The fact that a defendant is a multiple murderer stands as a "heavy" factor against defendant when determining the proportionality of a death sentence. State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996).

G. Course of Conduct.

Not Unconstitutionally Vague. — The term "course of conduct" in this section is not unconstitutionally vague or without definition. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Reliance on Related Course of Conduct Is Not Double Jeopardy. — The principle of double jeopardy has not evolved to the point that it prevents the prosecution from relying, at the sentencing phase of a capital case, upon a related course of criminal conduct by the defendant as an aggravating factor to enhance the punishment of defendant for another distinct offense, and this is so, irrespective of whether the defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Some Connection Required. — The further apart the acts are temporally, the more incumbent it is upon a court to carefully consider other factors, such as modus operandi and motivation, in determining whether the acts of violence are part of a course of conduct; thus, in order to find course of conduct, a court must consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together. State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992).

The State's evidence tended to show that four days before the double murder at motel, defendant robbed convenience store and killed the clerk and that less than three weeks after the motel shootings, defendant shot a taxicab driver, there was a span of only twenty-two days from the murder of the clerk and robbery at the convenience store to the shooting of the taxicab driver; the time frame was sufficiently close to support the submission of this aggravating circumstance. Further, the modus operandi was similar in that evidence tended to show that defendant used the same pistol to kill, or attempt to kill each victim and had one or two accomplices during each crime and, finally, the evidence of motivation was strong; numerous witnesses testified that these acts were robberies for the purpose of obtaining money to buy drugs. State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995).

Submission of the course of conduct aggravating circumstance is proper where there is evidence that the victim's murder and other violent crimes were part of a pattern of intentional acts establishing that there existed in the defendant's mind a plan, scheme, or design involving both the murder of the victim and other crimes of violence. State v. Cole, 343 N.C. 399, 471 S.E.2d 362 (1996), cert. denied, 519 U.S. 1064, 117 S. Ct. 703, 136 L. Ed. 2d 624 (1997).

Shooting Spree as Course of Conduct. — The evidence supported submission of the aggravating circumstance that the murder was part of a course of conduct where the defendant killed three people and wounded two others during a shooting spree at the business from which he was fired. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Common Modus Operandi and Motivation. — Defendant's challenge to evidence of a course of conduct which was the sole aggravating circumstance in one murder and one of only two aggravating circumstances admitted in a second murder was denied where the similarities in the two murders demonstrated that there did exist in the defendant's mind a common plan, scheme or design. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Submission of each of two killings as an aggravating circumstance for the other under the "course of conduct" provision of subdivision (e)(11) of this section did not constitute double jeopardy nor deprive him of due process of law. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

The submission of each of two murders as an aggravating circumstance for the other does not violate double jeopardy. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

There is no constitutional authority mandating a conclusion that the submission of subdivision (e)(11) of this section in aggravation of both of murders of which defendant was convicted violated defendant's protection against double jeopardy. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Use of Crime Involvement in Prior Sentencing. — Trial court's denial of defendant's pretrial motion to dismiss two murder charges against him in violation of G.S. 14-17, based on double jeopardy pursuant to G.S. 15A-954, was proper because the fact that in a prior murder case against defendant, the State had introduced evidence of the two murders in support of the aggravating circumstance described in G.S. 15A-2000(e)(11) was not tantamount to the State putting defendant on trial for those crimes; the jury's consideration of defendant's "other crimes of violence" in making its penalty recommendation on one murder was not logically equivalent to defendant receiving multiple punishment for the same crime. State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003), cert. denied, 541 U.S. 943, 124 S. Ct. 1670, 158 L. Ed. 2d 368 (2004).

Limiting Jury's Consideration to One Other Crime. — Trial court may properly instruct the jury on the G.S. 15A-2000(e)(11) alleged crime of violence aggravating circumstance by limiting the jury's consideration to the conduct involved in one other crime. State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

Transactionally Connected Offenses Joined for Trial. — Where several similarities tied murders together and suggested a common motivation or modus operandi supporting the finding of a transactional connection for purposes of joinder, they also supported the submission and finding of the course of conduct aggravating circumstance. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Prosecutor's Comment. — Prosecutor's reference to the defendants as animals was made for a legitimate purpose supported by the evidence where he was arguing that the evidence established the aggravating factor that the murder was part of a course of conduct which included the commission of crimes of violence against other people. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

Prosecutor's remarks regarding the G.S. 15A-2000(e)(11) course of conduct aggravating circumstance were not grossly improper. The prosecutor distinguished between what the State contended about defendant's course of conduct on the one hand and what the jury had to consider and find about defendant's course of conduct on the other hand; further, the trial court correctly instructed the jury on the course of conduct aggravating circumstance, thus curing any misstatement of law by the prosecutor. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Where the crimes occurred within moments of each other at the same location and the same modus operandi was used in each killing, the facts clearly established that the two crimes were committed as a part of a course of conduct in which defendant engaged and which included the commission by defendant of a crime of violence against another person. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, 513 U.S. 1134, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995), cert. dismissed, 342 N.C. 417, 465 S.E.2d 547 (1995).

Where four prior unadjudicated assaults were virtually identical to the cir-

cumstances surrounding attempted rape, the facts were sufficiently similar to permit the jury to conclude the defendant intended to rape victim; thus, testimony was properly admitted. State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

References to woman that defendant raped, murdered, and burned less than one month after committing the crimes at issue were properly admitted to support the aggravating circumstance of course of conduct. State v. Smith, 347 N.C. App. 453, 496 S.E.2d 357 (1998).

Evidence Held Sufficient. — Where the State presented substantial evidence that after killing victim, defendant fired his weapon at another individual, intending to kill him, and the jury, by returning guilty verdicts, found beyond a reasonable doubt that defendant had committed this murder and assault, the trial court properly submitted the aggravating circumstance that the murder for which defendant stood convicted was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons to the jury for its consideration. State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Evidence was sufficient to warrant the submission of the course of conduct aggravating circumstance to the jury where defendant undertook a violent course of conduct, over a period of two days, in which he physically battered his girlfriend, threatened to kill her and ultimately tried to drown her — the very day he succeeded in drowning her son. State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995), cert. denied, 517 U.S. 1197, 116 S. Ct. 1694, 134 L. Ed. 2d 794 (1996).

The aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence reflects upon a defendant's long-term course of violent conduct. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997).

Murder held part of a course of conduct where the defendant participated in two bank robberies in the two months preceding the robbery/murder for which he was being tried, and the circumstances surrounding the crimes were similar. State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999).

The trial court properly submitted the course of conduct aggravating circumstance to the jury, where the jury's affirmative response that it did find defendant guilty of first-degree murder under one theory, on the basis of malice, premeditation, and deliberation, did not indicate that the jury rejected conviction under a felony murder theory. State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1013 (1999).

Failure to Submit (e)(11) Evidence Upheld. — Where defendant opposed joinder of third murder, and State, consequently, had no evidence available to support a statutory aggravating circumstance related to the severed case and was thereby precluded from submitting it to the jury, defendant obtained a benefit which he could not claim, on appellate review, was illegal. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Evidence of Prior Conviction Admitted to Show Course of Conduct. — The court properly admitted evidence of a different murder of which defendant had been convicted and for which he had received a death sentence, in order to support the submission of the (e)(11) aggravating circumstance; the evidence of this other murder was clearly relevant to support submission of the (e)(11) aggravating circumstance because it occurred two days after the murder of the victim and, in both instances, defendant robbed and killed elderly victims to obtain money to purchase cocaine. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

Two Aggravating Circumstances to Each of Three Murders. — There was support in the record of defendant's rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant's commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

H. Judicial Officer or Witness.

Construction with Other Factors. — Submission of aggravating circumstances to a jury for both committing a murder to avoid apprehension for a crime, under G.S. 15A-2000(e)(4), and murder of a law enforcement officer engaged in his official duties, under G.S. 15A-2000(e)(8), was proper because one deals with defendant's purpose and the other deals with the factual circumstance of the killing, i.e., that defendant killed a law enforcement officer. State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109, 2002 N.C. LEXIS 24 (2002), cert. denied, 537 U.S. 845, 123 S. Ct. 178, 154 L. Ed. 2d 71 (2002), cert. denied, — N.C. —, 619 S.E.2d 859 (2005).

Two-Part Test. — Under subdivision (e)(8), the fact that a victim was waiting to testify against a defendant may be considered in making the factual determination of whether the victim was a witness against defendant, however, the factual determination was only the first step, the State also had to show that defendant's motivation in killing the victim was that she was a witness. State v. Long, 354 N.C. 534, 557 S.E.2d 89, 2001 N.C. LEXIS 1235 (2001).

Murder of Witness or to Disrupt Government Function Shown. — Where murdered wife was scheduled to return to court to obtain extension of ex parte domestic violence order against defendant husband the morning after her murder, evidence was sufficient to submit to jury either the aggravating circumstance that murder was committed to disrupt or hinder the lawful exercise of a governmental function (G.S. 15A-2000(e)(7)) or that it was committed against a witness because of the exercise of her official duty as a witness (G.S. 15A-2000(e)(8)). State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

Editor's Note. — For case holding unanimity requirement for finding of mitigating factors unconstitutional, see McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), annotated under analysis lines I and II, above.

Definition of Mitigating Circumstance. — A mitigating circumstance under this section is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than are other first-degree murders. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982); State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985).

The law differs in the treatment of statutory and nonstatutory mitigating factors, and the defendant was not entitled to a jury charge applying a nonstatutory mitigating circumstance to a statutory mitigating circumstance. Green v. French, 978 F. Supp. 242 (E.D.N.C. 1997), aff'd, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525 U.S. 1090, 119 S. Ct. 844, 142 L. Ed. 2d 698 (1999).

Statutory Versus Nonstatutory Mitigating Circumstances. — If any error occurred in the re-instruction concerning mitigators, the error was to the defendant's benefit because it implied all the listed circumstances had some mitigating value, rather than instructing the jury it should not find a nonstatutory mitigating circumstance unless it deemed that circumstance to exist and have mitigating value. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Consideration of Mitigating Circumstances on Voir Dire. — A defendant may not use voir dire to stake out potential jurors by asking whether they could consider specific mitigating circumstances during the sentencing phase. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Due process is not violated by requiring the defendant to prove mitigating circumstances by the preponderance of the evidence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

"McKoy" Error — Held Harmless. — Trial court's error in requiring the jury to answer each mitigating circumstance "no" if it did not find the circumstance unanimously by a preponderance of the evidence was harmless beyond a reasonable doubt because there was unequivocal extrinsic evidence, both from the jury foreman's colloquy with the court and the individual jurors' answers, that the instruction did not prevent any juror's consideration of the defendant's mitigating evidence; rather, the jury was unanimous in rejecting the one mitigating circumstance that it failed to find. State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 216, 116 L. Ed. 2d 174 (1991), rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Since the jury found all submitted mitigating circumstances, any error in trial court's instructions requiring the jury to unanimously find a mitigating circumstance before it could be meaningfully considered in defendant's favor was harmless beyond a reasonable doubt. State v. Roper, 328 N.C. 337, 402 S.E.2d 600,

cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless. State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996), cert. denied, 519 U.S. 901, 117 S. Ct. 254, 136 L. Ed. 2d 180 (1996).

Same — Harm Found. — Where there was evidence to support the submitted but unfound mitigating circumstances, the error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) was not harmless. State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990), cert. denied, 489 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991).

Where, in a murder prosecution the jury failed to find unanimously several proposed mitigating circumstances supported by substantial evidence, and where some, but not all jurors may have found credible the evidence in support of some or all of these circumstances and that the nonstatutory circumstances had mitigating value, had each juror been allowed to consider such of these circumstances as each found to exist, and the evidence supporting them, in the final weighing process, it cannot be said beyond a reasonable doubt that there would not have been a different result in the sentence. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

The North Carolina Supreme Court could not conclude beyond a reasonable doubt that the erroneous unanimity jury instruction did not preclude one or more jurors from considering in mitigation defendant's evidence of his diminished capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law. Nor could it conclude beyond a reasonable doubt that had such jurors been permitted, under proper instructions, to consider the circumstance, they would nevertheless have voted for the death penalty rather than life imprisonment. State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where the trial court instructed the jury to answer each mitigating circumstance "no" if the jury did not unanimously find the circumstance by a preponderance of the evidence, the instruction constituted error as a juror could have found the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs where defendant consumed two beers and smoked five marijuana cigarettes six-and-one-half hours before the murder. State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991).

Instruction that the jury had to unanimously find each mitigating circumstance before considering that circumstance in the ultimate sentencing decision constituted error requiring a new sentencing proceeding where there was evidence tending to support the statutory circumstance of impaired capacity. State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991).

Where there was substantial evidence to support each of the submitted mitigating circumstances, one of which was by statute deemed to have mitigating value and the others of which were such as a juror could reasonably find to have mitigating value, instructions contrary to the dictates of McKoy necessitated a new sentencing hearing. State v. Artis, 329 N.C. 679, 406 S.E.2d 827 (1991).

Where there was substantial evidence from which a juror reasonably might have found the "catchall" statutory mitigating circumstance that was submitted, McKoy error in the instructions would necessitate a new capital sentencing proceeding. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

McKoy error as to issue of whether murder was committed while the defendant was under the influence of a mental or emotional disturbance was not harmless, and because of it, defendant was entitled to be given a new capital sentencing hearing. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991), appeal dismissed, 347 N.C. 580, 502 S.E.2d 605 (1998).

Where evidence presented at trial and during sentencing proceeding supported reasonable inferences that defendant's participation in both murders was relatively minor, that he acted under the domination of another person, and that his low I.Q. impaired his ability to make judgments, court could not conclude beyond a reasonable doubt that erroneous unanimity instruction did not preclude one or more jurors from considering in mitigation defendant's lesser and subordinate role in the two murders or his impaired mental abilities. State v. Barnes, 330 N.C. 104, 408 S.E.2d 843 (1991).

Where the jury was required to be unanimous in finding mitigating circumstances and uncontradicted evidence could have supported determination that defendant's ability to conform his conduct to the requirements of the law was impaired, or that defendant acted under influence of mental or emotional disturbance, yet jury answered "no" as to statutory mitigating circumstances addressing defendant's mental condition, the McCoy error was not harmless. State v. Simpson, 331 N.C. 267, 415 S.E.2d 351 (1992), cert. denied, 516 U.S. 1161, 116 S. Ct. 1048, 134 L. Ed. 2d 194 (1996).

All the Evidence Must Be Taken into Account by the Trial Court. — Whereas subsection (b) of this section mandates that a mitigating circumstance be submitted to the jury for its consideration when it may be supported by the evidence, all the evidence must be taken into account by the trial court — not just that which the court has ruled admissible for other purposes. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

An honorable discharge is a nonstatutory mitigating circumstance that the jury may consider but need not find to be mitigating. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997).

Absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless. State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996).

Weight of Mitigating Circumstances for Jurors to Determine. — Where, after being instructed by the court to consider impaired capacity as a mitigating circumstance if defendant proved that circumstance by a preponderance of the evidence, juror answered, "I would weigh it, your honor, but it would carry little weight, I'm afraid. I don't consider that a mitigating circumstance, but I would weigh it," trial court did not err in denying the challenge to this potential juror as defendant is entitled to have the jury consider all appropriate mitigating circumstances, but the weight to be given each circumstance is for the individual juror to determine. State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991).

In a capital murder case, the appellate court found that the trial court record supported the trial court's conclusion that the juror could perform his duties as a juror consistent with the trial court's instructions when considering mitigating evidence as, in response to incisive questions from both sides and the trial court, the juror responded that he could follow the law as instructed and he never indicated that he would automatically give more weight to any particular testimony, but steadfastly assured the parties and the trial court that he would look at each person's testimony in light of the other evidence in the case. State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Admissibility Generally. — The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985).

The admissibility of mitigating evidence during the penalty phase is not constrained by the Rules of Evidence, although the trial judge must determine the admissibility of such evidence subject to general rules excluding evidence that is repetitive, unreliable, or lacking an adequate foundation. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

Jury Must Be Permitted to Consider Mitigating Circumstances. — As the General Assembly has determined that certain circumstances, as a matter of law, have mitigating value, and has expressly provided by statute for their submission to the jury under appropriate circumstances, if the jury is not permitted to consider a mitigating circumstance supported by the evidence, a defendant's due process rights are implicated. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Instruction that told jurors they could give no weight to statutory mitigating circumstances they found to exist was contrary to the intent of subsection (f) and was an incorrect statement of the law. State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996).

But Mitigating Circumstances May Be Subsumed. — The trial court's refusal to submit a requested nonstatutory mitigating circumstance concerning the defendant's suicidal depression after returning from Korea was proper where this circumstance was subsumed in an already-given instruction concerning the defendant's emotional problems. State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

All Proposed Mitigating Circumstances Subsumed. — Trial court did not err in excluding defendant's proposed mitigating circumstance that he was under the influence of a mental or emotional disturbance after the trial court did not permit defendant's witness to testify as to defendant's mental state because the sociologist and criminologist was not qualified to make such a conclusion; further the trial court's final list of mitigating circumstances subsumed the proposed mitigating circumstances to the exclusion of none; and finally, defendant's death sentence was not disproportional when compared to the penalty in similar cases. State v. Taylor, 354 N.C. 28, 550 S.E.2d 141, 2001 N.C. LEXIS 832 (2001), cert. denied, 535 U.S. 934, 122 S. Ct. 1312, 152 L. Ed. 2d 221 (2002).

The trial judge's jury instructions were proper where they mirrored the requirements of a constitutional instruction by instructing the jury that only one juror needed to deem a factor mitigating for it to receive consideration. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

The court rejected the defendant's allegation that a jury instruction "lumped together" several mitigating circumstances in the conjunctive. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Trial court properly amended a requested mitigator to avoid a misinterpretation unsupported by substantial evidence. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002), cert. denied, 537 U.S. 1010, 123 S. Ct. 478, 154 L. Ed. 2d 412 (2002).

The trial court must offer for the jury's consideration any mitigating circumstance that the jury might reasonably find supported by the evidence, and when the evidence adduced at trial appears to support the mitigating circumstance that defendant had no prior significant history of criminal activity, both parties must be given the opportunity to introduce additional evidence supporting or rebutting that circumstance. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The trial judge's determination of whether a mitigating circumstance should be submitted to the sentencing jury should be guided by the following statement of the State Supreme Court in State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), reh. denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983): Common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the first sentencing hearing. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983), death sentence vacated and life sentence imposed, 319 N.C. 1, 352 S.E.2d 653 (1987).

The trial court's exclusion of defendant's father's mitigation testimony during the sentencing proceeding regarding a conversation he had with defendant during defendant's pretrial incarceration was harmless where the father testified as to the substance of the conversation and the defendant failed to make an offer of proof after the objection was sustained. State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001).

Prior Mitigating Circumstances Not Established as a Matter of Law. — Trial court did not err by refusing to instruct the jury that the mitigating circumstances found at previous sentencing proceeding were established as a matter of law. State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997), cert. denied, 522 U.S. 1096, 118 S. Ct. 892, 139 L. Ed. 2d 878 (1998).

Substantial Evidence of Mitigating Factors. — The trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented to the jury which would support a reasonable finding by the jury of the existence of the circumstance. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

Where evidence as to subdivision (f)(2) and (f)(6) mitigating circumstances conflicted (defendant's experts testified that he had borderline mental intelligence and a reading disorder while his psychologist conceded that he worked, earned his living, had a driver's license and functioned within the limits of his intelligence; the State's testimony showed defendant coldheartedly and calmly planning to obtain the pesticide which he eventually put in his children's Kool-Aid, cunningly passing the blame on to his ex-girlfriend and remaining silent as they lay dying or deathly ill in the hospital; and no one testified that defendant was in any way enraged or intoxicated at the time of the crimes), the trial court did not err in denying the defendant's request for instructions regarding mitigating circumstances. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

In order to show reversible error in the trial court's omission of a statutory mitigating circumstance in a capital case, defendant must affirmatively establish three things: (1) That the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in subsection (f) of this section); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The weight a mitigating circumstance is assigned during the sentencing phase of a trial for a capital offense is entirely for the jury to decide. It follows that counsel is entitled to argue what weight circumstances should ultimately be assigned. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

Mitigating circumstances are given sufficient "independent mitigating weight" in a balancing with aggravating factors. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Jury must be permitted to consider any and all possible mitigating factors. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Motion for Listing of Possible Mitigating Circumstances. — If, in a capital case, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, the trial judge must put such circumstances on the written list. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Where, in a capital case, there are a number of things including good character, which a defendant contends the jury should consider in mitigation, in order to insure that the trial judge mentions these to the jury in his instructions the defendant must file a timely request. Otherwise, failure of the court to mention any particular item as a possible mitigating factor will not be held for error so long as the trial judge instructs that the jury may consider any circumstances which it finds to have mitigating value pursuant to subdivision (f)(9) of this section. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The legislature intended that all mitigating circumstances, both those expressly mentioned in this statute and others which might be submitted under subdivision (f)(9) of this section, be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing. Where, however, defendant makes no specific request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury and, likewise, makes no timely request to include defendant's good character as a mitigating circumstance, the actions of the trial judge in failing to do these things are not erroneous. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Burden on Issue of Mitigating Circumstances. — The burden of persuading the jury on the issue of the existence of any mitigating circumstance is upon the defendant and the standard of proof is by a preponderance of the evidence. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The burden of persuading the jury as to the existence of any mitigating circumstance is upon the defendant to so prove by a preponderance of the evidence, and when all the evidence tends to show the existence of a particular mitigating circumstance, a defendant is entitled to a peremptory instruction on that issue. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983), death sentence vacated and life sentence imposed, 319 N.C. 1, 352 S.E.2d 653 (1987).

Whether a violation of a defendant's federal constitutional rights is prejudicial is controlled by subsection (b) of this section, and such violation is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the state to so prove. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Burden Constitutional. — The North Carolina Supreme Court abandoned the Pinch test with respect to statutory mitigating circumstances because due process constitutional issues are involved and, as to constitutional issues, the Pinch test impermissibly shifts the burden of proof to the defendant. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988). See also, State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

State Does Not Have Burden of Proving Absence of Mitigating Factors. — The State does not have the burden of proof that, in a given capital case, no mitigating circumstances exist. It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Right to Peremptory Instruction. — Where, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, rehearing denied, 471 U.S. 1050, 105 S. Ct. 2044, 85 L. Ed. 2d 342 (1985).

Although the defendant has the burden of proving the existence of a mitigating circumstance, upon a proper request where all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance, but such a peremptory instruction is inappropriate when there is conflicting evidence on that issue. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

When a mitigating factor is uncontroverted, the trial judge must give a peremptory instruction to the jury on that circumstance. The effect of this type of instruction is to remove the question of whether the mitigating circumstance exists from the jury's determination and to conclusively establish the existence of that factor; it also requires the jury to consider the peremptorily instructed circumstance in its final determination of a sentence recommendation. It does not, however, affect the weight that ultimately may be assigned to that circumstance by the jury. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

The trial court is required to give a peremptory instruction, if the defendant so requests, when evidence showing that the mitigating circumstance exists is uncontroverted. State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995), cert. denied, 516 U.S. 1161, 116 S. Ct. 1048, 134 L. Ed. 2d 194 (1996).

It was not error for the trial court in the capital case to refuse to give preemptive instructions on a mitigating circumstance since defendant's counsel failed to submit the instructions to the trial court in writing; and, even if the requested instructions had been submitted in writing the evidence supporting the G.S. 15A-2000(f)(2), (f)(6) mitigating circumstances was not uncontroverted. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Instructions on Defendant's Relatively Minor Role in Murder Inappropriate. — The jury's factual findings underlying the determination that defendant was guilty of first-degree murder at the guilt-phase precluded the resentencing jury from considering the statutory mitigating circumstance that "defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor." State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

The trial court did not err in refusing to peremptorily instruct the jury, etc. — Under subdivision (f)(3) of this section that victim was a voluntary participant in defendant's homicidal act, where the State produced ample evidence to contradict defendant's claim that victim initially attacked him with a knife. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Where there was contradictory evidence supporting the subdivision (f)(2) and (f)(6) mitigators, the defendant's evidence was not "uncontroverted and manifestly credible" so as to warrant preemptory instructions. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

The court's denial of the nonstatutory mitigating circumstance of "[t]he defendant having found a closer path to the Lord" was not improper where the evidence was controverted. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

The trial court's properly denied defendant's motion for a peremptory instruction regarding two statutory mitigating circumstances where the evidence conflicted concerning his mental state and ability to conform his conduct to the law. The girlfriend of the defendant, who carried out nine premeditated, calculated, and vicious murders while carefully avoiding detection for two years, testified that she had not observed anything unusual about him and had not known him to experience hallucinations. Defendant held numerous jobs involving management responsibilities and maintained non-abusive relationships with his girlfriend and other women during the time these crimes were committed. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

The trial court's refusal to give peremptory instruction including the mitigating circumstances of mental disturbance and capacity to appreciate criminality was proper where the evidence was controverted. The prosecution's witness testified based on his evaluation performed two months after the murder whereas the evaluation done by defendant's expert was performed 11 years after the murder. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

The trial court did not err in refusing to peremptorily instruct the jury on the statutory mitigating circumstances under subdivisions (f)(2), (f)(6), and (f)(7), where the court actually instructed on the first and where the evidence on the other two was controverted. State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001), cert. denied, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Defendant Must Bring Forward Evidence of Factor's Existence. — Although the trial court has a fundamental duty to declare and explain the law arising upon the evidence, it is not required to instruct upon a statutory mitigating circumstance sua sponte unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified factor. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Additional Factors Requested by Defendant. — The trial court must include additional factors, which are timely requested by the defendant, on the written list submitted to the jury if they are supported by the evidence, and are such that the jury could reasonably deem them to have mitigating value. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Mitigating factors found by the jury in favor of the defendant included two statutory mitigators: (1) that the murder was committed while defendant was under the influence of mental or emotional disturbance, G.S. 15A-2000(f)(2), and (2) defendant's age at the time of the crime, G.S. 15A-2000(f)(7), and 6 of 10 submitted nonstatutory mitigating circumstances: the defendant (1) had a lack of adequate role modeling during the defendant's formative years contributed to defendant's acceptance of peer pressure in forming his opinions and shaping his behavior, (2) was intoxicated, reducing his ability to make appropriate judgments, (3) had a desire to correct his deficiencies and make a positive contribution to society in the future, (4) was negatively affected as a young teen by the family trauma caused by his father, (5) had a chaotic and unstable home life lacking in parental guidance, and (6) changed and began acting tough when his father entered into his life. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Nonstatutory mitigating circumstances do not have mitigating value as a matter of law. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

No Duty to Instruct on Nonstatutory Factors Absent Request. — The court has no obligation specifically to instruct on nonstatutory mitigating circumstances which are not called to its attention. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Where neither defendant nor the state introduced evidence to show that defendant had no significant history of prior criminal activity, the court did not err in refusing to instruct the jury on this mitigating circumstance. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Sympathy. — Notwithstanding that the trial court should not specifically refer to sympathy, the catchall mitigating circumstance permits jurors to weigh sympathy in their determinations, if they in fact have sympathy for the defendant, and consider that sympathy to be a circumstance having mitigating value. State v. Conner, 345 N.C. 319, 480 S.E.2d 626 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997).

Court Not Required to Sift Through Evidence for Mitigating Facts. — Although the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted, the trial court is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value, especially when the trial court instructs the jury upon the open-ended provision of subdivision (f)(9) of this section and thus does not hinder it from evaluating on its own anything of mitigating value. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Nonstatutory Mitigating Factors. — Nonstatutory mitigating circumstances do not necessarily have mitigating value and it is for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value for although evidence may support the existence of the nonstatutory circumstance, the jury may decide that the circumstance is not mitigating. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

When a jury determines that a statutory mitigating circumstance exists, it is not free to refuse to consider the circumstance and must give it some weight in its final sentencing determinations; however, it is for the jury to determine whether submitted nonstatutory mitigating circumstances established by the evidence should be given any mitigating value and nonstatutory mitigating circumstances are mitigating only when one or more jurors deem them to be so. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, 513 U.S. 1198, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

Failure to Submit. — Where defendant had been previously convicted of two counts of larceny, fifteen counts of injury to property, an alcoholic beverage violation, and five counts of felony breaking and entering, trial court did not abuse its discretion by failing to submit mitigating circumstances to the jury in defendant's murder trial. State v. Rowsey, 343 N.C. 603, 472 S.E.2d 903 (1996), cert. denied, 519 U.S. 1151, 117 S. Ct. 1087, 137 L. Ed. 2d 221 (1997).

Trial court did not err by failing to instruct the jury that they could consider the fact that defendant's participation in a murder during a home invasion was relatively minor, when they determined if defendant should be sentenced to death, because, although a person who was confined with defendant's accomplice testified that defendant's accomplice admitted that he killed the victim, other evidence showed that defendant's participation was not relatively minor. State v. Watts, 357 N.C. 366, 584 S.E.2d 740, 2003 N.C. LEXIS 827 (2003), cert. denied, 541 U.S. 944, 124 S. Ct. 1673, 158 L. Ed. 2d 370 (2004).

Failure to Submit Nonstatutory Mitigating Circumstances to Jury Raises Federal Constitutional Issues. — Upon such showing by a defendant, (1) that a nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) that there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Refusal to Submit Nonstatutory Factors Held Not Error. — The trial court did not err in refusing to submit defendant's proposed nonstatutory mitigating circumstances where these were already subsumed in the mitigating circumstance under subdivision (f)(4) submitted to the jury. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

Failure to Submit Particular Factor Absent Request. — When counsel makes no request for additional mitigating circumstance instructions, failure of the court to mention any particular item as a possible mitigating factor will not be held for error, so long as the trial judge instructs that the jury may consider any circumstance which it finds to have mitigating value pursuant to subsection (f)(9) of this section. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

No Requirement to Specify Those Factors Found and Those Not Found. — While it is the better practice to require the jury to specify mitigating factors found and not found for the benefit of Supreme Court in reviewing the appropriateness of the death penalty, there is no such requirement in the statutes. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

There are no statutory or constitutional requirements of specific findings on the mitigating circumstances submitted to the jury. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991).

Although it is the better practice for a jury to specify on the verdict form which mitigating circumstances it finds and which it does not find, there is no constitutional or statutory requirement that it do so. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Testimony Offered Solely to Refute Possible Mitigating Circumstances. — Admission of testimony offered by the State solely to refute mitigating circumstances upon which defendant might later rely was error; however, it was harmless beyond a reasonable doubt as (1) much of the testimony objected to by defendant, in addition to rebutting mitigating circumstances, also was competent as evidence of aggravating circumstances, and (2) a review of the evidence shows that the jury had before it a clear record of what must be described as defendant's unconscionable acts toward many of his victims. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

The court's admission of state-proffered hearsay testimony during the sentencing proceeding as rebuttal to the hearsay evidence offered by defendant in support of the (f)(4) mitigating circumstance and a nonstatutory mitigating circumstance that defendant requested, i.e. based on his contentions that someone else pulled the trigger and that his role in the murders was relatively small, did not result in plain error where other evidence existed from which the jury could infer that he shot and killed the victims. State v. Lemons, 352 N.C. 87, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000), cert. denied, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001).

Any aspect of defendant's character, record or circumstance of the particular offense which defendant offers as a mitigating circumstance should be considered by the sentencer. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988); State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court did not err in excluding mitigating factors evidence where the propounded evidence was irrelevant to defendant's character and was instead merely the opinions of third parties. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Evidence irrelevant to mitigating factors may be properly excluded by the trial court. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Evidence Unrelated to Defendant Properly Excluded. — Where the evidence offered by the defendant in a capital case and excluded by the trial judge was in no way connected to defendant, his character, his record or the circumstances of the charged offense, it was, therefore, irrelevant and of no probative value as mitigating evidence in the sentencing procedure of defendant's trial, and the trial judge's ruling excluding the evidence did not unduly limit the jury's consideration of mitigating factors in violation of subdivision (f)(9) of this section. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Evidence that wife suffered from the battered woman syndrome did not entitle her to a charge on self-defense, following State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989). State v. Grant, 343 N.C. 289, 470 S.E.2d 1 (1996).

Character Evidence. — In a capital sentencing proceeding character evidence may be offered in hope of lending a convicted murderer some degree of "humanness." Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

In a prosecution for a capital offense the State may not in its case in chief offer evidence of a defendant's bad character; a defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in subsection (f) of this section. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Although the State cannot in its case in chief offer evidence of a defendant's bad character as an aggravating circumstance in a capital case, the State can offer evidence of a defendant's bad character to rebut evidence of his good character presented by a defendant as a mitigating circumstance. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Evidence of bad reputation or character is admissible when its sole purpose is to rebut mitigating circumstances upon which defendant might later rely. However, when defendant offers evidence of any circumstance that may reasonably be deemed to have mitigating value, whether or not it appears in the statutory list, the State may rebut this with evidence of defendant's bad character. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

The fact that defendant was raped while in prison subsequent to the crime charged does not have mitigating value as to that crime. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

Mentality of a defendant is generally relevant to sentencing and it can, with supporting evidence, be properly considered in mitigation of a capital felony. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v.

Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Score on Intelligence Test. — Fact that defendant scored 66 on an intelligence test unquestionably related to defendant's mentality, and defendant would have been entitled to an instruction about his specific intelligence quotient if he had tendered a properly worded request therefor. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Age of 45 at the time of the crime could not rationally be considered a mitigating circumstance. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Punishment of Accomplice. — Accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. It bears no relevance to these factors, and thus there is no error in judge's refusal to submit it to the jury. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance; it does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

That a murder was not committed in a calculated manner is not a mitigating circumstance. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Testimony on Religious, Ethical, etc., Perspectives of Capital Punishment. — The trial court did not err under subsection (f) of this section by excluding testimony by defense witnesses on the religious, ethical, legal and public policy perspectives of capital punishment as it was totally irrelevant and of no probative value as mitigating evidence in the sentencing phase of defendant's trial. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Evidence Defendant Showed Remorse. — The jury cannot be precluded from considering mitigating evidence relating to the defendant's character or record and the circumstances of the offense that the defendant offers as the basis for a sentence less than death. Proffered testimony that the defendant was sorry for what he had done showed his remorse and should have been admitted as relevant mitigating evidence in the sentencing phase of his capital trial. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Evidence that defendant showed remorse held insufficient where the defendant beat his two-year-old stepdaughter to death; even though he called 911 to obtain help for her before she died, he misled the medical technicians by saying that the child had fallen from a chair rather than directing them to the fatal injuries hidden beneath her clothes. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999).

Eyewitness Account of Execution Properly Excluded. — In a capital case, it was not error for the trial judge to refuse to allow the defendant to present during the sentencing phase of the trial, an eyewitness account of a gas chamber execution, since the evidence was in no way connected to defendant, his character, his record or the circumstances of the charged offense. It was totally irrelevant and, therefore, properly excluded by the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

A defendant's failure to harm eyewitnesses is not a mitigating circumstance. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Willingness to Take Polygraph Test. — The mere fact that a defendant desires to take a polygraph test is not, standing alone, evidence of a mitigating circumstance. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

The defendants' desire to take a polygraph test is not evidence from which the jury could have found as a mitigating factor their willingness to cooperate with the police, where there is no evidence that the State even suggested that the defendants take a polygraph test. A defendant's personal desire to submit to a polygraph examination, absent a police request, does not indicate a willingness to cooperate with the police. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), cert. denied, 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1987).

Defendant's Prior Sentences not a Mitigating Factor. — Trial court correctly denied defendant's request to submit his prior sentences in another state totaling 105 years as a mitigating circumstance because the defendant was not entitled to use his prior sentences as a mitigating device the way the State was entitled to use them as an aggravating device. State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

Inadvertent Omission in Instruction. — The inadvertent omission of the words "circumstance to exist" following "One or more of us finds this mitigating" in the issues and recommendations form setting forth a particular mitigating circumstance was not plain error. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Counsel's Failure to Request Instructions Does Not Indicate Ineffectiveness. — Trial counsel's failure to request specific, explanatory instructions with respect to mitigating circumstances arguably present in a case is not evidence of ineffectiveness, for a trial court is required to instruct the jury only on the basis of actual evidence offered and received in open court and not as to mere arguments of counsel. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

No New Hearing if Failure to Submit Circumstance Was Harmless. — A new sentencing hearing under this section will not be ordered for the erroneous failure to submit a mitigating circumstance if that error was harmless beyond a reasonable doubt. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

As to when the trial court's omission or restriction of a statutory or timely requested mitigating circumstance is reversible error, see State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Rebuttal of Evidence of Mitigating Factors. — The prosecution is entitled to offer evidence designed to rebut mitigating circumstances only after defendant offers evidence in support of such mitigating factors. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Prosecutor May Minimize Value of Mitigating Circumstances. — The prosecutor's explanation of the catchall mitigating circumstance of this section neither diminished the importance of mitigation nor denigrated the list of nonstatutory mitigating circumstances, but was a legitimate attempt to minimize the value of those circumstances. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Trial court did not err in resorting to a dictionary when responding to jury foreman's question as to the meaning of "extenuating" in a nonstatutory mitigating factor. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Court's Refusal to Submit Mitigating Factors Independently Was Not Error. — Where court refused to submit three mitigating circumstances as separate factors, but instead incorporated their content into its instructions on two other mitigating circumstances, court's refusal to submit proposed circumstances to the jury as independent mitigating circumstances was not error since mechanical, mathematical approach to capital sentencing was rejected and refusal to submit proposed circumstances separately and independently was within dictates of constitutional precedent. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The trial court correctly refused to submit the defendant's nonstatutory mitigating circumstance which was subsumed in other mitigating circumstances submitted to the jury. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Catchall Mitigating Circumstance Cures Failure to Submit Others. — The trial court's refusal to submit to the jury the defendant's self-serving statement that "the defendant did not set out to kill [the victim] and attempted to leave the house several times before the lethal acts occurred" was harmless where it submitted the catchall mitigating circumstance under subdivision (f)(9) and where the underlying requested circumstance was fully argued to the jury by defense counsel during closing argument. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Refusal to Submit Nonstatutory Factors Held Not Error. — Where the court's instructions required the jury to consider defendant's relationship with the victim in determining defendant's sentence, the court did not err in refusing to submit defendant's requested nonstatutory mitigating circumstance of an extenuating relationship between defendant and the victim. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

A capital murder defendant was not entitled to have submitted to the jury the mitigating circumstance that there was an extenuating circumstance between the defendant and the victim, where the defendant never established that there was "a stepfather/stepson relationship." State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

Refusal to Submit That Crime Was Out of Character for Defendant. — In a first-degree murder case, the trial judge properly refused to submit as a mitigating circumstance that the crime was out of character for defendant, where the evidence that might have supported that circumstance did not include defendant's character and behavior between 1980, when he joined the Marines, and 1985, when the offenses occurred. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Evidence as to the different levels of security in the prison was properly excluded. as irrelevant to show defendant's character, prior record, or circumstances of the offense although its exclusion prevented him from showing that he was not considered by the prison staff to be dangerous or to require special supervision. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Refusal to Submit Adjustment to Jail Life. — In a first-degree murder case the trial judge properly refused to submit the mitigating circumstance that defendant had adjusted well to jail life, where the trial judge noted that there was no evidence to support the proposed circumstance and called upon defendant's counsel to point out the evidence supporting it, but defendant's counsel replied that he did not want to be heard. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Refusal to Submit That Defendant Did Not Resist Arrest. — In a first-degree murder case, the refusal of the trial judge to submit as a mitigating circumstance that defendant did not resist arrest was not error, where the trial judge submitted as mitigating circumstances that defendant cooperated with the police upon his arrest, that he voluntarily confessed, and that he voluntarily agreed to searches of his car, motel room, home, and storage bin. The proposed circumstance was subsumed in these mitigating circumstances. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Brain Injury Did Not Entitle Defendant to Factors. — The court was not required to find mitigating factors under subdivision (f)(2) or (f)(6) just because it determined there was sufficient evidence to warrant a peremptory instruction that defendant's brain injury affected his ability to function on a daily basis and also substantially affected his personality. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

Mitigating Circumstances Far Outnumbered Aggravating Circumstances. — Trial court did not violate subsection (b) of this section by failing to impose a life sentence in the killing of two victims when the jury returned with its non-unanimous verdict after two hours' deliberation, or after 45 minutes' additional deliberation, when the trial was reconvened on Monday morning; the trial court did not abuse his discretion since two aggravating circumstances and 24 mitigating circumstances were submitted in the killing of one victim and one aggravating circumstance and 24 mitigating circumstances in the killing of the other victim, for a total of three aggravating circumstances and 48 mitigating circumstances, and since at the time the jury returned with its nonunanimous verdict it had deliberated for less than two hours, and at the time the jury reconvened on Monday morning, it had deliberated for less than two hours and 45 minutes. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Nonstatutory Mitigating Circumstance. — Even though the trial judge found that the evidence of mitigating circumstances was uncontroverted, it was not error for the judge to require the jury both to find that the circumstance existed and to find that the circumstance had mitigating value; the jury only "finds" a nonstatutory mitigating circumstance if it finds that the evidence supports the existence of the circumstance and if it deems it to have mitigating value. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Where prosecutor stated that the statutory mitigating circumstances submitted in this case had been passed into law by the Legislature, so that the Legislature had therefore provided for their consideration by the jury, and that the nonstatutory mitigating circumstances were created and urged upon the jury by defense counsel, there was no implication in this statement that the nonstatutory mitigating circumstances submitted to the jury were unworthy of the jury's consideration. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Finding and Weighing of "Any Other Circumstance". — Prosecutor did not improperly limit the scope of the matters in mitigation which the jury could have found and weighed under the "any other circumstance" provision of subdivision (f)(9) of this section; the prosecutor's statement essentially told the jurors that they could find any circumstance supported by the evidence to be mitigating, and taken in its entirety it would have been reasonably interpreted by jurors only as an admonition to base their finding and weighing of "any other circumstance" in mitigation upon the evidence and not upon their emotions. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Evidence Held Insufficient. — Where there was nothing in the transcript to show that defendant in a murder prosecution was an excessive user of drugs or alcohol which might have brought him under the influence of his codefendant, and the only evidence as to parental obligation was that defendant's daughter lived with his mother and he visited her and brought her presents, the evidence on both mitigating factors was insufficient to require their submission to the jury. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Refusal to Give Peremptory Instruction Not Error. — It was not error for the trial court in defendant's trial for multiple rapes and murders to refuse to give his requested peremptory instructions on the statutory mitigating circumstances that the murders were committed while defendant was under the influence of a mental or emotional disturbance, pursuant to G.S. 15A-2000(f)(2), and that the capacity of defendant to conform his conduct to the requirements of the law was impaired, pursuant to G.S. 15A-2000(f)(6). If asked, a court had to give a peremptory instruction for any statutory or nonstatutory mitigating circumstance that uncontroverted and manifestly credible evidence supported, but the testimony of defendant's expert, who had no contact with him until after his arrest, was not manifestly credible, and the evidence supporting a possible submission of mitigating circumstances under G.S. 15A-2000(f)(1) and (2) was not uncontroverted. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

B. No Significant Prior Criminal Activity.

Duty of Court to Determine If Evidence Will Support This Mitigating Circumstance. — Subsection (b) of this section does not require evidence of no history of prior criminal activity before the mitigating circumstance must be submitted for the jury's consideration. Rather, the statute places upon the trial court the duty to determine whether the evidence will support a reasonable finding of the mitigating circumstance of "no significant history of prior criminal activity." State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316, vacated and remanded for further consideration, 488 U.S. 807, 109 S. Ct. 38, 102 L. Ed. 2d 18, reinstated, 323 N.C. 622, 374 S.E.2d 277 (1988), vacated and remanded for further consideration, 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), death sentence vacated, 329 N.C. 662, 407 S.E.2d (1991).

And to Submit It If Present in the Record. — Even though defendant did not offer evidence supporting submission of the mitigating circumstance of no significant history of prior criminal activity, where such evidence was in fact present in the record, it was error not to submit this mitigating circumstance to the jury. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Where the evidence showed that the defendant had been convicted of five misdemeanors and two felonies as well as the unlawful consumption of drugs and alcohol, the trial court was required to submit the mitigating circumstance of no significant history of prior criminal activity to the jury. State v. Billings, 348 N.C. 169, 500 S.E.2d 423 (1998).

Test for Submission to Jury. — The proper determination, when considering the submission of a mitigating circumstance under G.S. 15A-2000(f)(1), is whether a rational jury could conclude that defendant had no significant history of prior criminal activity, and a significant history of prior criminal activity, for purposes of G.S. 15A-2000(f)(1), is one that is likely to influence the jury's sentence recommendation and is not supported by the mere absence of any substantial evidence concerning the defendant's prior criminal history. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002), cert. denied, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002).

Trial court did not err in failing to give the G.S. 15A-2000(f)(2), (f)(6), and (f)(7) peremptory instructions. Defendant did not request a peremptory instruction on any of the three submitted statutory mitigating circumstances. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

It is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Standard for Determining Prejudice upon Failure to Submit. — Because failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity, when it is supported by the evidence, is a violation of both our statute and the Eighth Amendment, the standard for determining prejudice is G.S. 15A-1443(b), which provides that violation of defendant's federal constitutional rights is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt. State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).

In determining whether to submit to the jury the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity, the trial court must consider all relevant circumstances and determine whether a rational jury could conclude that the defendant had no significant history of criminal activity as it relates to the sentencing decision. State v. Williams, 343 N.C. 345, 471 S.E.2d 379 (1996), cert. denied, 519 U.S. 1061, 117 S. Ct. 695, 136 L. Ed. 2d 618 (1997).

Time of Prior Criminal Activity. — The history of prior criminal activity referred to defendant's criminal activity prior to the murder for which he was being sentenced, not prior to sentencing; therefore, the crimes for which defendant was convicted in 1986 were not relevant to the mitigator, "history of prior criminal activity", as used in subdivision (f)(1). State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

Not Submitted Where No Evidence of Prior Record. — Where the record showed defense counsel stated that no evidence of defendant's criminal history was presented by the defense or the state and the defense had chosen not to request submission of mitigating circumstances in subdivision (f)(1) of this section, since the record showed that no evidence was offered to support an instruction on mitigating circumstances in subdivision (f)(1), the trial court did not err in failing to submit it. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Where there is no recorded evidence of a capital defendant's criminal history, the subdivision (f)(1) mitigating circumstance may not be submitted to the jury; where there is evidence supporting this circumstance, it is the trial court's duty to determine whether a rational jury could conclude that defendant had no significant history of prior criminal activity. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

Evidence Must Be Uncontroverted. — The trial court properly refused to submit to the jury a preemptory instruction on the mitigating factor that the defendant had no prior history of significant criminal activity, even though the parties had stipulated to that mitigating circumstance in the defendant's first sentencing hearing, where the State presented evidence during the new sentencing proceeding that the defendant previously had twice assaulted his wife. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999).

Finding of No Prior Criminal Activity Not Required. — Subsection (b), requiring the submission of mitigating and aggravating circumstances to the jury, does not require a finding of no evidence of prior criminal activity before this mitigating circumstance must be submitted for the jury's consideration. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Evidence that defendant had a prior felony conviction for the second-degree kidnapping of his wife and had stored illegal drugs in his shed and evidence of his complicity in a theft did not amount to such a significant history of prior criminal activity that no rational jury could find the existence of the mitigating circumstance of no significant history of prior criminal activity. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

"Prior criminal activity" is not limited to prior convictions. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983); State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943

F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Prior Criminal History Must Be Significant. — The court must determine whether a rational jury could conclude that the defendant had no "significant" history of prior criminal activity; a defendant's criminal history is considered "significant" if it is likely to affect or have an influence upon the determination by the jury of its recommended sentence. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Where the defendant's conduct in the robbery-murder of his father was strikingly similar to his lengthy history of prior criminal activity and convictions, the trial court properly refused to submit the mitigating circumstance of no significant history of prior criminal activity to the jury. The focus for determining submission of instructions under this section should be on whether the criminal activity is such as to influence the jury's sentencing recommendation. State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000), cert. denied, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000).

Significant Criminal Activity Shown. — A capital murder defendant who battered and beat his infant son to death was not entitled to submission of the mitigating circumstance that he lacked a significant history of prior criminal activity, where his prior criminal activities included an illegal sexual relationship with the mother of the child and another male, he was discharged from the Air Force after only three months for alcohol-related fights, he assaulted the mother of the victim during her pregnancy and threatened further violence if she informed on him, and he repeatedly abused his son over the course of his brief life. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

While the trial court is obligated to determine that a rational juror could find from the evidence that defendant had no significant history of criminal activity before submitting the subdivision (f)(1) mitigator, there is no requirement that such finding be made prior to admitting the state's rebuttal evidence. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

The trial court properly refrained from submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence included a conviction for indecent liberties with a minor, previous recent assaults on his ex-girlfriend, recent communicated death threats against her and her new boyfriend, a history of drowning young puppies and kittens, and where the defendant did not request such an instruction. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Defendant had significant history of prior criminal activity where defendant had been convicted of the first-degree murder of his former wife and was sentenced to life imprisonment, from which he was later paroled. State v. King, 353 N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001).

Trial court was not required to instruct the jury regarding whether defendant had no significant history of prior criminal activity under G.S. 15A-2000(f)(1), because, based on evidence of defendant's prior robbery convictions, no rational jury could have concluded that defendant had no significant history of prior criminal activity. State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004).

Since no rational jury could find that defendant's criminal activity was insignificant where defendant had been convicted of "several" breaking and entering charges and had been charged with driving under the influence, the trial court did not err in deciding not to instruct pursuant to G.S. 15A-2000(f)(1). State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

State v. Rouse, 339 N.C. 59 is overruled to the extent it conflicts with other decisions by implying that if the evidence pertaining to defendant's criminal history is offered in a context other than for the purpose of determining whether a G.S. 15A-2000(f)(1) instruction should be given the defendant might not be entitled to the instruction, it is overruled. State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

No Significant Prior Activity Shown. — Rational jury could have concluded that defendant had no significant history of prior criminal activity; thus, the trial court properly submitted the (f)(1) mitigating circumstance, G.S. 15A-2000(f)(1), to the jury. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

New Trial Warranted. — Where the trial court gave a peremptory instruction on the mitigating circumstance of the defendant's lack of criminal history but did not give a peremptory instruction on other nonstatutory mitigating circumstances which were supported by uncontroverted evidence, the trial court erred and defendant was entitled to a new sentencing proceeding for convictions for three first-degree murders. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

New Sentencing Proceeding Warranted. — Defendant's death sentence was vacated and the case was remanded for a new capital sentencing proceeding where the trial court erred by failing to submit the (f)(1) mitigating circumstance of no significant history of prior criminal activity by the defendant. State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997).

Good Character Not Encompassed by Subdivision (f)(1). — The mitigating circumstance in a capital case which refers to a defendant's lack of "significant history of prior criminal activity" does not encompass a contention regarding defendant's good character, since good character imports more than simply the absence of criminal convictions. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Criminal Record Admissible to Negate Evidence Under Subdivision (f)(1). — Portions of defendant's criminal record which were read to the jury during the sentencing phase of a first-degree murder case were relevant and competent to negate evidence that defendant had no significant history of prior criminal activity which was submitted to the jury on his behalf as a possible mitigating circumstance. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Any alleged error by the trial court in allowing the G.S. 15A-2000(f)(1) mitigator to `be introduced and thereby allowing the State's rebuttal evidence as to defendant's criminal history was not so egregious and prejudicial that defendant was not able to receive a fair sentencing proceeding as a result of the trial court's decision; therefore the alleged error did not rise to the level of plain error. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Submission of Mitigating Factor over Defendant's Objection. — The trial court did not commit prejudicial error by submitting to the jury, over his objection, the mitigating factor that defendant had no significant history of prior criminal activity, where despite evidence concerning his convictions on six counts of felony breaking or entering, six counts of felonious larceny, five counts of armed robbery, and one count of felonious assault in 1963 and 1965, defense counsel had strenuously argued that there was no evidence that defendant had committed any violent acts or violated any prison rules during the 18 years that he was incarcerated following such convictions, and where there was also evidence that defendant was only 20 years old when convicted of the 1965 offenses. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Trial court had to submit evidence of the defendant's history of prior criminal activity — his drug use, juvenile delinquency and violence — as a mitigating circumstance under this section if a rational jury could conclude that such history was insignificant, and failure to inform jury that submission was required as a matter of law, in spite of defendant's objections, was harmless error. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

The submission of the (f)(1) mitigating factor, showing that defendant's prior criminal history including robbery and armed robbery occurred six years earlier, and that evidence indicated that defendant had put his past behind him, as required by law, did not prejudice defendant nor did it injure the defense team's credibility before the jury. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Trial court properly submitted the G.S. 15A-2000(f)(1) mitigating circumstance, despite the defendant's objection and defendant's prior conviction for rape years earlier, because a rational juror could have found that the defendant had no significant history of prior criminal activity and the defendant tendered expert testimony that the defendant's addiction to alcohol and drugs caused him to do things that he could not control; moreover, the defendant cross-examined the rape victim to convince the jury that the victim's testimony was false. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Since there was evidence that a defendant had a prior criminal history, the trial court had no discretion and had to submit the G.S. 15A-2000(f)(1) mitigator to the jury to determine whether defendant had no "significant" history of prior violent criminal activity, even it the defendant (or the State) did not want it to be submitted, and even if an effect of the evidence of the mitigator could have had the effect of bolstering the prior crimes aggravator; the trial court properly instructed the jury that the defendant did not want the mitigator to be submitted but that the law required submission. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Submission of Mitigating Factor and Potentially Conflicting Aggravating Factor. — Trial court's mitigating instruction of no prior criminal activity in case where it also gave aggravating instruction of prior criminal activity based on defendant's criminal record was harmless error; and defendant's death sentence was not disproportional. State v. Bone, 354 N.C. 1, 550 S.E.2d 482, 2001 N.C. LEXIS 833 (2001), cert. denied, 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2d 231 (2002).

Submission of Mitigating Circumstance Upheld. — Where defendant's only felony convictions occurred almost 20 years before trial, and all of defendant's misdemeanor convictions were alcohol related, e.g., public drunkenness and driving while under the influence, while the evidence tended to show that defendant had suffered from episodic alcohol abuse since 1973, the trial court was correct in its view that a jury could reasonably find the mitigating circumstance of "no significant history of prior criminal activity" and in submitting that factor for consideration. State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316, vacated and remanded for further consideration, 488 U.S. 807, 109 S. Ct. 38, 102 L. Ed. 2d 18, reinstated, 323 N.C. 622, 374 S.E.2d 277 (1988), vacated and remanded for further consideration, 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), death sentence vacated, 329 N.C. 662, 407 S.E.2d (1991).

Defendant's convictions for use of drugs and alcohol, while prior convictions, were not significant enough to keep the G.S. 15A-2000(f)(1) mitigating circumstance from the jury; these same convictions were used to support two other mitigating circumstances and the defendant received no active prison time for any of his prior convictions, and although the defendant's history was fairly recent, numerous mitigating circumstances based on his age and family history were presented for the jury to consider when viewing his criminal history, and thus, a rational juror could have reasonably found the mitigating circumstance that the defendant had no significant history of prior criminal activity. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Under a plain error analysis in defendant's capital murder case, the appellate court found that the evidence in the case was more than sufficient to support submission of the G.S. 15A-2000(f)(1) circumstance, as both the nature and recency of defendant's prior criminal activities were such that a rational juror could find his history insignificant and could conclude that defendant's underage alcohol and illegal drug use were minor offenses, and thus insignificant when considered in light of the total circumstances. State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Failure to Submit Held Harmless Error. — Assuming that the trial court's failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity was error, the error was harmless beyond a reasonable doubt; given the lack of any substantial evidence on the matter of prior criminality of the defendant and the trial court's erroneous peremptory instruction — favorable to the defendant — that the jury must find the nonstatutory mitigating circumstance of no prior convictions for violent felonies, the defendant received virtually the same benefit he would have received if the jury had found the statutory mitigating circumstance of no significant history of prior criminal activity. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Failure to Submit Upheld. — Trial court properly found that no reasonable juror could have concluded that defendant's criminal history was insignificant and therefore properly precluded instructions on the statutory mitigating circumstance under this section. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Where defendant stipulated to the State's evidence that his prior record included convictions for second-degree rape and second-degree murder and he objected to the State's request for the (f)(1) mitigating circumstance, the trial court did not err by failing to submit it to the jury. State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514, 1999 N.C. LEXIS 1000 (1999), cert. denied, 529 U.S. 1102, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000).

Where during capital sentencing proceeding the trial court erroneously failed to submit the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity, the sentence of death entered against the defendant was vacated and the case remanded to the Superior Court for a new capital sentencing proceeding. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

In a death penalty case, where nonstatutory mitigating circumstances were submitted to the jury in lieu of the statutory mitigating circumstance of "no significant history of prior criminal activity," the state did not prove that the error was harmless beyond a reasonable doubt, since the jury was not required to give any weight to the nonstatutory mitigating circumstances, but, by contrast, would have been required to give value to a statutory mitigating circumstance. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Where evidence of prior history of criminal activities was limited to that tending to show defendant's use of illegal drugs and her theft of money and credit cards to support her drug habit, it did not establish that the defendant had such a significant history of prior criminal activity that no rational jury could find the existence of the statutory mitigating circumstance. Therefore, the trial court erred by failing to submit this mitigating circumstance to the jury. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Testimony that defendant used marijuana but not other drugs, drank while underage but was never charged, and did not get in many fights at school was not substantial evidence that defendant lacked a significant history of prior criminal activity. The evidence begged further development in order to support submission of the N.C. Gen. Stat. § 15A-2000(f)(1) mitigating circumstance, and the jury's finding of the circumstance on the strength of that evidence alone would have been based purely upon speculation and conjecture and unreasonable as a matter of law; therefore, the trial court did not err in failing to submit the (f)(1) mitigating circumstance. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

No Reversal Where Defendant Invited Error. — Defendant could not complain that the trial court committed plain error by instructing jurors that defendant had no significant prior criminal history when defendant invited the error by requesting the instruction. State v. Polke, 361 N.C. 65, 638 S.E.2d 189, 2006 N.C. LEXIS 1297 (2006).

No New Hearing If Failure to Submit Was Harmless. — Defendant was not entitled to a new sentencing proceeding because the trial court did not submit the statutory mitigating circumstance that the defendant has no significant history or prior criminal activity; witness's cursory and unsubstantiated references to past marijuana use by the defendant were not, standing alone, substantial evidence as to whether the defendant had a significant history of criminal activity and a jury finding of no significant history of criminal activity, solely upon witness's remarks about marijuana use, would have been based purely upon speculation and conjecture, not upon substantial evidence. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Failure to Submit Held Erroneous. — Where the jury was aware of the prior criminal activity of defendant, but was not allowed to consider the quality of this activity in its deliberations because the statutory mitigating circumstance of no significant history of prior criminal activity was not submitted, and the court could not state affirmatively that had this one mitigating circumstance been found and balanced against the four aggravating circumstances, the jury would still have returned a sentence of death, the case would be remanded for a new sentencing hearing. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

The trial court erred in not submitting to the jury the mitigating factor that defendant had no significant history of prior criminal activity, even though the defendant had a history of stealing since he was a child and had been convicted of numerous offenses involving stealing, because his history of nonviolent criminal activity was less significant than that of other defendants for whom this mitigating circumstance has been found. State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118, 143 L. Ed. 2d 113 (1999).

New Sentencing Proceeding Not Warranted. — The trial court's admission of a felony larceny conviction occurring after the murder for the jury's consideration vis-a-vis the subdivision (f)(1) mitigating circumstance, where the truck theft was the subject of collateral attack by a pending motion for appropriate relief at the time of defendant's murder trial, was not reversible error; the pending motion was irrelevant and the submission of this later occurring felony, although in error, was not highly prejudicial given the prosecutor's emphasis on the defendant's drug activity. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

Refusal to Submit Criminal History Not Error. — It was not error in defendant's rape and murder trial to refuse to submit his criminal history as a mitigating factor under G.S. 15A-2000(f)(1); his record before the murders showed many prior convictions. Thus, while it was error to consider his criminal history that amassed after the murders, the error was harmless in light of the other, substantial, competent evidence presented to the court and because the test was whether a rational juror would conclude that defendant had no significant history of prior criminal activity. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

C. Mental or Emotional Disturbance.

Mental Retardation No Exception. — This statute, which provides for the death penalty, does not have an exception for mental retardation. State v. Best, 342 N.C. 502, 467 S.E.2d 45 (1996).

Test for Submission to Jury. — In considering when the G.S. 15A-2000(f)(2) mitigating circumstance may be submitted, the central question is a defendant's mental and emotional state at the time of the crime, and the use of the word "disturbance" in the G.S. 15A-2000(f)(2) circumstance shows the North Carolina General Assembly intended something more than mental impairment. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002), cert. denied, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002).

Use of the word "disturbance" shows the General Assembly intended something more in the mitigating circumstance at subdivision (f)(2) of this section than mental impairment, which is found in another mitigating circumstance. State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987).

Timing of Mental Disturbance. — A defendant's mental or emotional disturbance does not warrant submission of the (f)(2) circumstance unless the disturbance existed at the time of the murder. State v. Hill, 347 N.C. App. 275, 493 S.E.2d 264 (1997).

The fact that a juror accepted the expert's testimony to support the nonstatutory mitigating circumstance that the defendant " . . . lacked parental involvement or support in treatment for psychological problems" was not determinative of the sufficiency of the evidence in support of the statutory mitigating circumstance under subdivision (f)(2); the two mitigating circumstances emphasize different times and different events. The nonstatutory circumstance relates to parental support at the time the defendant sought psychological treatment, before these crimes were committed. The statutory circumstance involves his mental or emotional state at the time the crimes were committed. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Evidence was insufficient to warrant submission of the mitigating circumstance under G.S. 15A-2000(f)(2) based either on defendant's drug abuse or on claims of depression and family crisis; there was no evidence that defendant was depressed or in crisis at the time of the murder. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

Provocation Not Prerequisite to Factor. — Although some provocation will almost always be present where defendant suffers from a mental or emotional disturbance contemplated by subdivision (f)(2) of this section, it is not a prerequisite to submission of this mitigating circumstance. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991), appeal dismissed, 347 N.C. 580, 502 S.E.2d 605 (1998), explaining State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Failure of State to Controvert Expert Testimony. — The trial court should have instructed peremptorily on the mitigating circumstance that the defendant suffered a mental or emotional disturbance at the time of the murder where the defendant submitted evidence in support of this statutory mitigating circumstance in the form of expert testimony, and the state presented no evidence that controverted the defendant's evidence on this mitigating circumstance. State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a mental or emotional disturbance under subdivision (f)(2) of this section. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Defendant's alleged voluntary alcohol use on the night that he committed burglary and murder did not qualify as a mental or emotional disturbance for purposes of subsection (f)(2). State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996), cert. denied, 519 U.S. 875, 117 S. Ct. 196, 136 L. Ed. 2d 133 (1996).

As to the mitigating circumstance that the defendant was under the influence of a mental or emotional disturbance at the time of the offense, G.S. 15A-2000(f)(2), his or her mental and emotional state at the time of the crime is the central question presented; the use of the word "disturbance" in G.S. 15A-2000(f)(2) shows the General Assembly intended something more than mental impairment that is found in another mitigating circumstance (G.S. 15A-2000(f)(6)); voluntary intoxication is not a mental disturbance for purposes of G.S. 15A-2000(f)(2). Section 15A-2000(f)(6) applies where there is evidence of some mental disorder to the degree that it affected the defendant's ability to understand and control his actions. State v. Hooks, 353 N.C. 629, 548 S.E.2d 501, 2001 N.C. LEXIS 670 (2001), cert. denied, 534 U.S. 1155, 122 S. Ct. 1126, 151 L. Ed. 2d 1018 (2002).

Drug withdrawal stemming from voluntary intoxication does not qualify as a mental or emotional disturbance for purposes of subdivision (f)(2). State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Equivocal testimony of psychiatrist as to the mental and emotional condition of defendant held sufficient to make it a jury question as to whether he was under the influence of a mental or emotional disturbance at the time of the killing. State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988).

Controverted and conflicting evidence proffered by defendant in support of mitigating circumstances to show that murder was committed while defendant was under the influence of a mental or emotional disturbance did not entitle him to a jury instruction under this section. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883

(1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Because of the expert witness's reservations and the inconsistencies between the defendant's statements, on which the expert based an opinion, as to how many rocks of crack cocaine the defendant smoked before the defendant committed the murder, the defendant was not entitled to a G.S. 15A-2000 (f)(6)instruction as the instruction was not supported by uncontroverted and manifestly credible evidence. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Habeas Relief Was Denied Where Petitioner Did Not Prove His Counsel Was Ineffective. — Where the habeas petitioner claimed that the petitioner's trial counsel improperly phrased the questions to the petitioner's expert psychologist during the sentencing hearing, should have obtained additional expert testimony, and should have requested a peremptory instruction on the mitigating factors listed at G.S. 15A-2000(f)(2), (f)(6), habeas relief was denied; (1) counsel was not ineffective in not asking the expert questions regarding the petitioner's exact state of mind or condition on the date of the murder because the expert had already advised counsel that he could not make that determination; (2) counsel was not ineffective in failing to obtain the opinion of a second mental health expert, as counsel had determined to focus on "the good" the petitioner had done during his life, not on his prior history of drug abuse; and (3) the evidence that the petitioner had diminished capacity at the time of the murder was not uncontroverted, so the petitioner was not entitled to a peremptory instruction. Powell v. Lee, 282 F. Supp. 2d 355, 2003 U.S. Dist. LEXIS 16191 (W.D.N.C. 2003).

No Mitigating Circumstance Where Psychiatrists Examined Defendant Long After Crime. — Defendant did not present uncontradicted and inherently credible evidence to support the existence of the statutory mitigating circumstance that he was under the influence of mental or emotional disturbance, where, even though defendant presented two psychiatrists who testified that he was suffering from significant psychological disorders at the time of the shooting, those experts did not examine the defendant until several weeks or months after the crime and there was other evidence which contradicted the experts. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Argument of Prosecutor. — Defendant failed to show prejudice in the prosecutor's argument to the jury where he quoted irrelevant law, repeatedly reminded the jury that they were being asked to consider whether mitigating circumstances reduced defendant's culpability, and argued against mitigating circumstances in subdivision (f)(2) of this section by emphasizing evidence that the greater component of defendant's incapacity consisted of his personality disorder, not his low mental capacity. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Peremptory Instruction Not Required. — The trial court was not required to give a peremptory instruction on the mitigating circumstance under subdivision (f)(2) where defendant's evidence was not uncontroverted. For example, a defense witness testified that there was nothing about defendant's condition that would have forced him to beat an elderly lady to death, and defendant's supervisor testified that he did his job correctly, exhibited no memory problems, came to work on time, picked up his paycheck on time, demonstrated good common sense, caused no trouble and did not appear to be mentally deficient. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

With regard to defendant's convictions on two counts of first-degree murder, the trial court did not err by failing to submit a peremptory instruction on the G.S. 15A-2000(f)(2) mitigating circumstance of whether defendant was under the influence of mental or emotional disturbance at the time of the murders as neither party pointed to, nor could the Supreme Court of North Carolina, find in the record defendant's written request for such an instruction; however, even if defendant had submitted the proposed instruction to the trial court, he would not have been entitled to such an instruction as the evidence was not uncontroverted that defendant acted under the influence of mental or emotional disturbance at the time of the crime. State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Peremptory Instruction Not Allowed. — The defendant was not entitled to a peremptory instruction under subdivision (f)(2) where the evidence as to his mental state at the time he murdered two people was conflicting. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

The trial court did not err in declining to submit the mitigating circumstance under subdivision (f)(2) to the jury where the defendant's testimony that he always carried a knife for his personal safety and to enforce order at his card games and that he attacked the victim with his knife since he "felt like if I didn't try to do something, then I'd have been in the situation where I would have been stabbed up, and I probably been dead" demonstrated that he was in a rational, calculating state of mind. State v.

Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Submission of Nonstatutory Mitigating Factor Instead. — Where a trial judge did not instruct the jury to consider defendant's mental retardation with respect to the statutory mitigating circumstance, but instead submitted a separate, nonstatutory circumstance, instructing the jury to consider whether defendant bordering on mild mental retardation, with a full scale intelligence quotient of 67, was a mitigating factor, this was not an abuse of discretion. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Failure to Submit Held Erroneous. — The trial court erred in not submitting to the jury the subdivision (f)(2) mitigating factor where a juror could reasonably have found from the testimony of the defendant's psychologist that the defendant was under the influence of a mental or emotional disturbance at the time of the killing. State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118, 143 L. Ed. 2d 113 (1999).

Failure to Submit Held Not Erroneous. — Failure to submit mitigating circumstances in G.S. 15A-2000(f)(2) and (6) did not require reversal, because pepper spray did not result in mental or emotional disturbance or impair defendant's mental capacity. State v. Polke, 361 N.C. 65, 638 S.E.2d 189, 2006 N.C. LEXIS 1297 (2006).

Refusal to submit certain mitigating circumstances to the jury was not erroneous as there was no evidence defendant suffered from any mental or emotional disturbance at the time of the crime. State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

D. Duress.

Inapplicable Absent Evidence of Duress or Coercion. — Mitigating circumstances of acting under duress was inapplicable where there was no evidence that petitioner acted under the influence or coercion of any other person. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

The capital murder defendant was not entitled to a jury instruction on the statutory mitigating circumstance that she acted under duress or under the domination of the two-year old murder victim's uncle, where she admitted that she repeatedly beat and abused the child during the time the child lived with her and the uncle. State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

Issues of Provocation or Lack of Intent Not to be Relitigated at Sentencing Phase. — Jury decided during the guilt-innocence proceeding that defendant was guilty of first-degree murder, rejecting his contention he acted under perceived provocation; the defendant was properly not allowed to put provocation back into issue during the sentencing phase. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

E. Impaired Capacity.

Model Penal Code Test for Mental Capacity Adopted. — The legislature, by enactment of subdivision (f)(6) of this section, has determined to depart from the traditional M'Naghten test and to adopt the Model Penal Code test for mental capacity as a mitigating circumstance to be considered on the question of punishment in capital cases. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Subdivision (f)(6) Circumstance Exists. — This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Impaired mental capacity would exist if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished). State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Refusal to Instruct Where Not All Evidence Supports Existence of Factor. — Where not all of the evidence supported the existence of the mitigating circumstance of subdivision (f)(6) of this section, the trial court correctly refused to give defendant's requested peremptory instructions upon it. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert.

denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

Where the record disclosed conflicting evidence concerning whether defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, the trial court did not err by denying his motion for a peremptory instruction on this mitigating circumstance. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Evidence contradicted the mitigating circumstance, that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, where a fellow inmate's testimony tended to show that defendant committed a calculated and planned crime, entering 80-year-old lady's house at a time when he was not likely to be detected. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

The trial court did not err in refusing to give a peremptory instruction on the statutory mitigating circumstance under subdivision (f)(6) where, while there was evidence which supported the defendant's contention that he could not "appreciate the criminality of his conduct," there was also evidence that he attempted to eliminate one individual as a witness and that he initially denied shooting two police officers. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Controverted and conflicting evidence proffered by defendant in support of mitigating circumstances to show that murder was committed while defendant was under the influence of a mental or emotional disturbance did not entitle him to a jury instruction under this section. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883 (1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Because of the expert witness's reservations and the inconsistencies between the defendant's statements, on which the expert based an opinion, as to how many rocks of crack cocaine the defendant smoked before the defendant committed the murder, the defendant was not entitled to a G.S. 15A-2000 (f)(6)instruction as the instruction was not supported by uncontroverted and manifestly credible evidence. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Where None of the Evidence Supports Existence of Factor. — The trial court properly declined to submit the mitigating circumstance under subdivision (f)(6) where the record was devoid of any evidence that defendant's paranoia and fear of violence from the prison environment so impaired him as to prevent him from understanding the criminality of his conduct or that it affected his ability to control his actions. Defendant had completed a psychology course, obtaining a "4.0" grade; he owned and operated a canteen, card games, and a loan business, all illegal or against prison regulations. On the afternoon of the murder, defendant played a card game; and he testified that he pulled his knife in the shower since he had heard that the victim had a knife. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Defendant failed to show that defendant's ability to appreciate the criminality of his actions or to conform his conduct to the law was impaired when defendant's own forensic psychology expert testified that he was not suggesting that defendant was unable to tell the difference between right and wrong or to appreciate the nature and quality of his actions. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002), cert. denied, 537 U.S. 1010, 123 S. Ct. 478, 154 L. Ed. 2d 412 (2002).

Trial court properly refused to submit the G.S. 15A-2000(f)(6) mitigator where the evidence showed that the defendant was depressed and suffering from borderline personality disorder, because while the defendant was under the influence of a mental or emotional disturbance the defendant's own expert testified that this disturbance did not prevent the defendant from appreciating the criminality of the defendant's conduct and controlling the defendant's conduct as required by law. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Timing of Impairment of Capacity. — Evidence was insufficient to warrant submission of the mitigating circumstance under G.S. 15A-2000(f)(6) where defendant failed to show a link between defendant's drug habit and defendant's allegedly impaired capacity at the time of the murder. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

Legislature did not intend the mere ingestion of alcohol to be a mitigating circumstance. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983).

Voluntary Intoxication Not Subsumed Under Subdivision (f)(2). — Voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a "mental or emotional disturbance" under subdivision (f)(2) of this section. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Petitioner's voluntary alcohol use did not qualify as a mental or emotional disturbance for purposes of mitigating circumstances under G.S. 15A-2000(f)(2); petitioner's habeas corpus petition was denied. Chandler v. French, 252 F. Supp. 2d 219, 2003 U.S. Dist. LEXIS 4534 (M.D.N.C. 2003).

But Properly Considered Under Subdivision (f)(6). — Voluntary intoxication, to the degree that it affects defendant's ability to understand and control his actions, is properly considered under the provision for impaired capacity, subdivision (f)(6) of this section. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

Under some circumstances, evidence of a defendant's intoxication at the time of the crime may properly be evaluated by the jury as a mitigating circumstance under subdivision (f)(6) of this section. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

To What Degree of Intoxication Subdivision (f)(6) Applies. — When the defendant contends that his faculties were impaired by intoxication, such intoxication must be to such a degree that it affects defendant's ability to understand and control his actions before subdivision (f)(6) of this section is applicable. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Defendant's habits regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

No Error Not to Submit Impaired Mental Capacity Due to Drugs or Alcohol. — It was not error not to submit the mitigating circumstance of defendant's impaired mental capacity to the jury where the fact that defendant may have taken a drug several hours before the shooting or that he may have drunk some beer was not sufficient alone to show a diminished capacity to appreciate the criminality of the offense or to refrain from illegal conduct. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Schizophrenia. — In a first-degree murder prosecution in which there was evidence from which the jury could have found that, although defendant knew the difference between right and wrong at the time of the killing, he suffered from schizophrenia and that at the time of the killing defendant's schizophrenia had surfaced, defendant would be entitled to a new sentencing hearing where the trial judge, in his instruction, failed to explain the difference between defendant's capacity to know right from wrong, and the impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law within the meaning of subdivision (f)(6) of this section. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Bipolar Disorder. — Where the record revealed no evidence that defendant was under the influence of either bipolar disorder or antisocial personality disorder at the time he committed attempted robbery with a dangerous weapon and first-degree murder, the submission of a peremptory instruction was not required, and the trial court did not err in failing to make such instruction during the sentencing phase of defendant's trial. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

Separate Instructions Not Required. — The trial court did not err by denying defendant's request for separate instructions on each of his three alleged mental impairments under this section or by giving a single instruction combining all of the mental impairments into a single mitigating circumstance. The trial court's instruction specifically referred to each of the alleged mental disorders—his "personality disorder," "borderline range of intelligence," and "long-term, chronic and severe abuse of crack-cocaine at and around the time of the offenses"—and instructed the jury to consider whether one or all of them impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Oversimplification of Law Held Not Gross Impropriety. — While some of prosecutor's language may have oversimplified the law concerning the statutory mitigating circumstance of impaired capacity and might have been construed as additional improper commentary on the sentencing law, his argument did not rise to the level of gross impropriety requiring the trial court to intervene ex mero motu, as any potential impact of the statements was de minimis and as the jury found this statutory circumstance in mitigation of the crimes. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Presumption of Mitigating Value. — Since the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is a statutory mitigating circumstance, it is presumed to have mitigating value if found. State v. Cummings, 329 N.C. 249, 404 S.E.2d 849 (1991).

New Sentencing Proceeding Where Jury Instruction Erroneous. — The sentence of death was vacated and a new sentencing proceeding ordered due to error in instructing jury to find unanimously each mitigating circumstance before considering that circumstance in the ultimate sentencing decision; there was evidence tending to support the statutory mitigating circumstance of impaired capacity. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Plain Error Not Found. — Where defendant's evidence concentrated on the combined effects of gasoline inhalation, alcohol consumption and lower intelligence, the trial court's instruction in the conjunctive accorded with defendant's evidence and thus, the instruction on impaired capacity did not constitute plain error. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

The defendant's deficient mental status did not render the death sentence disproportionate. State v. Norwood, 344 N.C. 511, 476 S.E.2d 349 (1996), cert. denied, 520 U.S. 1158, 117 S. Ct. 1341, 137 L. Ed. 2d 500 (1997).

Inmate was not entitled to habeas corpus relief on his claim that defense counsel was ineffective in failing to garner expert testimony regarding his blood alcohol content; the inmate was not prejudiced, as the jury unanimously rejected the expert's sentencing testimony that the inmate was entitled to the statutory mitigator. McHone v. Polk, 392 F.3d 691, 2004 U.S. App. LEXIS 26918 (4th Cir. 2004), cert. denied, — U.S. —, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

No Right to Peremptory Instruction. — G.S. 15A-2000(f)(6) mitigating circumstance was not uncontroverted for the purpose of giving a preemptive jury instruction because evidence that the defendant tried to make the murders look like a robbery-murder could cause a reasonable jury to conclude that he knew and appreciated the the criminality of his actions. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

F. Age of Defendant.

Age Must Have Mitigating Value. — Unless a defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age only if that juror finds by a preponderance of the evidence that defendant's age has mitigating value. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Link Between Condition and Culpability Required. — Evidence that a physical condition exists is not enough to establish a mitigating factor, and although petitioner established the existence of his age, the jury did not believe, as evidenced by the verdict, that defendant had established a link between his age and his culpability by a preponderance of the evidence. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

The following instruction was upheld where the defendant failed to object, waived appellate review and could not show prejudice because one or more jurors found the circumstance under subdivision (f)(7) : "The evidence tends to show that the defendant was seventeen years of age at the time of each of these murders. The mitigating effect of the age of the defendant is for you to determine from all the facts and circumstances which you find from the evidence. 'Age' is a flexible and relative concept. The chronological age of the defendant is not always the determinative factor." State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Chronological age of a defendant is not the determinative factor under subdivision (f)(7) of this section. Relevant to this inquiry is not only the chronological age of the defendant, but also his experience, criminal tendencies, and presumably the rehabilitative aspects of his character. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

The chronological age of a defendant is not the determinative factor under subdivision (f)(7) of this section. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Independent Duty of Court to Submit Factor of Age. — Testimony of clinical psychologist that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten-year-old was substantial evidence from which a juror or jurors reasonably could find that the defendant's age at the time of the offense was mitigating; therefore, regardless of the defendant's wishes about the matter, the trial court had an independent duty to submit the statutory mitigating circumstances. State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Chronological age is not the determinative factor with regard to the mitigating circumstance of age of the defendant at the time of the crime, the defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the crime must also be considered. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

Emotional Age Also a Factor. — Chronological age is not the determinative factor in concluding the mitigating circumstance under G.S. 15A-2000(f)(7) exists; a defendant's immaturity, youthfulness, or lack of emotional or intellectual development are relevant. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002), cert. denied, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002).

Failure to Consider Mental Age. — Where the jury did not consider the nonstatutory factor that the mental age of the defendant at the time of the murder was a mitigating circumstance, although defendant had offered credible evidence that defendant was functioning in a mentally retarded range of intellect with an I.Q. that placed him in the lowest two percent of the population, McKoy error in instruction as to unanimity in finding mitigating circumstances necessitated a new sentencing hearing. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

When the testimony of doctors constituted substantial evidence that the defendant's mental age was mitigating at the time of the crime, the trial court was required to submit the circumstance and failure to do so was prejudicial error such that defendant was entitled to a new capital sentencing trial. State v. Zuniga, 348 N.C. 214, 498 S.E.2d 611 (1998).

Any hard and fast rule as to age would tend to defeat the ends of justice, so the term "youth" must be considered as relative and this factor weighed in the light of varying conditions and circumstances. It is well known that two young persons may vary greatly in mental and physical development, experience and criminal tendencies (citation omitted). One of these factors may have greater significance than the others in some cases, depending on the circumstances. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Largely conclusory statements that defendant was emotionally immature for his 23 years, made by foster parents with whom defendant lived from the time he was 16 until he was almost 18 years old, when balanced against defendant's chronological age, his apparently normal physical and intellectual development, and his level of experience, did not require the trial court to submit the mitigating circumstance listed at subdivision (f)(7) of this section. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Age Properly Not Considered. — The trial court did not err in failing to submit the mitigating circumstance of age, where the defendant was 29 at the time he murdered his infant son; even though the defendant suffered from a dissociative identity disorder, had a learning disability, and spent long periods of time playing video games, he also functioned in the average to high-average IQ range, he graduated from high school, he served in the Air Force, and he was able to operate complicated machinery at work. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Where defendant presented evidence of a restricted childhood and a lack of friends to support a showing of immaturity relative to his age, but evidence existed that he had completed his GED, had a normal level of reading skills, had a stable marital relationship, handled his own finances, and had held various jobs including aiding his ill father-in-law in running his business, the trial court did not err in failing to submit the age statutory mitigating circumstance. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

In light of the evidence that defendant was 26 at the time of the murder, that he was gainfully employed and able to perform his job duties proficiently and that he functioned adequately in society, the court could not conclude that the evidence of defendant's immaturity was so substantial as to require the trial court to submit the mitigating circumstance of age ex mero motu. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

Where doctors disagreed about whether the defendant had AIDS-related dementia and where defendant was 33 years of age at the time of the murders, appeared to be fairly well adjusted in society, and had sufficient intelligence to attend community college and establish a good work history, the evidence of defendant's immaturity was not so substantial as to require the trial court to submit the mitigating circumstance of age pursuant to this section. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

The evidence did not support an (f)(7) mitigating circumstance where the defendant presented evidence through several lay witnesses regarding his emotional immaturity, but no evidence whatsoever of mental impairment; the evidence showed that defendant "was of normal intelligence," that he was in honors English and history classes in high school, that he was a "voracious" reader, that he completed his General Equivalency Diploma, and that he served in the military and did well in quartermaster school. State v. Meyer, 353 N.C. 92, 540 S.E.2d 1, 2000 N.C. LEXIS 906 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Trial court did not err in failing to submit to the jury the mitigating factor of defendant's age found in G.S. 15A-2000(f)(7) where, contrary to defendant's assertion regarding that he functioned at a level lower than his chronological age would have, there was evidence admitted at trial that tended to show defendant's apparently normal intellectual and physical development. State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004).

Trial court did not err in failing to submit the age mitigator under G.S. 15A-2000(f)(7) in the death penalty case where evidence of defendant's emotional immaturity was counterbalanced by other factors such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience. State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

Peremptory Instruction Not Required. — Because the State did not stipulate to defendant's age as constituting a mitigating circumstance, a mandatory peremptory instruction was not required. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Defendant was not entitled to a new sentencing proceeding because the trial court failed to submit to the jury the statutory mitigating circumstance of his age at the time of the crimes; no evidence concerning the defendant's age was before the jury and the defendant's only witness introduced no substantial evidence of his immaturity, youthfulness or lack of emotional or intellectual development at the time of these crimes and on the contrary, witness testified that the defendant had been a trustworthy, responsible and dependable employee who was soon to become an unsupervised construction foreman with a crew of his own. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where the evidence was not sufficient to show that a 20-year-old defendant had not developed normally mentally or emotionally, it was not error for the judge to fail to submit the mitigating circumstance of age of the defendant. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

No Ineffective Assistance for Failing to Object to Issues on Age. — Trial counsel's failure to object to a number of questions posed by the prosecution during jury selection concerning the prospective jurors "sympathy" for defendant on account of defendant's age did not amount to ineffective assistance, because it was not clear that the subject questions were directed at defendant's age rather than toward any bias and counsel did make repeated references to defendant's youth throughout the penalty proceeding. State v. Murrell, 362 N.C. 375, 665 S.E.2d 61, 2008 N.C. LEXIS 688 (2008).

G. Aid in Apprehension of Another or Testimony on Behalf of Prosecution of Another Felony.

Aiding in Apprehension of Coconspirator. — Where there was sufficient evidence to support the assertion that defendant aided in the apprehension of his coconspirator, and the omission of this factor in the witness's submission to the jury potentially worked to the prejudice of defendant, he was entitled to a new sentencing hearing. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

Evidence Insufficient to Support Submission of Age as Factor. — Where defendant asserted at sentencing phase of his trial for first-degree murder that his borderline I.Q. of 71 and his chronological age of 61, combined, supported submission of the circumstances of his age to the jury as a mitigating circumstance, when balanced against defendant's youthful interest in the victim, his vigorous responses to the prosecutor's cross-examination, and his physical prowess in his attempts to escape, the evidence did not require submission of this circumstance. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

State's Failure to Contradict Defendant's Evidence. — Defendant was entitled to peremptory instruction on the statutory mitigating circumstance of his giving testimony in another defendant's trial as the State presented no evidence to contradict defendant's evidence on the mitigating circumstance. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

§ 15A-2001. Capital offenses; plea of guilty.

(a) Any defendant who has been indicted for an offense punishable by death may enter a plea of guilty at any time after the indictment.

(b) If the defendant enters a guilty plea to first degree murder and the State has not given notice of intent to seek the death penalty as provided in G.S. 15A-2004 or the State has agreed to accept a sentence of life imprisonment where it initially gave notice of intent to seek the death penalty, then the court shall sentence the person to life imprisonment. The defendant may plead guilty to first degree murder and the State may agree to accept a sentence of life imprisonment, even if evidence of an aggravating circumstance exists.

(c) If the defendant enters a guilty plea to first degree murder and the State has given notice of its intent to seek the death penalty, then the court may sentence the defendant to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant in a case in which the State has given notice of its intent to seek the death penalty, the presiding judge shall impanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty and the State has given notice of its intent to seek the death penalty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury. (1977, c. 406, s. 2; 2001-81, s. 2.)

Editor's Note. — Session Laws 2001-81, s. 1, which amended this section, is effective July 1, 2001, and applicable to pending and future cases, except that the provisions of the act regarding the State's notice of intent to seek the death penalty do not apply to defendants indicted in capital cases before the effective date of the act.

Legal Periodicals. — For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

For note on jury discretion in capital cases in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Campbell L. Rev. 451 (1983).

CASE NOTES

Guilty Plea Not Permitted Formerly. — Before the enactment of this statute defendant would not have been permitted to enter a plea of guilty to a crime for which the punishment might be death. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

But Now Upheld As a Result of a Shift in Public Policy And Law. — The practice of accepting a plea of guilty for an offense that could result in capital punishment as laid out in this section resulted from a shift in both public policy and the law, and the court will not disregard such provisions unless they are unconstitutional. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Conditional Plea of Guilty Not Proper. — In a capital case, the trial judge did not err in construing G.S. 15A-2000 and this section as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979), decided prior to the 2001 amendment.

Where defendants were being jointly tried for the same capital offense when one defendant changed his plea to guilty, it was error for the trial to continue as both a sentencing proceeding as to one defendant and as a trial to determine the guilt or innocence of the other. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Cited in State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

§ 15A-2002. Capital offenses; jury verdict and sentence.

If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison, without parole.

The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole. (1977, c. 406, s. 2; 1993, c. 538, s. 29; 1994, Ex. Sess., c. 21, s. 5; c. 24, s. 14(b).)

Legal Periodicals. — For note on jury discretion in capital cases in light of State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Campbell L. Rev. 451 (1983).

CASE NOTES

Legislative Intent. — This section clearly indicates the legislature's intention that the jury's sentence recommendation be binding on the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

The General Assembly has amended this section to require the trial court to instruct the jury during a capital sentencing proceeding concerning the parole eligibility of a defendant sentenced to life; however, the General Assembly has decided that the legislation is to be applied prospectively. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, 513 U.S. 1134, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995), cert. dismissed, 342 N.C. 417, 465 S.E.2d 547 (1995).

1994 Amendment. — The 1994 amendment was not an ameliorative act; it clearly increased the punishment for first-degree murder by making it a crime for which parole is no longer a possibility. Therefore, retroactive application of the amendment would violate the constitutional prohibition on ex post facto application of punitive laws. State v. Conner, 345 N.C. 319, 480 S.E.2d 626 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997); State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Effect of Amendments. — Where legislative changes to this section were deemed only to have prospective force and defendant committed his crimes two years before, the changes in the statute were inapplicable to defendant. State v. Roseboro, 344 N.C. 364, 474 S.E.2d 314 (1996).

The trial court has no power to overturn jury's sentencing recommendation. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

This section does not apply to the jury selection process, only to the sentencing hearing. State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001).

Instructions Regarding Parole Upheld. — The trial court's instruction to "determine the question as though life imprisonment without parole means exactly what the statute says 'imprisonment for life without parole in the state's prison'" did not violate this section. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Instructions Regarding Parole Not Required. — Although the General Assembly amended this section to require the trial court to instruct the jury during a capital sentencing proceeding concerning the parole eligibility of a defendant sentenced to life, defendant was not entitled to such an instruction. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

The trial court did not err in refusing to permit voir dire questions about parole and rejecting proposed jury instructions about the law of parole; although North Carolina has enacted legislation mandating a parole eligibility instruction, the statute was not in effect at the time of defendant's trial and is not retroactive. Green v. French, 978 F. Supp. 242 (E.D.N.C. 1997), aff'd, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525 U.S. 1090, 119 S. Ct. 844, 142 L. Ed. 2d 698 (1999).

In defendant's trial on charges of first-degree murder and robbery with a firearm, the trial court properly advised the jury that life imprisonment meant a sentence of life without the possibility of parole, and the State Supreme Court rejected the argument that G.S. 84-14 (recodified as G.S. 7A-97) gave defendant the right to inform the jury of the punishment that could be imposed if defendant was convicted. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Nothing in G.S. 15A-2002 requires a trial judge to state "life imprisonment without parole" every time he alludes to or mentions that sentence when discussing it as an alternative to the death penalty. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

When a trial court instructs the jury pursuant to G.S. 15A-2002, the trial court has no duty to inform the jury that a life sentence means life without parole every time it mentions a life sentence, so the trial court did not err by not doing so; however the trial court did adequately inform that a life sentence was without parole several times. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Substantial Compliance. — While the better practice would be to charge precisely as this section states: "a sentence of life imprisonment means a sentence of life without parole," the trial court did not err in instructing the jurors that "[i]f you unanimously recommend a sentence of life imprisonment without parole, the Court will impose a sentence of life imprisonment without parole." State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Where offense predated new law providing that jury must be informed that a sentence of life imprisonment means a sentence of life without parole, trial court correctly denied defendant's pretrial motion to question the jurors about their understanding of life imprisonment. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Instructions Not Required to Be Repeated. — Trial judge who, on one occasion, correctly instructed jury, pursuant to this section, "that a sentence of life imprisonment means a sentence of life without parole" was not required to give the same instructions again during voir dire, as well as on each and every other occasion where the issue arose. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Trial court was not required to state "life imprisonment without parole" every time it alluded to or mentioned the alternative sentence. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

Instructions Regarding Result of Lack of Unanimity Not Required. — The trial court did not err by instructing that the jury must be unanimous in its recommendation of a sentence of life and by prohibiting defendant from informing the jury that a life sentence would be imposed if the jury was not unanimous. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Because former G.S. 14-2 treated defendant's life sentence as an 80-year sentence for all purposes, the trial court erred in denying defendant's G.S. 15A-1420 motion for appropriate relief; accordingly, the matter was remanded for a hearing to determine how many sentence reduction credits defendant was eligible to receive and how those credits were to be applied. State v. Bowden, — N.C. App. —, 668 S.E.2d 107, 2008 N.C. App. LEXIS 2005 (2008).

Nothing in this statute requires the judge to state "life imprisonment without parole" every time he alludes to or mentions the alternative sentence to the death penalty. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Instructions Upheld. — Where trial court instructed jury, pursuant to this section, that "life" meant life imprisonment "without parole," fact that court would not tell the jury what he would do if they returned two life sentences did not constitute reversible error. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Trial court followed its responsibilities under G.S. 15A-2002 by utilizing the proper North Carolina Pattern Jury Instruction. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Cited in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980); State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995); State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997); State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

§ 15A-2003. Disability of trial judge.

In the event that the trial judge shall become disabled or unable to conduct the sentencing proceeding provided in this Article, the Chief Justice shall designate a judge to conduct such proceeding. (1977, c. 406, s. 2.)

Legal Periodicals. — For article on the former North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

§ 15A-2004. Prosecutorial discretion.

(a) The State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists. The State may agree to accept a sentence of life imprisonment for a defendant at any point in the prosecution of a capital felony, even if evidence of an aggravating circumstance exists.

(b) A sentence of death may not be imposed upon a defendant convicted of a capital felony unless the State has given notice of its intent to seek the death penalty. Notice of intent to seek the death penalty shall be given to the defendant and filed with the court on or before the date of the pretrial conference in capital cases required by Rule 24 of the General Rules of Practice for the Superior and District Courts, or the arraignment, whichever is later.

(c) If the State has not given notice of its intent to seek the death penalty prior to trial, the trial shall be conducted as a noncapital proceeding, and the court, upon adjudication of the defendant's guilt of first degree murder, shall impose a sentence of life imprisonment.

(d) Notwithstanding any other provision of Article 100 of Chapter 15A of the General Statutes, the State may agree to accept a sentence of life imprisonment for a defendant upon remand from the Supreme Court of North Carolina of a capital case for resentencing or upon an order of resentencing by a court in a State or federal post-conviction proceeding. If the State exercises its discretion and does agree to accept a sentence of life imprisonment for the defendant, then the court shall impose a sentence of life imprisonment. (2001-81, s. 3.)

Editor's Note. — Session Laws 2001-81, s. 4, which enacted this section, is effective July 1, 2001, and applicable to pending and future cases, except that the provisions of the act regarding the State's notice of intent to seek the death penalty do not apply to defendants indicted in capital cases before the effective date of the act.

CASE NOTES

Cited in State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

§ 15A-2005. Mentally retarded defendants; death sentence prohibited.

(a)(1) The following definitions apply in this section:

a. Mentally retarded. — Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning. — Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning. — An intelligence quotient of 70 or below.

(2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive

functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.

(b) Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.

(c) Upon motion of the defendant, supported by appropriate affidavits, the court may order a pretrial hearing to determine if the defendant is mentally retarded. The court shall order such a hearing with the consent of the State. The defendant has the burden of production and persuasion to demonstrate mental retardation by clear and convincing evidence. If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty against the defendant.

(d) The pretrial determination of the court shall not preclude the defendant from raising any legal defense during the trial.

(e) If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

(f) The defendant has the burden of production and persuasion to demonstrate mental retardation to the jury by a preponderance of the evidence.

(g) If the jury determines that the defendant is not mentally retarded as defined by this section, the jury may consider any evidence of mental retardation presented during the sentencing hearing when determining aggravating or mitigating factors and the defendant's sentence.

(h) The provisions of this section do not preclude the sentencing of a mentally retarded offender to any other sentence authorized by G.S. 14-17 for the crime of murder in the first degree. (2001-346, s. 1.)

CASE NOTES

Jurisdiction. — Superior court lacked jurisdiction to hear defendant's motion for appropriate relief, under G.S. 15A-1418, which motion was filed during defendant's appeal of his capital murder conviction and death sentence, because the procedures established in G.S. 15A-2005 were the only avenues by which defendant could have been adjudicated mentally retarded by the superior court. State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761, 2005 N.C. LEXIS 204 (2005).

Construction With Other Laws. — G.S. 15A-1417, which was enacted in 1977 and allows a trial court to fashion any other appropriate relief, must be read in pari materia with the more recently enacted G.S. 15A-2005 and G.S. 15A-2006; therefore, because the one-year window for post-conviction determinations of mental retardation under G.S. 15A-2006 has expired, and because G.S. 15A-2005 allows only for pretrial and sentencing determinations of mental retardation, superior courts are without jurisdiction to adjudicate criminal defendants mentally retarded via a motion for appropriate relief proceeding. State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761, 2005 N.C. LEXIS 204 (2005).

Relationship Between Mental Retardation, Competency to Stand Trial, and Forming Requisite Intent to Kill. — Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined State v. Ruof jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

Federal Habeas Corpus Review. — State death row prisoner was properly denied an evidentiary hearing by a federal district court on the issue of whether he was mentally retarded and therefore precluded from being executed under state law; a federal appellate court deferred to a state post-conviction court's factual finding that the prisoner failed to show that he suffered from significantly sub-average general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both manifesting before the age of 18, as required by G.S. 15A-2005(a)(1)(a), (a)(1)(c). Conaway v. Polk, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

Where the record was replete with evidence that an inmate was not mentally retarded under North Carolina's statutory definition found in G.S. 15A-2005, his death sentence did not violate the Eighth Amendment. Cole v. Branker, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 69904 (E.D.N.C. Sept. 20, 2007).

Cited in State v. Anderson, 355 N.C. 136, 558 S.E.2d 87, 2002 N.C. LEXIS 14 (2002).

§ 15A-2006: Expired pursuant to Session Laws 2001-346, s. 3, effective October 1, 2002.

§§ 15A-2007 through 15A-2009: Reserved for future codification purposes.

ARTICLE 101.

North Carolina Racial Justice Act.

§ 15A-2010. North Carolina Racial Justice Act.

No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race. (2009-464, s. 1.)

Editor's Note. — Session Laws 2009-464, s. 2, made this Article effective August 11, 2009. For persons under a death sentence imposed before the effective date of this act, motions under this act shall be filed within one year of the effective date of this act; for persons whose death sentence is imposed on or after the effective date of this act, motions shall be filed as provided in this act.

§ 15A-2011. Proof of racial discrimination.

(a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.

(c) The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death. (2009-464, s. 1.)

§ 15A-2012. Hearing procedure.

(a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.
(1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.
(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.
(3) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

(b) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.

(c) Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief from a death sentence upon the ground that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed shall follow and comply with G.S. 15A-1420, 15A-1421, and 15A-1422. (2009-464, s. 1.)

Chapter 15B.

Victims Compensation.

Article 1.

Crime Victims Compensation Act.

Sec.
15B-1. Short title.
15B-2. Definitions.
15B-3. Crime Victims Compensation Commission.
15B-4. Award of compensation.
15B-5. Attorney General to represent State.
15B-6. Powers of the Commission and Director.
15B-7. Filing of application for compensation award; contents.
15B-8. Procedure for filing application.
15B-8.1. Privilege and records of the Commission.
15B-9. [Repealed.]
15B-10. Awarding claims.
15B-11. Grounds for denial of claim or reduction of award.
15B-12. Evidence in contested cases.
15B-13. [Repealed.]
15B-14. Effect of prosecution or conviction of offender.
15B-15. Clerks of court to be notified.
15B-16. Manner of payment; non-assignability and exemptions.
15B-17. Award not subject to taxation or execution.
Sec.
15B-18. Subrogation by State.
15B-19. Subrogation by collateral sources prohibited.
15B-20. Publicity.
15B-21. Annual report.
15B-22. Disbursements.
15B-23. Crime Victims Compensation Fund.
15B-24. Requiring defendant to pay restitution encouraged.
15B-25. Compensation limits.
15B-26. Crime victims credit protection.
15B-27 through 15B-29. [Reserved.]

Article 2.

The Crime Victims Financial Recovery Assistance Act.

15B-30. Declaration of policy and purpose.
15B-31. Definitions.
15B-32. Notice of contract or agreement to pay.
15B-33. Penalties.
15B-34. Civil action to recover profits or funds; responsibilities of the Commission.
15B-35. Subrogation by the Crime Victims Compensation Fund.
15B-36. Conviction overturned or pardon issued.
15B-37. Evasive action void.

ARTICLE 1.

Crime Victims Compensation Act.

§ 15B-1. Short title.

This Article may be cited as the "North Carolina Crime Victims Compensation Act." (1983, c. 832, s. 1; 1991, c. 301, s. 1; 2004-159, s. 1.)

Editor's Note. — Session Laws 1983, c. 832, s. 6, as amended by Session Laws 1991, c. 301, s. 1, provides: "This act shall become effective when funds are appropriated by the General Assembly to the Department of Crime Control and Public Safety to implement the provisions of this act. No claims may be filed under this act for any criminally injurious conduct occurring before the effective date of this act. The Revisor of Statutes is informed that funds were appropriated by Session Laws 1987, c. 738, s. 118."

Session Laws 2004-159, s. 1, effective October 1, 2004, and applicable to contracts for profit from crime entered into on or after that date or funds of an offender that have accrued on or after that date, provides: "Sections 1 through 25 of Chapter 15B of the General Statutes are redesignated as Article 1 of Chapter 15B. The Revisor of Statutes is authorized to make changes in the newly designated Article 1 that will reflect the results of the recodification."

Session Laws 2004-159, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For comment, "Repairing the Breach and

Reconciling the Discordant: Mediation in the Criminal Justice System," see 72 N.C.L. Rev. 1479 (1994).

§ 15B-2. Definitions.

As used in this Article, the following definitions apply, unless the context requires otherwise:

(1) Allowable expense. — Reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, medically-related property, and other remedial treatment and care.

Allowable expense includes a total charge not in excess of five thousand dollars ($5,000) for expenses related to funeral, cremation, and burial, including transportation of a body, but excluding expenses for flowers, gravestone, and other items not directly related to the funeral service.

Allowable expense for medical care, counseling, rehabilitation, medically-related property, and other remedial treatment and care of a victim shall be limited to sixty-six and two-thirds percent (66 ⅔%) of the amount usually charged by the provider for the treatment or care. By accepting the compensation paid as allowable expense pursuant to this subdivision, the provider agrees that the compensation is payment in full for the treatment or care and shall not charge or otherwise hold a claimant financially responsible for the cost of services in addition to the amount of allowable expense.

(2) Claimant. — Any of the following persons who claims an award of compensation under this Article:

a. A victim;

b. A dependent of a deceased victim;

c. A third person who is not a collateral source and who provided benefit to the victim or his family other than in the course or scope of his employment, business, or profession;

d. A person who is authorized to act on behalf of a victim, a dependent, or a third person described in subdivision c.

The claimant, however, may not be the offender or an accomplice of the offender who committed the criminally injurious conduct.

(3) Collateral source. — A source of benefits or advantages for economic loss otherwise compensable that the victim or claimant has received or that is readily available to the victim or the claimant from any of the following sources:

a. The offender.

b. The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more states.

c. Social Security, Medicare, or Medicaid.

d. State-required, temporary, nonoccupational disability insurance.

e. Worker's compensation.

f. Wage continuation programs of any employer.

g. Proceeds of a contract of insurance payable to the victim for loss that the victim sustained because of the criminally injurious conduct.

h. A contract providing prepaid hospital and other health care services, or benefits for disability.

i. A contract of insurance that will pay for expenses directly related to a funeral, cremation, and burial, including transportation of a body.

(4) Commission. — The Crime Victims Compensation Commission established by G.S. 15B-3.

(4a) Consumer reporting agency. — As defined in G.S. 75-61(4).

(4b) Credit report. — As defined in G.S. 75-61(3).

(5) Criminally injurious conduct. — Conduct that by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death, or would be so punishable but for the fact that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this State. Criminally injurious conduct includes conduct that amounts to an offense involving impaired driving as defined in G.S. 20-4.01(24a), and conduct that amounts to a violation of G.S. 20-166 if the victim was a pedestrian or was operating a vehicle moved solely by human power or a mobility impairment device. For purposes of this Article, a mobility impairment device is a device that is designed for and intended to be used as a means of transportation for a person with a mobility impairment, is suitable for use both inside and outside a building, and whose maximum speed does not exceed 12 miles per hour when the device is being operated by a person with a mobility impairment. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle when the conduct is punishable only as a violation of other provisions of Chapter 20 of the General Statutes. Criminally injurious conduct shall also include an act of terrorism, as defined in 18 U.S.C. § 2331, that is committed outside of the United States against a citizen of this State.

(6) Dependent. — An individual wholly or substantially dependent upon the victim for care and support and includes a child of the victim born after his death.

(7) Dependent's economic loss. — Loss after a victim's death of contributions of things of economic value to his dependents, not including services they would have received from the victim if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death.

(8) Dependent's replacement service loss. — Loss reasonably incurred by dependents after a victim's death in obtaining ordinary and necessary services in lieu of those the victim would have performed for their benefit if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death and not subtracted in calculating dependent's economic loss.

Dependent's replacement service loss will be limited to a 26-week period commencing from the date of the injury and compensation shall not exceed two hundred dollars ($200.00) per week.

(9) Director. — The Director of the Commission appointed under G.S. 15B-3(g).

(10) Economic loss. — Economic detriment consisting only of allowable expense, work loss, replacement services loss, and household support loss. If criminally injurious conduct causes death, economic loss includes a dependent's economic loss and a dependent's replacement service loss. Noneconomic detriment is not economic loss, but economic loss may be caused by pain and suffering or physical impairment.

(10a) Household support loss. — The loss of support that a victim would have received from the victim's spouse for the purpose of maintaining a home or residence for the victim and the victim's dependents. A victim may be compensated fifty dollars ($50.00) per week for each dependent child. Compensation for household support loss shall not exceed three hundred dollars ($300.00) per week and shall be limited to 26 weeks commencing from the date of the injury. A victim may receive only one compensation for household support loss. Household support loss is only available to an unemployed victim whose spouse is the offender who committed the criminally injurious conduct that is the basis of the victim's claim under this act.

(11) Noneconomic detriment. — Pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage.

(12) Replacement services loss. — Expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured.

Replacement service loss will be limited to a 26-week period commencing from the date of the injury, and compensation may not exceed two hundred dollars ($200.00) per week.

(12a) Substantial evidence. — Relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

(13) Victim. — A person who suffers personal injury or death proximately caused by criminally injurious conduct.

(14) Work loss. — Loss of income from work that the injured person would have performed if he had not been injured and expenses reasonably incurred by him to obtain services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him, or by income he would have earned in available appropriate substitute work that he was capable of performing but unreasonably failed to undertake.

Compensation for work loss will be limited to 26 weeks commencing from the date of the injury, and compensation shall not exceed three hundred dollars ($300.00) per week. A claim for work loss will be paid only upon proof that the injured person was gainfully employed at the time of the criminally injurious conduct and, by physician's certificate, that the injured person was unable to work. (1983, c. 832, s. 1; 1987, c. 819, ss. 1-8; 1989, c. 322, s. 1; c. 679, s. 1; 1991, c. 301, s. 1; 1997-227, ss. 1, 2; 1998-212, s. 19.4(l); 2004-124, s. 18.1; 2004-159, s. 1; 2006-183, ss. 1, 2; 2009-355, s. 5.)

Editor's Note. — Session Laws 1997-227, s. 4, provides: "No additional funds shall be appropriated to implement this act as provided in G.S. 15B-22."

Subdivision (10a) was added by Session Laws 1998-212, s. 19.4(*l*), as subdivision (15), and was redesignated to preserve alphabetical order at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-355, s. 5, effective October 1, 2009, inserted "the following definitions apply" in the introductory language; made stylistic and punctuation changes throughout the section; and added subdivisions (4a) and (4b).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

OPINIONS OF ATTORNEY GENERAL

Payments made to the victim pursuant to under-insured or uninsured coverage are from a collateral source as defined in this section, and an award under the Crime Victims Compensation Act, will be reduced to the extent that the economic loss will be recouped from under-insured or uninsured coverage. See Opinion of Attorney General to Gary B. Eichelberger, Director, North Carolina Crime Control and Public Safety, Division of Victim and Justice Services, — N.C.A.G. — (May 8, 1995).

§ 15B-3. Crime Victims Compensation Commission.

(a) There is established the Crime Victims Compensation Commission of the Department of Crime Control and Public Safety, consisting of seven members as follows:

(1) One member to be appointed by the Governor;
(2) One member to be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate under G.S. 120-121;
(3) One member to be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121;
(4) The Attorney General or the Attorney General's designee;
(5) The Secretary of the Department of Crime Control and Public Safety or the Secretary's designee; and
(6) Two members to be appointed by the Secretary of the Department of Crime Control and Public Safety.

(b) Members shall serve terms of four years. A member shall continue to serve until his successor is duly appointed, but a holdover under this provision does not affect the expiration date of the succeeding term.

(c) In case of a vacancy on the Commission before the expiration of a member's term, a successor shall be appointed within 30 days of the vacancy for the remainder of the unexpired term by the appropriate official pursuant to subsection (a). Vacancies in legislative appointments shall be filled under G.S. 120-122.

(d) The Commission shall elect one of its members as chairman to serve until the expiration of his term.

(e) A majority of the Commission constitutes a quorum to transact business.

(f) Members shall receive compensation and reimbursement for expenses as provided in G.S. 138-5.

(g) The Commission shall name a Director upon the recommendation of the Secretary of Crime Control and Public Safety. The Director shall serve at the pleasure of the Commission. The Department of Crime Control and Public Safety shall provide for the compensation of the Director and shall provide professional and clerical staff necessary for the work of the Commission. (1983, c. 832, s. 1; 1987, c. 819, ss. 9, 10; 1991, c. 301, s. 1; 1995, c. 490, s. 14; 1999-269, s. 1; 2004-159, s. 1.)

§ 15B-4. Award of compensation.

(a) Subject to the limitations in G.S. 15B-22, compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met. Compensation shall only be paid for economic loss and not for noneconomic detriment. The Commission shall follow the rules of liability applicable to civil tort law in North Carolina.

(b) Compensation shall only be awarded for criminally injurious conduct that occurs or is attempted in this State except that criminally injurious conduct that occurs or is attempted against a resident of this State while in another state which does not have a victims compensation program of any type may be a basis of compensation. (1983, c. 832, s. 1; 1987, c. 819, s. 11; 1989, c. 322, s. 2; 1991, c. 301, s. 1; 2004-159, s. 1; 2006-183, s. 3.)

CASE NOTES

Robber was not entitled to benefits after being shot while attempting to flee a convenience store with money he stole from a customer. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Injuries to Criminals Not Covered. — The Victims Compensation Fund is not a Workers' Compensation fund for criminals that are injured during their illicit employment. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

§ 15B-5. Attorney General to represent State.

The Attorney General shall represent the interest of the State when:

(1) A decision of the Commission is appealed to the courts; and

(2) When the State is sued or when it brings or enters a lawsuit pursuant to this Article. (1983, c. 832, s. 1; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-6. Powers of the Commission and Director.

(a) In addition to powers authorized by this Article and Chapter 150B, the Commission may:

(1) Adopt rules in accordance with Part 3, Article 1 of Chapter 143B and Article 2A of Chapter 150B of the General Statutes necessary to carry out the purposes of this Article;

(2) Establish general policies and guidelines for awarding compensation and provide guidance to the staff assigned by the Secretary of the Department of Crime Control and Public Safety to administer the program;

(3) Accept for any lawful purpose and functions under this Article any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm, or corporation, and may deposit the same to the Crime Victims Compensation Fund.

(b) The Director shall have the following authority:

(1) With the consent of the district attorney, to request that law enforcement officers employed by the State or any political subdivision provide copies of any information or data gathered in the investigation of criminally injurious conduct that is the basis of any claim to enable the Director or Commission to determine whether, and the extent to which, a claimant qualifies for an award of compensation;

(2) With the consent of the district attorney, to request that prosecuting attorneys, law enforcement officers, and State agencies conduct investigations and provide information necessary to enable the Director or Commission to determine whether, and the extent to which, a claimant qualifies for an award of compensation; and

(3) To require the claimant to supplement the application for an award of compensation with any reasonably available medical or psychological reports pertaining to the injury for which the award of compensation is claimed.

Information obtained pursuant to this subsection is subject to the same privilege against public disclosure that may be asserted by the providing source. (1983, c. 832, s. 1; 1987, c. 819, s. 12; 1989, c. 679, s. 2; 1991, c. 301, s. 1; 2000-189, s. 3; 2004-159, s. 1.)

§ 15B-7. Filing of application for compensation award; contents.

(a) A claim for an award of compensation is commenced by filing an application for an award with the Director. The application shall be in a form prescribed by the Commission and shall contain the following information:

(1) The name and address of the victim of the criminally injurious conduct, the name and address of the claimant, and the relationship of the claimant to the victim;

(2) If the victim is deceased, the name and address of each dependent of the victim and the extent to which each is dependent upon the victim for care and support;

(3) The nature of the criminally injurious conduct that is the basis for the claim and the date on which the conduct occurred;

(4) The law-enforcement agency or officer to whom the criminally injurious conduct was reported and the date on which it was reported;

(5) The nature and extent of the injuries that the victim sustained from the criminally injurious conduct for which compensation is sought, the name and address of any person who gave medical treatment to the victim for the injuries, the name and address of any hospital or similar institution where the victim received medical treatment for the injuries, and whether the victim died as a result of the injuries;

(6) The total amount of the economic loss that the victim, a dependent, or the claimant sustained as a result of the criminally injurious conduct, without regard to the financial limitations set forth in G.S. 15B-11(f) and (g).

(7) The amount of benefits or advantages that the victim, a dependent, or other claimant has received or is entitled to receive from any collateral source for economic loss that resulted from the criminally injurious conduct, and the name of each collateral source;

(8) Whether the claimant is the spouse, parent, child, brother, or sister of the offender, or is similarly related to an accomplice of the offender who committed the criminally injurious conduct;

(9) A release authorizing the Commission and the Commission's staff to obtain any report, document, or information that relates to the determination of the claim for an award of compensation;

(10) Any additional relevant information that the Commission may require. The Commission may require the claimant to submit, with the application, materials to substantiate the facts that are stated in the application.

(b) A person who knowingly and willfully presents or attempts to present a false or fraudulent application, or a State officer or employee who knowingly and willfully participates or assists in the preparation or presentation of a false or fraudulent application is guilty of a Class 1 misdemeanor if the application is for a claim of not more than four hundred dollars ($400.00). If the application is for a claim of more than four hundred dollars ($400.00), the person is guilty of a Class I felony. (1983, c. 832, s. 1; 1987, c. 819, s. 13; 1991, c. 301, s. 1; 1993, c. 539, s. 303; 1994, Ex. Sess., c. 24, s. 14(c); 2004-159, s. 1.)

§ 15B-8. Procedure for filing application.

(a) The Director shall establish procedures for screening, filing, recording, investigating, and processing applications for an award of compensation. The Director shall also establish the procedures and methods for processing follow-up claims for compensation. The procedures and methods established by the Director under this subsection shall conform to any rules adopted by the Commission.

(b) Repealed by Session Laws 1987, c. 819, s. 14. (1983, c. 832, s. 1; 1987, c. 819, s. 14; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-8.1. Privilege and records of the Commission.

(a) In a proceeding under this Article, the privileges set forth in G.S. 8-53, 8-53.3, 8-53.4, 8-53.7, 8-53.8, and 8-56 do not apply to communications or records concerning the physical, mental or emotional condition of the claimant or victim if that condition is relevant to a claim for compensation.

(b) All medical information relating to the mental, physical, or emotional condition of a victim or claimant and all law enforcement records and information and any juvenile records shall be held confidential by the Commission and Director. Except for information held confidential under this subsection, the records of the Division shall be open to public inspection. (1989, c. 679, s. 3; 2004-159, s. 1.)

§ 15B-9: Repealed by Session Laws 1987, c. 819, s. 15.

§ 15B-10. Awarding claims.

(a) The Director shall decide the award of compensation for an initial claim or follow-up claim when the claim does not exceed twelve thousand five hundred dollars ($12,500) and does not include future economic loss. The Director shall report all awards under this subsection to the Commission.

(b) The Director shall recommend the award of compensation for an initial claim or follow-up claim when the claim exceeds twelve thousand five hundred dollars ($12,500) or involves future economic loss. The Commission shall decide the award of compensation for a claim based on a review of written evidence submitted to the Commission by the Director.

(c) In reporting a decision under subsection (a) or recommending a decision under subsection (b), the Director shall submit to the Commission documentation to establish the economic loss of the claimant by substantial evidence.

(d) The Director shall send each claimant a written statement of a decision made under subsection (a) or (b) that gives the reasons for the decision. A claimant who is dissatisfied with a decision may commence a contested case under Article 3 of Chapter 150B of the General Statutes. (1983, c. 832, s. 1; 1987, c. 819, s. 16; 1991, c. 301, s. 1; 1999-269, s. 2; 2004-159, s. 1; 2009-354, s. 3.)

Effect of Amendments. — Session Laws 2009-354, s. 3, effective July 27, 2009, substituted "twelve thousand five hundred dollars ($12,500)" for "seven thousand five hundred dollars ($7,500)" in the first sentence of subsections (a) and (b).

OPINIONS OF ATTORNEY GENERAL

Nontraffic Misdemeanors and Contributory Misconduct. — In all cases of nontraffic misdemeanors and contributory misconduct the final decision to award or deny a claim must be made by the Crime Victims Compensation Commission even if the amount of the claim is less than $ 7,500.00; the director of the commission recommends denial or award of such claims, and the commission decides. See opinion of Attorney General to Mr. A. A. Adams, Chairman, North Carolina Victims Compensation Commission, 2000 N.C. AG LEXIS 30 (4/5/2000).

§ 15B-11. Grounds for denial of claim or reduction of award.

(a) An award of compensation shall be denied if:

(1) The claimant fails to file an application for an award within two years after the date of the criminally injurious conduct that caused the injury or death for which the claimant seeks the award;

(2) The economic loss is incurred after one year from the date of the criminally injurious conduct that caused the injury or death for which the victim seeks the award, except in the case where the victim for whom compensation is sought was 10 years old or younger at the time the injury occurred. In that case an award of compensation will be denied if the economic loss is incurred after two years from the date of the criminally injurious conduct that caused the injury or death for which the victim seeks the award;

(3) The criminally injurious conduct was not reported to a law enforcement officer or agency within 72 hours of its occurrence, and there was no good cause for the delay;

(4) The award would benefit the offender or the offender's accomplice, unless a determination is made that the interests of justice require that an award be approved in a particular case;

(5) The criminally injurious conduct occurred while the victim was confined in any State, county, or city prison, correctional, youth services, or juvenile facility, or local confinement facility, or half-way house, group home, or similar facility; or

(6) The victim was participating in a felony at or about the time that the victim's injury occurred.

(b) A claim may be denied or an award of compensation may be reduced if:

(1) The victim was participating in a nontraffic misdemeanor at or about the time that the victim's injury occurred; or

(2) The claimant or a victim through whom the claimant claims engaged in contributory misconduct.

(b1) The Commission or Director, whichever has the authority to decide a claim under G.S. 15B-10, shall use the Commission's/Director's discretion in determining whether to deny a claim under subsection (b) of this section. In exercising its discretion, the Commission or Director shall consider whether any proximate cause exists between the injury and the misdemeanor or contributory misconduct, when applicable. The Director or Commission shall deny claims when it finds that there was contributory misconduct that is a proximate cause of becoming a victim. However, contributory misconduct that is not a proximate cause of becoming a victim shall not lead to an automatic denial of a claim.

(c) A claim may be denied, an award of compensation may be reduced, and a claim that has already been decided may be reconsidered upon finding that the claimant or victim, without good cause, has not fully cooperated with appropriate law enforcement agencies or in the prosecution of criminal cases with regard to the criminally injurious conduct that is the basis for the award.

(c1) A claim may be denied upon a finding that the claimant has been convicted of any felony classified as a Class A, B1, B2, C, D, or E felony under the laws of the State of North Carolina and that such felony was committed within 3 years of the time the victim's injury occurred.

(d) After reaching a decision to approve an award of compensation, but before notifying the claimant, the Director shall require the claimant to submit current information as to collateral sources on forms prescribed by the Commission.

An award that has been approved shall nevertheless be denied or reduced to the extent that the economic loss upon which the claim is based is or will be recouped from a collateral source. If an award is reduced or a claim is denied because of the expected recoupment of all or part of the economic loss of the claimant from a collateral source, the amount of the award or the denial of the claim shall be conditioned upon the claimant's economic loss being recouped by the collateral source. If it is thereafter determined that the claimant will not receive all or part of the expected recoupment, the claim shall be reopened and an award shall be approved in an amount equal to the amount of expected recoupment that it is determined the claimant will not receive from the collateral source, subject to the limitations set forth in subsections (f) and (g).

(e) Repealed by Session Laws 1998-212, s. 19.4(m), effective December 1, 1998.

(f) Compensation for replacement services loss, dependent's economic loss, and dependent's replacement services loss may not exceed two hundred dollars ($200.00) per week. Compensation for work loss and household support loss may not exceed three hundred dollars ($300.00) per week.

(g) Compensation payable to a victim and to all other claimants sustaining economic loss because of injury to, or the death of, that victim may not exceed thirty thousand dollars ($30,000) in the aggregate in addition to allowable funeral, cremation, and burial expenses.

(h) The right to reconsider or reopen a claim does not affect the finality of its decision for the purpose of judicial review. (1983, c. 832, s. 1; 1987, c. 819, ss. 17-21; 1989 (Reg. Sess., 1990), c. 898, s. 1; c. 1066, s. 131; 1991, c. 301, s. 1; 1994, Ex. Sess., c. 3, s. 1; 1997-227, s. 3; 1998-212, s. 19.4(m); 1999-269, s. 3; 2004-159, s. 1; 2006-183, ss. 4, 5; 2009-354, s. 4.)

Editor's Note. — Session Laws 1997-227, s. 4, provides: "No additional funds shall be appropriated to implement this act as provided in G.S. 15B-22."

Effect of Amendments. — Session Laws 2009-354, s. 4, effective July 27, 2009, designated the former last paragraph of subsection (b) as subsection (b1) and rewrote subsection (b1).

CASE NOTES

Misconduct by Claimant. — The conduct of the claimant is misconduct if it is not within the accepted norm or standard of proper behavior, which includes unlawful conduct. The test for determining accepted norms and proper behavior is best determined by the use of a reasonable man standard, or what a reasonable person would have done under similar and like circumstances. Evans v. North Carolina Dep't of Crime Control & Pub. Safety, 101 N.C. App. 108, 398 S.E.2d 880 (1990), decided prior to the 1994 Extra Session amendment to this section.

When Claimant's Misconduct Will Occasion Denial or Reduction in Award. — Where a claimant's injuries are a direct result of the criminally injurious conduct of another, the claimant's own misconduct must have been a proximate cause of those injuries for the Commission to deny or reduce a claim under the statute. Evans v. North Carolina Dep't of Crime Control & Pub. Safety, 101 N.C. App. 108, 398 S.E.2d 880 (1990), decided prior to the 1994 Extra Session amendment to this section.

The test for contributory misconduct is two-pronged, that is (1) was there misconduct on the part of petitioner and, if so, (2) was that misconduct a proximate cause of the injury? McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Robber was not entitled to benefits after being shot while attempting to flee a convenience store with money he stole from a customer. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Criminals Not Entitled to Compensation. — The Victims' Compensation Fund is not a Workers' Compensation fund for criminals that are injured during their illicit employment. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Applied in Ellis v. North Carolina Crime Victims Comp. Comm'n, 111 N.C. App. 157, 432 S.E.2d 160 (1993).

OPINIONS OF ATTORNEY GENERAL

Payments made to the victim pursuant to under-insured or uninsured coverage are a from collateral source as defined in G.S. 15B-2, and an award under the Crime Victims Compensation Act will be reduced to the extent that the economic loss will be recouped from under-insured or uninsured coverage. See opinion of Attorney General to Gary B. Eichelberger, Director, North Carolina Crime Control and Public Safety, Division of Victim and Justice Services, — N.C.A.G. — (May 8, 1995).

Nontraffic Misdemeanors and Contributory Misconduct. — In all cases of nontraffic misdemeanors and contributory misconduct the final decision to award or deny a claim must be made by the Crime Victims Compensation Commission even if the amount of the claim is less than $ 7,500.00; the director of the commission recommends denial or award of such claims, and the commission decides. See opinion of Attorney General to Mr. A. A. Adams, Chairman, North Carolina Victims Compensation Commission, 2000 N.C. AG LEXIS 30 (4/5/2000).

§ 15B-12. Evidence in contested cases.

(a) Except as provided in this section, evidence in a contested case shall be taken in accordance with Article 3 of Chapter 150B of the General Statutes.

(b) In a proceeding under this Article, the privileges set forth in G.S. 8-53, 8-53.3, 8-53.4, 8-53.7, 8-53.8, and 8-56 do not apply to communications or records concerning the physical, mental or emotional condition of the claimant or victim if that condition is relevant to a claim for compensation.

(c) If the mental, physical, or emotional condition of a victim or claimant is material to a claim for an award of compensation, the administrative law judge may order the victim or claimant to submit to a mental or physical examination by a physician or psychologist, and may order an autopsy of a deceased victim. The order may be made for good cause shown and upon notice to the person to be examined and to the claimant. The order shall specify the time, place, manner, conditions, and scope of the examination or autopsy and the person by whom it is to be made, and shall require the person who performs the examination or autopsy to file with the administrative law judge a detailed written report of the examination or autopsy. The report shall set out the findings, including the results of all tests made, diagnosis, prognosis, and other conclusions, and reports of earlier examinations of the same conditions. On request of the person examined, the administrative law judge shall furnish him a copy of the report. If the victim is deceased, the administrative law judge on request, shall furnish the claimant a copy of the report.

(d) The administrative law judge may request that law-enforcement officers employed by the State or any political subdivision thereof provide it with copies of any information or data gathered in the investigation of the criminally injurious conduct that is the basis of any claim to enable it to determine whether, and the extent to which, a claimant qualifies for an award of compensation. The administrative law judge may also request that prosecuting attorneys, law-enforcement officers, and State agencies conduct investigations and provide information necessary to enable the administrative law judge to determine whether, and the extent to which, a claimant qualifies for an award of compensation. Information obtained pursuant to this subsection is subject to the same privilege against public disclosure that may be asserted by the providing source.

(e) The administrative law judge may require the claimant to supplement the application for an award of compensation with any reasonably available medical or psychological reports relating to the injury for which the award of compensation is claimed.

(f) The administrative law judge may not request the victim or the claimant to supply any evidence that would not be admissible at a trial under G.S. 8C-1, Rule 412.

(g) Notwithstanding any provision to the contrary relating to the confidentiality of juvenile records, the administrative law judge shall have access to the records of juvenile proceedings which bear upon an application for compensation, but to the extent possible, it shall maintain the confidentiality of those records.

(h) The administrative law judge may exclude from a hearing of any matter at issue all persons, except those engaged in the hearing, during the taking of medical information and law-enforcement investigative records and information as evidence.

(i) Except for information held confidential by the administrative law judge, the official record in a contested case under this Article is open to public inspection. (1983, c. 832, s. 1; 1987, c. 819, s. 22; 1989, c. 679, ss. 4, 5; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-13: Repealed by Session Laws 1987, c. 819, s. 23.

§ 15B-14. Effect of prosecution or conviction of offender.

(a) An award of compensation may be approved whether or not any person is prosecuted or convicted for committing the conduct that is the basis of the award. Proof of conviction of a person whose conduct gave rise to a claim is conclusive evidence that the crime was committed, unless an application for rehearing, an appeal of the conviction, or a writ of certiorari is pending, or a rehearing or new trial has been ordered.

(b) Upon a request of the Attorney General, the proceedings in a claim for an award of compensation may be suspended pending disposition of a criminal prosecution that has been commenced or is imminent.

(c) In making an award, any specific statement of loss to a victim that a trial court has included in its judgment in the case may be considered. (1983, c. 832, s. 1; 1987, c. 819, s. 24; 1991, c. 301, s. 1; 2004-159, s. 1.)

CASE NOTES

Cited in Ellis v. North Carolina Crime Victims Comp. Comm'n, 111 N.C. App. 157, 432 S.E.2d 160 (1993).

§ 15B-15. Clerks of court to be notified.

The Director shall notify in writing the clerk of superior court of the county in which the offense occurred of any award made from the Crime Victims Compensation Fund to the victim. The clerk shall place the notice in the case file of any defendant charged with the offense that gave rise to the award to the victim. (1983, c. 832, s. 1; 1987, c. 819, s. 25; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-16. Manner of payment; non-assignability and exemptions.

(a) The Director shall pay award payments directly to the service provider on behalf of the claimant. Eligible out-of-pocket costs borne by the claimant shall be paid directly to the victim only if such costs can be documented and verified.

(b) Upon request of the claimant, future economic loss, other than allowable expense, may be commuted to a lump sum only on a finding that:

(1) The award in a lump sum will promote the interests of the claimant; or

(2) The present value of all future economic loss other than allowable expense does not exceed one thousand dollars ($1,000).

(c) An award for future economic loss payable in installments may be made only for a period as to which future economic loss can reasonably be determined. An award for future economic loss payable in installments may be reconsidered and modified upon a finding that a material and substantial change of circumstances has occurred.

(d) An order on reconsideration of an award may not require refund of amounts previously paid unless the award was obtained by fraud.

(e) The Director, even after an award made by the Commission, may negotiate with any service provider in order to obtain a reduction of the amount claimed by the provider in exchange for a full release of any claim against a claimant. (1983, c. 832, s. 1; 1987, c. 819, s. 26; 1989, c. 679, s. 6; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-17. Award not subject to taxation or execution.

(a) An award is exempt from taxation.

(b) An award is not subject to execution, attachment, garnishment, or other process, except that, upon receipt of an award by a claimant, the part of the award that is for allowable expense is not exempt from such an action by a creditor to the extent that he provides products, services, or accommodations the costs of which are included in the award, and the part of the award that is for work loss is not exempt from such an action to secure payment of alimony, maintenance, or child support. (1983, c. 832, s. 1; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-18. Subrogation by State.

(a) If compensation is awarded, the Crime Victims Compensation Fund is subrogated to all the claimant's rights to receive or recover benefits or advantages for economic loss from a source that is, or if readily available to the victim or claimant would be, a collateral source, to the extent of the compensation awarded.

(b) The Crime Victims Compensation Fund is an eligible recipient for restitution under G.S. 15A-1021, 15A-1343, 148-33.1, 148-33.2, 148-57.1, and any other applicable statutes.

(c) As a prerequisite to bringing an action to recover damages related to criminally injurious conduct for which compensation is claimed or awarded, the claimant shall give the Commission prior written notice of the proposed action. After receiving the notice the Commission shall immediately notify the Attorney General who shall promptly:

(1) Join in the action as a party plaintiff to recover compensation awarded;

(2) Require that the claimant bring the action in his individual name as a trustee in behalf of the State to recover compensation awarded; or

(3) Reserve its rights and do neither in the proposed action. If, as requested by the Attorney General, the claimant brings the action as trustee and recovers compensation awarded from the Crime Victims Compensation Fund, he may deduct from the compensation recovered in behalf of the State the reasonable expenses, including attorney fees, allocable by the court for that recovery.

(d) If a judgment or verdict separately indicates economic loss and noneconomic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In an action in a court of this State arising out of criminally injurious conduct, the judge, on timely motion, shall direct the jury to return a special verdict, indicating separately the awards for noneconomic detriment, punitive damages, and economic loss.

(e) Any funds recovered by the Crime Victims Compensation Fund pursuant to this section shall be paid to the general fund.

(f) The Director may pursue any claim of the Crime Victim's Compensation Fund or the Commission set forth in this Article. At the request of the Director, or otherwise, the Attorney General is authorized to assert the rights of the Crime Victim's Compensation Fund or Commission before any administrative or judicial tribunal for purposes of enforcing a claim or right set forth in this Article. (1983, c. 832, s. 1; 1987, c. 819, s. 27; 1989, c. 679, s. 6; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-19. Subrogation by collateral sources prohibited.

Subrogation rights that a collateral source may have may not extend to a recovery from a claimant of all or any part of an award made under this Article. A collateral source may not apply in the name of a claimant or otherwise for an award of compensation based upon injury to a claimant to whose rights the collateral source may be subrogated. (1983, c. 832, s. 1; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-20. Publicity.

Law enforcement agencies responsible for investigating offenses committed in the State may provide information to victims of those offenses and to their dependents concerning the existence of the Crime Victims Compensation Fund and the source of applications for compensation from the Fund. (1983, c. 832, s. 1; 1987, c. 819, s. 28; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-21. Annual report.

The Commission shall, by March 15 each year, prepare and transmit to the Governor and the General Assembly a report of its activities in the prior fiscal year and the current fiscal year to date. The report shall include:

(1) The number of claims filed;
(2) The number of awards made;
(2a) The number of pending cases by year received;
(3) The amount of each award;
(4) A statistical summary of claims denied and awards made;
(5) The administrative costs of the Commission, including the compensation of commissioners;
(6) The current unencumbered balance of the North Carolina Crime Victims Compensation Fund;
(7) The amount of funds carried over from the prior fiscal year;
(8) The amount of funds received in the prior fiscal year from the Department of Correction and from the compensation fund established pursuant to the Victims Crime Act of 1984, 42 U.S.C. § 10601, et seq.; and
(9) The amount of funds expected to be received in the current fiscal year, as well as the amount actually received in the current fiscal year on the date of the report, from the Department of Correction and from the compensation fund established pursuant to the Victims Crime Act of 1984, 42 U.S.C. § 10601, et seq.

The Attorney General and State Auditor shall assist the Commission in the preparation of the report required by this section. (1983, c. 832, s. 1; 1987, c. 819, s. 29; 1991, c. 301, s. 1; 1999-237, s. 20.2; 2001-424, s. 26.5; 2004-159, s. 1.)

§ 15B-22. Disbursements.

If compensation awarded under this Article cannot be paid due to insufficient funds in the Crime Victims Compensation Fund, payment shall be delayed until sufficient funds are available and no further awards of compensation shall be made until sufficient funds are available. (1983, c. 832, s. 1; 1987, c. 819, s. 31; 1991, c. 301, s. 1; 2004-159, s. 1.)

§ 15B-23. Crime Victims Compensation Fund.

There is established the Crime Victims Compensation Fund. Revenue in the Crime Victims Compensation Fund includes amounts credited to the Fund under G.S. 148-2 and other funds. Any surplus in the Crime Victims Compensation Fund shall not revert. The Crime Victims Compensation Fund shall be kept on deposit with the State Treasurer, as in the case of other State funds, and may be invested by the State Treasurer in any lawful security for the investment of State money. The Crime Victims Compensation Fund is subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1987, c. 819, s. 30; 1993 (Reg. Sess., 1994), c. 769, s. 21.5(b); 2004-159, s. 1.)

§ 15B-24. Requiring defendant to pay restitution encouraged.

Pursuant to a Court's power to require restitution as a condition of probation, parole or work-release privileges, a Court may require a defendant to pay restitution to a victim, regardless of whether the victim receives compensation from the Crime Victims Compensation Fund, or to the Fund. It is the intent of the General Assembly that a victim's receipt of compensation from the Fund shall not discourage a Court from considering, where appropriate, payment of restitution by the defendant and alternatives to incarceration of the defendant. (1987, c. 819, s. 33; 2004-159, s. 1.)

§ 15B-25. Compensation limits.

This Article shall not be construed to create a right to receive compensation. Compensation payable under Chapter 15B shall only be available to the extent that the General Assembly appropriates funds that purpose. (1987, c. 819, s. 36; 2004-159, s. 1.)

§ 15B-26. Crime victims credit protection.

(a) A creditor that is owed money for services provided to a victim as a result of the criminally injurious conduct inflicted on the victim shall not communicate any information about the debt to a consumer reporting agency during the pendency of an application for an award filed pursuant to G.S. 15B-7 or during the pendency of an appeal from a decision related to such an application.

(b) The victim bears the burden of notifying the creditor that the debt is subject to subsection (a) of this section.

(c) A creditor may request monthly verification from the Commission that the application or appeal is still pending, and the Commission shall provide this verification. (2009-355, s. 6.)

Editor's Note. — Session Laws 2009-355, s. 8, made this section effective October 1, 2009.

§§ 15B-27 through 15B-29: Reserved for future codification purposes.

Article 2.

The Crime Victims Financial Recovery Assistance Act.

§ 15B-30. Declaration of policy and purpose.

The General Assembly of North Carolina hereby declares as a matter of public policy that:

(1) No person who commits a crime should thereafter gain monetary profit as the result of committing the crime.

(2) Victims of crime have a special relationship to any profit from the crime committed against them, including the personal belongings and memorabilia of a convicted felon whose criminal actions and resulting notoriety enhance the value of those belongings and memorabilia.

(3) To the extent profit from crime would not have been realized but for an offender's commission of illegal acts, an offender does not have an equitable interest in the profit and allowing the offender to retain the profit would result in the offender's unjust enrichment.

The General Assembly finds that the State has a compelling interest in ensuring that persons convicted of crimes do not profit from those crimes, and that victims of crime are compensated by those who have harmed them.

The General Assembly further finds that crime victims have difficulty satisfying restitution orders or civil judgments entered against their offenders because the victims often lack the expertise and resources to identify or locate assets that an offender may have.

In order to carry out this public policy and to satisfy these compelling interests, the General Assembly has enacted the provisions of this Article providing a mechanism by which crime victims are notified of the existence of an offender's assets and are authorized to bring an action to recover those assets. (2004-159, s. 2.)

Editor's Note. — Session Laws 2004-159, s. 5, made this Article effective October 1, 2004, and applicable to contracts for profit from crime entered into on or after that date or funds of an offender that have accrued on or after that date.

Session Laws 2004-159, s. 4, contains a severability clause.

§ 15B-31. Definitions.

The following definitions apply in this Article:

(1) Commission. — The Crime Victims Compensation Commission established under G.S. 15B-3.

(2) Convicted. — A finding or verdict of guilty by a jury or by entry of a plea of guilty or no contest, or a finding of not guilty by reason of insanity.

(3) Crime memorabilia. — Any tangible property belonging to or that belonged to an offender prior to conviction, the value of which is increased by the notoriety gained from the conviction of a felony.

(4) Earned income. — Income derived from one's own labor or through active participation in a business, as distinguished from income including dividends or investments.

(5) Eligible person. — Any of the following:
  a. A victim of the crime for which the offender was convicted.
  b. A surviving spouse, parent, or child of a deceased victim of the crime for which the offender was convicted.

c. Any other person dependent for the person's principal support upon a deceased victim of the crime for which the offender was convicted.

However, "eligible person" does not include the offender or an accomplice to the offender.

(6) Felony. — An offense defined as a felony by any North Carolina or United States statute that was committed in North Carolina and that resulted in physical or emotional injury, or death, to another person.

(7) Funds of an offender. — All funds and property received from any source by an offender, excluding child support and earned income, where the offender:

a. Is an inmate serving a sentence with the Department of Correction or a prisoner confined at a local correctional facility or federal correctional institute, and includes funds that a superintendent, sheriff, or municipal official receives on behalf of an inmate or prisoner and deposits in an inmate account to the credit of the inmate or deposits in a prisoner account to the credit of the prisoner; or

b. Is not an inmate or prisoner but who is serving a sentence of probation, conditional discharge, or post-release supervision.

(8) Offender. — A person who has been convicted of a felony or that person's legal representative or assignee.

(9) Profit from crime. — Any income, assets, or property obtained through or generated from the commission of a crime for which the offender was convicted, including any income, assets, or property generated from the sale of crime memorabilia or obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of the crime, as well as any gain from the sale, conversion, or exchange of the income, assets, or property. "Profit from crime" does not include voluntary donations or contributions to an offender used to assist in the appeal of a conviction, provided the donation or contribution is not given in exchange for something of material value.

(10) Victim. — Any natural person who suffers physical or emotional injury, or the threat of physical or emotional injury, as the result of the commission of a felony. (2004-159, s. 2.)

§ 15B-32. Notice of contract or agreement to pay.

(a) Notice to Commission. —

(1) Every person, firm, corporation, partnership, association, or other legal entity, or representative of a person, firm, corporation, partnership, association, or entity that knowingly contracts for, pays, or agrees to pay to an offender (i) profit from crime or (ii) funds of an offender where the value or aggregate value of the payment or payments exceeds ten thousand dollars ($10,000) shall submit to the Commission a copy of the contract or reduce to writing the terms of any oral agreement or obligation to pay as soon as practicable after discovering the payment or intended payment constitutes profit from crime or funds of an offender.

(2) Whenever the payment or obligation to pay involves funds of an offender that a superintendent, sheriff, or municipal officer (i) receives or will receive on behalf of an inmate serving a sentence with the Department of Correction or a prisoner confined at a local correctional facility, (ii) deposits or will deposit in an inmate account to the credit of an inmate or prisoner, and (iii) the value of such funds exceeds or

will exceed ten thousand dollars ($10,000), the State or subdivision of the State shall also give written notice to the Commission.

(3) Whenever the State or a subdivision of the State makes a payment or has an obligation to pay funds of an offender and the value of such funds exceeds or will exceed ten thousand dollars ($10,000), the State or subdivision of the State shall also give written notice to the Commission.

(4) In all other instances where the payment or obligation to pay involves funds of an offender and the value or aggregate value of the funds exceeds or will exceed ten thousand dollars ($10,000), the offender who receives or will receive the funds shall give written notice to the Commission.

(b) Notice to Eligible Persons. — The Commission shall, upon receipt of a notice of a contract, an agreement to pay, or payment of profit from crime or funds of an offender, notify in writing by certified mail, return receipt requested, all known eligible persons where the eligible persons' names and addresses are known to the Commission. The Commission may, in its discretion, provide for additional notice as it deems necessary. (2004-159, s. 2.)

§ 15B-33. Penalties.

(a) Assessment and Civil Penalty for Failure to Give Notice. — Any person or entity, other than the State, a subdivision of the State, or a person who is a superintendent, sheriff, or municipal official, who willfully fails to give notice as required by G.S. 15B-32 is subject to an assessment of up to the amount of the payment or obligation to pay and a civil penalty of up to one thousand dollars ($1,000) or ten percent (10%) of the payment or obligation to pay, whichever is greater.

(b) Notice and Opportunity to Be Heard Required. — After providing notice and opportunity to be heard in accordance with the provisions of Chapter 150B of the General Statutes, the Commission may order the respondent to pay the assessment and civil penalty imposed by this section.

(c) Failure to Pay. — If a respondent fails to pay the assessment and civil penalty imposed by this section within sixty (60) days of being ordered to pay, the assessment and civil penalty may be recovered from the respondent by an action brought by the attorney general, upon the request of the Commission, in any court of competent jurisdiction.

(d) Establishment of Escrow Account; Notice to Eligible Persons. — The Commission shall deposit the assessment in an escrow account pending the expiration of the three-year statute of limitations authorized by G.S. 15B-34 to preserve the funds to satisfy a civil judgment in favor of an eligible person to whom the failure to give notice relates. The Commission shall notify any eligible person who may have a claim against the offender of the existence of the funds being held in escrow. The notice shall instruct the eligible person that the person may have a right to commence a civil action against the offender as well as any other information deemed necessary by the Commission.

(e) Satisfaction of Judgment from Escrow Account. — Upon an eligible person's presentation to the Commission of a civil judgment for damages arising out of the offense for which the offender was convicted, the Commission shall satisfy up to one hundred percent (100%) of that judgment, including costs and disbursements as taxed by the clerk of the court, with the escrowed fund obtained pursuant to this section, but in no event shall the amount of all judgments, costs, and disbursements satisfied from the escrowed funds exceed the amount in escrow. If more than one eligible person indicates to the Commission that the eligible person intends to commence or has commenced a civil action against the offender, the Commission shall delay satisfying any judgment, costs, and disbursements until the claims of all eligible persons are reduced to judgment. If the aggregate of all judgments, costs, and disbursement obtained exceeds the amount of escrowed funds, the amount used to partially satisfy each judgment shall be reduced to a pro rata share.

(f) Return of Unclaimed Escrowed Funds. — After the expiration of the three-year statute of limitations period established in G.S. 15B-34, the Commission shall review all judgments that have been satisfied from the escrowed funds. In the event no claim was filed prior to the expiration of the three-year statute of limitations, the Commission shall return the escrowed amount to the respondent. In the event a claim or claims are pending at the expiration of the statute of limitations, the funds shall remain escrowed until the final determination of all claims to allow the Commission to satisfy any judgment which may be obtained by the eligible person after which time any remaining escrowed amount shall be returned to the respondent.

(g) Remittance of Proceeds from Civil Penalty. — The Commission shall remit the clear proceeds of the civil penalty of up to one thousand dollars ($1,000) or ten percent (10%) of the payment or obligation to pay, whichever is greater, assessed under this section to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (2004-159, s. 2.)

§ 15B-34. Civil action to recover profits or funds; responsibilities of the Commission.

(a) Civil Action. — Notwithstanding any inconsistent provision of law with respect to the timely bringing of an action, an eligible person may, within three years of the discovery of any profit from crime or funds of an offender, bring a civil action in a court of competent jurisdiction against an offender for damages arising out of the offense for which the offender was convicted.

(b) Notice by Eligible Persons. — Upon filing an action under subsection (a) of this section, the eligible person shall give notice to the Commission of the filing by delivering a copy of the summons and complaint to the Commission. The eligible person may also give notice to the Commission prior to filing the action so as to allow the Commission to apply for any appropriate provisional remedies, which are otherwise authorized to be invoked prior to the commencement of an action.

(c) Responsibilities of Commission. — Upon receipt of a copy of a summons and complaint, or upon receipt of notice from the eligible person prior to filing an action, the Commission shall immediately take action to:

(1) Notify all other known eligible persons of the filing of the civil action by certified mail, return receipt requested, where the eligible persons' names and addresses are known to the Commission.

(2) Provide, in its discretion, for additional notice as it deems necessary.

(3) Avoid the wasting of the assets identified in the complaint as the profit from crime or funds of an offender in any manner consistent with subsection (d) of this section.

(d) Standing; Authority to Avoid Wasting of Assets. — The Commission has standing and, acting on its own behalf or on behalf of all eligible persons, shall have the right to apply for any and all provisional remedies that are also otherwise available to the plaintiff in the civil action brought under subsection (a) of this section, including attachment, injunction, constructive trust, and receivership. On a motion for a provisional remedy, the moving party shall state whether any other provisional remedy has previously been sought in the same action against the same defendant. The court may require the moving party to elect between those remedies to which it would otherwise be entitled. (2004-159, s. 2.)

§ 15B-35. Subrogation by the Crime Victims Compensation Fund.

Claims on profit from crime or funds of an offender are subject to subrogation by the Crime Victims Compensation Fund pursuant to G.S. 15B-18. (2004-159, s. 2.)

§ 15B-36. Conviction overturned or pardon issued.

If profit from crime is subject to a provisional remedy on behalf of eligible persons and the conviction for the criminal offense from which profit from crime is realized is reversed, vacated, or set aside, or if the offender has been granted an unconditional pardon of innocence for the criminal offense, those funds shall be returned to the rightful owner. (2004-159, s. 2.)

§ 15B-37. Evasive action void.

Any action taken by an offender, whether by way of execution of a power of attorney, creation of corporate entities, or otherwise, to defeat the purpose of this Article shall be void as against the public policy of this State. (2004-159, s. 2.)

Chapter 15C.
Address Confidentiality Program.

Sec.
15C-1. Purpose.
15C-2. Definitions.
15C-3. Address Confidentiality Program.
15C-4. Filing and certification of applications; authorization card.
15C-5. Change of name, address, or telephone number.
15C-6. Falsifying application information.
Sec.
15C-7. Certification cancellation; records.
15C-8. Address use by State or local agencies.
15C-9. Disclosure of address prohibited.
15C-10. Assistance for program applicants.
15C-11. Limited liability.
15C-12. Rule-making authority.
15C-13. Additional time for action.

§ 15C-1. Purpose.

The purpose of this Chapter is to enable the State and the agencies of North Carolina to respond to requests for public records without disclosing the location of a victim of domestic violence, sexual offense, stalking, or human trafficking; to enable interagency cooperation in providing address confidentiality for victims of domestic violence, sexual offense, stalking, or human trafficking; and to enable the State and its agencies to accept a program participant's use of an address designated by the Office of the Attorney General as a substitute address. (2002-171, s. 1; 2007-547, s. 4.)

Cross References. — As to human trafficking, see G.S. 14-43.11. As to domestic violence, generally, see G.S. 50B-1 et seq. As to rape and other sex offenses, see G.S. 14-27.1 et seq. As to stalking, see G.S. 14-277.3A. As to public records, generally, see G.S. 132-1 et seq.

Editor's Note. — Session Laws 2002-171, s. 10, made this Chapter effective January 1, 2003.

Session Laws 2002-171, s. 9, provides: "No General Fund appropriations shall be used to implement this act. The Attorney General and all other agencies to which this act applies shall implement the provisions of this act with funds that are or will become available as a result of the settlement of the case entitled *State of Florida, et al. v. Nine West Group, Inc., and John Does 1-500*, Civil Action No. 00 CIV 1707 (BDP), U.S.D.C., Southern District of New York, or other grants or funds that are not appropriated from the General Fund."

§ 15C-2. Definitions.

The following definitions apply in this Chapter:

(1) Actual address or address. — A residential, work, or school street address as specified on the individual's application to be a program participant under this Chapter.

(2) Address Confidentiality Program or Program. — A program in the Office of the Attorney General to protect the confidentiality of the address of a relocated victim of domestic violence, sexual offense, or stalking to prevent the victim's assailants or potential assailants from finding the victim through public records.

(3) Agency of North Carolina or agency. — Includes every elected or appointed State or local public office, public officer, or official; institution, board, commission, bureau, council, department, authority, or other unit of government of the State or of any local government; or unit, special district, or other political subdivision of State or local government.

(4) Application assistant. — An employee of an agency or nonprofit organization who provides counseling, referral, shelter, or other specialized services to victims of domestic violence, sexual offense, stalking, or human trafficking and who has been designated by the

Attorney General to assist individuals with applications to participate in the Address Confidentiality Program.

(5) Attorney General. — Office of the Attorney General.

(6) Person. — Any individual, corporation, limited liability company, partnership, trust, estate, or other association or any state, the United States, or any subdivision thereof.

(7) Program participant. — An individual accepted into the Address Confidentiality Program in accordance with this Chapter.

(8) Public record. — A public record as defined in Chapter 132 of the General Statutes.

(9) Substitute address. — An address designated by the Attorney General under the Address Confidentiality Program.

(10) Victim of domestic violence. — An individual against whom domestic violence, as described in G.S. 50B-1, has been committed.

(11) Victim of a sexual offense. — An individual against whom a sexual offense, as described in Article 7A of Chapter 14 of the General Statutes, has been committed.

(12) Victim of stalking. — An individual against whom stalking, as described in former G.S. 14-277.3 for acts occurring before December 1, 2008, or G.S. 14-277.3A for acts occurring on or after December 1, 2008, has been committed.

(13) Victim of human trafficking. — An individual against whom human trafficking, as described in G.S. 14-43.11, has been committed. (2002-171, s. 1; 2007-547, s. 5; 2009-58, s. 4.)

Effect of Amendments. — Session Laws 2009-58, s. 4, effective June 5, 2009, substituted "former G.S. 14-277.3 for acts occurring before December 1, 2008, or G.S. 14-277.3A for acts occurring on or after December 1, 2008" for "G.S. 14-277.3" in subdivision (12).

§ 15C-3. Address Confidentiality Program.

The General Assembly establishes the Address Confidentiality Program in the Office of the Attorney General to protect the confidentiality of the address of a relocated victim of domestic violence, sexual offense, stalking, or human trafficking to prevent the victim's assailants or potential assailants from finding the victim through public records. Under this Program, the Attorney General shall designate a substitute address for a program participant and act as the agent of the program participant for purposes of service of process and receiving and forwarding first-class mail or certified or registered mail. The Attorney General shall not be required to forward any mail other than first-class mail or certified or registered mail to the program participant. The Attorney General shall not be required to track or otherwise maintain records of any mail received on behalf of a program participant unless the mail is certified or registered mail. (2002-171, s. 1; 2007-547, s. 6.)

§ 15C-4. Filing and certification of applications; authorization card.

(a) An individual who wants to participate in the Address Confidentiality Program shall file an application with the Attorney General with the assistance of an application assistant. Any of the following individuals may apply to the Attorney General to have an address designated by the Attorney General to serve as the substitute address of the individual:

(1) An adult individual.

(2) A parent or guardian acting on behalf of a minor when the minor resides with the individual.

(3) A guardian acting on behalf of an incapacitated individual.

(b) The application shall be dated, signed, and verified by the applicant and shall be signed by the application assistant who assisted in the preparation of the application.

(c) The application shall contain all of the following:

(1) A statement by the applicant that the applicant is a victim of domestic violence, sexual offense, stalking, or human trafficking and that the applicant fears for the applicant's safety or the safety of the applicant's child.

(2) Evidence that the applicant is a victim of domestic violence, sexual offense, stalking, or human trafficking. This evidence may include any of the following:

a. Law enforcement, court, or other federal or state agency records or files.

b. Documentation from a domestic violence program if the applicant is alleged to be a victim of domestic violence.

c. Documentation from a religious, medical, or other professional from whom the applicant has sought assistance in dealing with the alleged domestic violence, sexual offense, or stalking.

d. Documentation submitted to support a victim of human trafficking's application for federal assistance or benefits under federal human trafficking laws.

(3) A statement by the applicant that disclosure of the applicant's address would endanger the applicant's safety or the safety of the applicant's child.

(4) A statement by the applicant that the applicant has or will confidentially relocate in North Carolina.

(5) A designation of the Attorney General as an agent for the applicant for purposes of service of process and the receipt of first-class mail or certified or registered mail.

(6) The mailing address and telephone number where the applicant can be contacted by the Attorney General.

(7) The address that the applicant requests not to be disclosed by the Attorney General that directly relates to the increased risk of domestic violence, sexual offense, or stalking.

(8) A statement as to whether there is any existing court order or court action involving the applicant related to divorce proceedings, child support, child custody, or child visitation and the court that issued the order or has jurisdiction over the action.

(9) A statement by the applicant that to the best of the applicant's knowledge, the information contained in the application is true.

(10) A recommendation of an application assistant that the applicant have an address designated by the Attorney General to serve as the substitute address of the applicant.

(d) Upon the filing of a properly completed application, the Attorney General shall certify the applicant as a program participant. Upon certification, the Attorney General shall issue an Address Confidentiality Program authorization card to the program participant. The Address Confidentiality Program authorization card shall remain valid for so long as the program participant remains certified under the Program.

(e) Applicants shall be certified for four years following the date of filing unless the certification is withdrawn or canceled prior to the end of the four-year period. A program participant may withdraw the certification by filing a request for withdrawal acknowledged before a notary with the Attorney General. A certification may be renewed by filing an application containing the information required by G.S. 15C-3 with the Attorney General at least 30 days prior to expiration of the current certification. (2002-171, s. 1; 2007-547, s. 7.)

§ 15C-5. Change of name, address, or telephone number.

(a) A program participant shall notify the Attorney General within 30 days after the program participant has obtained a legal name change by providing the Attorney General a certified copy of any judgment or order evidencing the change or any other documentation the Attorney General deems to be sufficient evidence of the name change. If the program participant fails to notify the Attorney General of a name change in the manner provided in this subsection, the Attorney General shall cancel the certification of the program participant in the Program.

(b) A program participant shall notify the Attorney General of a change in address or telephone number from the address or telephone number listed for the program participant on the application at least seven days before the change occurs. If the program participant fails to notify the Attorney General of a change in address or telephone number in the manner provided in this subsection, the Attorney General shall cancel the certification of the program participant in the Program. (2002-171, s. 1.)

§ 15C-6. Falsifying application information.

An applicant who falsely attests in an application that disclosure of the applicant's address would endanger the applicant's safety or the safety of the applicant's child or who knowingly provides false information when applying for certification or renewal shall lose certification in the Program. The Attorney General shall investigate violations of this section. Upon finding that a violation has occurred, the Attorney General shall assess a civil penalty against the applicant not to exceed five hundred dollars ($500.00). (2002-171, s. 1.)

§ 15C-7. Certification cancellation; records.

(a) The Attorney General shall cancel the certification of a program participant under any of the following circumstances:

(1) The program participant files a request for withdrawal of the certification pursuant to G.S. 15C-4.

(2) The program participant fails to notify the Attorney General of a change in the program participant's name, address, or telephone number listed on the application pursuant to G.S. 15C-5.

(3) The program participant submitted false information in applying for certification to the Program in violation of G.S. 15C-6.

(4) Mail forwarded to the program participant by the Attorney General is returned as undeliverable.

(b) The provisions of Article 3 of Chapter 150B of the General Statutes shall not apply to any cancellation of certification by the Attorney General pursuant to subsection (a) of this section.

(c) The Attorney General shall send notice of cancellation to the program participant. Notice of cancellation shall set out the reasons for cancellation. The program participant shall have 30 days to appeal the cancellation decision under procedures developed by the Attorney General.

(d) Any records or documents pertaining to a program participant shall be maintained in accordance with The General Schedule for State Agencies as established by the Department of Cultural Resources.

(e) An individual who ceases to be a program participant is responsible for notifying persons who use the substitute address designated by the Attorney General as the program participant's address that the designated substitute address is no longer the individual's address. (2002-171, s. 1.)

§ 15C-8. Address use by State or local agencies.

(a) The program participant, and not the Attorney General, is responsible for requesting that agencies of North Carolina use the address designated by the Attorney General as the substitute address of the program participant.

(b) Except as otherwise provided in this section, when a program participant submits a current and valid Address Confidentiality Program authorization card to an agency of North Carolina, the agency shall accept the address designation by the Attorney General on the authorization card as the program participant's substitute address when creating a new public record.

(c) An agency may request a waiver from the requirements of the Address Confidentiality Program by submitting a waiver request to the Attorney General. The agency's waiver request shall be in writing and include an explanation of why the agency cannot meet its statutory or administrative obligations by possessing or using the substitute address and an affirmation that, if the Attorney General accepts the waiver, the agency will only use the program participant's actual address for those statutory or administrative purposes.

(d) The Attorney General's acceptance or denial of an agency's waiver request shall be made in writing and include a statement of specific reasons for acceptance or denial. Acceptance or denial of an agency's waiver request is not subject to further review.

(e) A board of elections shall use the actual address of a program participant for all election-related purposes and shall keep the address confidential from the public under the provisions of G.S. 163-82.10(d). Use of the actual address on letters placed in the United States mail by a board of elections shall not be considered a breach of confidentiality. The substitute address designation provided by the Attorney General shall not be used as an address for voter registration or verification purposes.

(f) For purposes of levying and collecting property taxes on motor vehicles pursuant to Article 22A of Chapter 105 of the General Statutes, the Attorney General shall issue to the county, city, or town assessor or tax collector a list containing the names and actual addresses of program participants residing in that county, city, or town. This list shall be used only for the purposes of listing, appraising, or assessing taxes on motor vehicles and collecting property taxes on motor vehicles in the county, city, or town. The county, city, or town assessor or tax collector or any current or former officer, employee, or agent of any county, city, or town, who in the course of service to or employment by the county, city, or town has access to the name and actual address of a program participant, shall not disclose this information to any other person.

(g) The substitute address designated by the Attorney General shall not be used for purposes of listing, appraising, or assessing taxes on property and collecting taxes on property under the provisions of Subchapter II of Chapter 105 of the General Statutes.

(h) The substitute address designated by the Attorney General shall not be used as an address by any register of deeds on recorded documents or for the purpose of indexing land registered under Article 4 of Chapter 43 of the General Statutes in the index of registered instruments pursuant to G.S. 161-22.

(i) A local school administrative unit shall use the actual address of a program participant for any purpose related to admission or assignment pursuant to Article 25 of Chapter 115C of the General Statutes and shall keep the actual address confidential from the public under the provisions of this Article. The substitute address designated by the Attorney General shall not be used as an address for admission or assignment purposes. For purposes of student records created under Chapter 115C of the General Statutes, the substitute address designated by the Attorney General shall be used.

(j) Except as otherwise provided in this section, a program participant's actual address and telephone number maintained by an agency of North Carolina is not a public record within the meaning of Chapter 132 of the General Statutes. A program participant's actual address or telephone number maintained by the Attorney General or disclosed by the Attorney General pursuant to this Chapter is not a public record within the meaning of Chapter 132 of the General Statutes. (2002-171, s. 1.)

Cross References. — As to registration of land transactions, and the effect of registration, see G.S. 43-13 et seq. As to listing, appraisal, and assessment of property and collection of taxes on property, see G.S. 105-271 et seq. As to motor vehicles, generally, see G.S. 105-330 et seq. As to admission and assignment of students, see G.S. 115C-364 et seq. As to public records, generally, see G.S. 132-1. As to index of registered instruments, see G.S. 161-22. As to official record of voter registration, see G.S. 163-82.10.

§ 15C-9. Disclosure of address prohibited.

(a) The Attorney General is prohibited from disclosing any address or telephone number of a program participant other than the substitute address designated by the Attorney General, except under the following circumstances:

(1) The information is requested by a federal, state, or local law enforcement agency for official use only.

(2) The information is required by direction of a court order. However, any person to whom a program participant's address or telephone number has been disclosed shall not disclose the address or telephone number to any other person unless permitted to do so by order of the court.

(3) Upon request by an agency to verify the participation of a specific program participant when the verification is for official use only.

(4) Upon request by an agency, in the manner provided for by G.S. 15C-8.

(5) The program participant is required to disclose the program participant's actual address as part of a registration required by Article 27A of Chapter 14 of the General Statutes.

(b) The Attorney General shall provide immediate notification of disclosure to a program participant when disclosure is made pursuant to subdivision (2) or (4) of subsection (a) of this section.

(c) If, at the time of application, an applicant is subject to a court order related to divorce proceedings, child support, child custody, or child visitation, the Attorney General shall notify the court that issued the order of the certification of the program participant in the Address Confidentiality Program and the substitute address designated by the Attorney General. If, at the time of application, an applicant is involved in a court action related to divorce proceedings, child support, child custody, or child visitation, the Attorney General shall notify the court having jurisdiction over the action of the certification of the applicant in the Address Confidentiality Program and the substitute address designated by the Attorney General.

(d) No person shall knowingly and intentionally obtain a program participant's actual address or telephone number from the Attorney General or an agency knowing that the person is not authorized to obtain the address information.

(e) No employee of the Attorney General or an agency shall knowingly and intentionally disclose a program participant's actual address or telephone number to a person known to the employee to be prohibited from receiving the program participant's actual address or telephone number, unless the disclosure is permissible by law. This subsection only applies when an employee obtains a program participant's actual address or telephone number during the course of the employee's official duties and, at the time of disclosure, the employee has specific knowledge that the actual address or telephone number disclosed belongs to a program participant.

(f) Any person who knowingly and intentionally obtains or discloses information in violation of this Chapter shall be guilty of a Class 1 misdemeanor and assessed a fine not to exceed two thousand five hundred dollars ($2,500). (2002-171, s. 1.)

§ 15C-10. Assistance for program applicants.

(a) The Attorney General shall designate agencies of North Carolina and nonprofit organizations that provide counseling and shelter services to victims of domestic violence, sexual offense, stalking, or human trafficking to assist individuals applying to be program participants. Any assistance and counseling rendered by the Office of the Attorney General or its designee to applicants shall in no way be construed as legal advice.

(b) The Attorney General, upon receiving notification pursuant to G.S. 15A-832(h), shall, within 96 hours of receiving the notification, issue the victim a letter of certification of eligibility or other relevant document entitling the person to have access to State benefits and services. (2002-171, s. 1; 2007-547, s. 8.)

§ 15C-11. Limited liability.

The State, agencies of North Carolina, and their officers, officials, employees, and agents, both past and present, in their official and individual capacities, shall be immune and held harmless from any liability in any action brought by or on behalf of any person injured or harmed by the actions or inactions of these entities and individuals in implementing this Chapter. However, if an employee's actions resulting in harm were not within the course and scope of the employee's duties, then that employee may be subject to suit as an individual to the extent permitted by the laws of the State of North Carolina. (2002-159, s. 28.5; 2002-171, s. 1.)

§ 15C-12. Rule-making authority.

The Attorney General is authorized to adopt any rules deemed necessary to carry out the provisions of this Chapter. (2002-171, s. 1.)

§ 15C-13. Additional time for action.

Whenever the laws of this State provide a program participant a legal right to act within a prescribed period of 10 days or less after the service of a notice or other paper upon the program participant, and the notice or paper is served upon the program participant by mail pursuant to this Chapter, five days shall be added to the prescribed period. (2002-171, s. 1.)

(f) Any person who knowingly and intentionally obtains or discloses information in violation of this Chapter shall be guilty of a Class 1 misdemeanor and assessed a fine not to exceed two thousand five hundred dollars ($2,500). (2002-171, s. 1.)

§ 15C-10. Assistance for program applicants.

(a) The Attorney General shall designate agencies of North Carolina and nonprofit organizations that provide counseling and shelter services to victims of domestic violence, sexual offense, stalking, or human trafficking to assist individuals applying to be program participants. Any assistance and counseling rendered by the Office of the Attorney General or its designees to applicants shall in no way be construed as legal advice.

(b) The Attorney General, upon receiving notification pursuant to G.S. 15A-832(h), shall, within 96 hours of receiving the notification, issue the victim a letter of certification of eligibility or other relevant document entitling the person to have access to State benefits and services. (2002-171, s. 1; 2007-547, s. 6.)

§ 15C-11. Limited liability.

The State, agencies of North Carolina, and their officers, officials, employees, and agents, both past and present, in their official and individual capacities, shall be immune and held harmless from any liability in any action brought by or on behalf of any person injured or harmed by the actions or inactions of these entities and individuals in implementing this Chapter. However, if an employee's actions resulting in harm were not within the course and scope of the employee's duties, then the employee may be subject to suit as an individual to the extent permitted by the laws of the State of North Carolina. (2002-159, s. 28.5; 2002-171, s. 1.)

§ 15C-12. Rule-making authority.

The Attorney General is authorized to adopt any rules deemed necessary to carry out the provisions of this Chapter. (2002-171, s. 1.)

§ 15C-13. Additional time for action.

Whenever the laws of this State provide a program participant a legal right to act within a prescribed period of 10 days or less after the service of a notice or other paper upon the program participant, and the notice or paper is served upon the program participant by mail pursuant to this Chapter, five days shall be added to the prescribed period. (2002-171, s. 1.)

Chapter 16.

Gaming Contracts and Futures.

Article 1.

Gaming Contracts.

Sec.
16-1. Gaming and betting contracts void.
16-2. Players and betters competent witnesses.

Article 2.

Contracts for "Futures".

16-3. Certain contracts as to "futures" void.

Sec.
16-4. Entering into or aiding contract for "futures" misdemeanor.
16-5. Opening office for sales of "futures" misdemeanor.
16-6. Evidence in prosecutions under this Article.

ARTICLE 1.

Gaming Contracts.

§ 16-1. Gaming and betting contracts void.

All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void. (1810, c. 796, P.R.; R.C., c. 51, ss. 1, 2; Code, ss. 2841, 2842; Rev., s. 1687; C.S., s. 2142.)

Cross References. — As to criminal laws regarding gambling, see G.S. 14-289 et seq.

CASE NOTES

Liberal Construction. — This section is construed liberally. Turner v. Peacock, 13 N.C. 303 (1830).

Judgments in Invitum Not Included. — This section does not include judgments taken in invitum, but only such as are confessed or taken by consent. Teague v. Perry, 64 N.C. 39 (1870).

Gambling contracts are void, because they are so declared by this section. Morehead Banking Co. v. Tate, 122 N.C. 313, 30 S.E. 341 (1898).

Gaming debts incurred in this State are not enforceable in the courts of this State. MGM Desert Inn, Inc. v. Holz, 104 N.C. App. 717, 411 S.E.2d 399 (1991), cert. denied, 331 N.C. 384, 417 S.E.2d 384 (1992).

No Recovery Where Game Fair. — Money, or a horse, or a judgment, won at cards and actually paid and delivered, cannot be recovered back, the game being fairly played. Hodges v. Pitman, 4 N.C. 276 (1816); Hudspeth v. Wilson, 13 N.C. 372 (1830); Warden v. Plummer, 49 N.C. 524 (1857); Teague v. Perry, 64 N.C. 39 (1870).

Recovery Where Gaming Unfair. — Unfair gaming was not only illegal by force of the statute against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law. Webb v. Fulchire, 25 N.C. 485 (1843); Warden v. Plummer, 49 N.C. 524 (1857).

Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. Webb v. Fulchire, 25 N.C. 485 (1843).

No Recovery on Bond Unfairly Won. — Where A., at a game of cards unfairly played, won a justice's judgment from B., and took from the defendants in the judgment a bond payable to himself for the amount, on which he brought suit, to which the statute against gaming was pleaded, it was held that he could not recover. Warden v. Plummer, 49 N.C. 524 (1857).

Money Lent for Gaming. — Money lent to play with at gaming, or to play at the time of loss, is not recoverable. Mooring v. Stanton, 1 N.C. 70 (1795).

Note given for a gambling debt is void and no action thereon can be maintained. Bullard v. Johnson, 264 N.C. 371, 141 S.E.2d 472 (1965).

Rights of Innocent Holder of Gambling Note. — This section, applicable to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void. This being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well-considered authorities elsewhere. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. Wachovia Bank & Trust Co. v. Crafton, 181 N.C. 404, 107 S.E. 316 (1921).

Note Given for Item Won at Cards. — A note given subsequently, in purchase of a magistrate's judgment which had been won at cards by the payee from the maker, is not void under this section against gaming. Teague v. Perry, 64 N.C. 39 (1870).

Note Given in Foreign State in Consideration of Bet. — A note given in consideration of a bet won on a horse race cannot be enforced in this State although given in a state where wagering contracts are not invalid. Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898); Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11 (1912).

When Stakeholder Liable. — Where money is deposited with a stakeholder, to be delivered to the winner, and the stakeholder pays over the money, after notice from the loser not to do so, the loser may recover the money from the stakeholder. Wood v. Wood, 7 N.C. 172 (1819); Forrest v. Hart, 7 N.C. 458 (1819).

Cards a Game of Chance. — It is a matter of common knowledge that a game of cards is a game of chance. State v. Taylor, 111 N.C. 680, 16 S.E. 168 (1892).

Betting on Horse Race. — It was the intention of this section to make betting on horse races a criminal offense, since such wagering contracts had already been outlawed and the denouncement of the wager as unlawful came in by amendment at a later time. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

Betting on dog races under a pari-mutuel system, having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, constitutes gambling within the meaning of the statutes presently codified as this section and G.S. 16-2 and 14-292. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

The game of tenpins is not a game of chance. State v. Gupton, 30 N.C. 271 (1848); State v. King, 113 N.C. 631, 18 S.E. 169 (1893).

"Shuffleboard". — The keeping of a gaming table called "a shuffleboard" is not indictable, as the game is not one of chance, but of skill. State v. Bishop, 30 N.C. 266 (1848).

"Shooting for beef" and other similar trials of skill, for which the participants pay for the "chance" or privilege of shooting, is not a game of chance, there being no "chance" in the sense of the acts against gambling. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

Agreement to Purchase Out-of-State Lottery Tickets. — Where the parties entered into an agreement to purchase Virginia lottery tickets and purchased such tickets over a period of time the agreement was void as against North Carolina public policy, violated this section and was unenforceable in North Carolina. Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994), cert. denied, 336 N.C. 778, 447 S.E.2d 418 (1994).

Loan Agreement Based on Personal Injury Claim was not an Illegal Gaming Contract. — Injured driver's claim that a loan agreement based on the driver's personal injury claim was void as an illegal gaming contract under G.S. 16-1 was properly dismissed since the parties desired the same outcome in the litigation and thus, the agreement was not a bet, and the driver had an independent interest in the litigation's outcome as it defined her rights and obligations under the agreement, and thus, it was not a wager. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

Cited in Moore v. Schwartz, 195 N.C. 549, 142 S.E. 772 (1928); Hatcher v. Harrah's NC Casino Co., 151 N.C. App. 275, 565 S.E.2d 241, 2002 N.C. App. LEXIS 712 (2002); Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

§ 16-2. Players and betters competent witnesses.

No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking. (R.C., c. 51, s. 3; Code, s. 2843; Rev., s. 1688; C.S., s. 2143.)

Cross References. — As to rule of evidence generally that defendant is not compellable to testify, see G.S. 8-54. As to exception with reference to testimony as to gambling, etc., see also G.S. 8-55.

CASE NOTES

Cited in State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Article 2.

Contracts for "Futures".

§ 16-3. Certain contracts as to "futures" void.

Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and chooses in action, at a place and at a time specified and agreed upon therein, to any other person, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any person, firm or corporation, or his or their agents, engaged in the business of manufacturing or wholesale merchandising in the purchase and/or sale of the necessary commodities required in the ordinary course of their business; nor shall this section be construed so as to apply to any contract with respect to the purchase and/or sale for future delivery of any of the articles or things mentioned and referred to in this section, where such purchase and/or sale is made on any exchange on which any such article or things are regularly bought and sold, or contracts therefor regularly entered into, and the rules and regulations of such exchange are such that either party to such contract may require delivery thereof: Provided, such contract is made in accordance with such rules and regulations.

In addition, this Article shall not apply to any person, firm, corporation, or other entity, either as principal or agent, or to any contract, that is excluded or exempted under the Commodity Exchange Act, as provided in section 16(e)(2) of the Commodity Exchange Act, 7 U.S.C. § 16(e)(2), and, accordingly, each section of this Article shall be considered a "law that regulates or prohibits the operation of bucket shops" within the meaning of section 16(e)(2) of the Commodity Exchange Act. (1889, c. 221, s. 1; 1905, c. 538, s. 7; Rev., s. 1689; 1909, c. 853, s. 1; C.S., s. 2144; 1931, c. 236, s. 1; 2001-110, s. 1.)

Legal Periodicals. — For note on Cody v. Hovey, 217 N.C. 407, 8 S.E.2d 479 (1940), see 18 N.C.L. Rev. 224 (1940).

CASE NOTES

I. General Consideration.
II. Practice and Procedure.

I. GENERAL CONSIDERATION.

Section Constitutional. — This section is in furtherance of the declared public policy of North Carolina, and is constitutional and valid. Garseed v. Sternberger, 135 N.C. 501, 47 S.E. 603 (1904); State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 60 S.E. 866 (1905); Rankin v. Mitchem, 141 N.C. 277, 53 S.E. 854 (1906); Randolph v. Heath, 171 N.C. 383, 88 S.E. 731 (1916).

The legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be prima facie evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a prima facie case that such purchases were void, and other circumstances shall not constitute such prima facie evidence, is not a discrimination forbidden by U.S. Const., Amend. 14. State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905), decided under former § 2145 of the Consolidated Statutes.

Not Contrary to Federal Constitution. — When, in an action pending in the courts of this State to recover on a judgment in a sister state, the legislature amended this section by adding thereto: "nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that it impairs the obligation of contracts, and it would seem that no such objection can be made under U.S. Const., Art. IV, § 1 and 2, "the full faith and credit clause," if it is admitted or clearly appears that the judgment sued on was rendered on a transaction expressly forbidden by the statute on gaming, and that the question was not raised, investigated, or determined in the courts of the state in which the judgment was originally rendered. Mottu v. Davis, 151 N.C. 237, 65 S.E. 969 (1909).

The North Carolina statutes prohibiting gambling in futures and denying jurisdiction of the courts to suits on judgments based upon such contracts have been upheld as constituting an exception to the application of the full faith and credit clause of the Constitution, on the ground that the State had not provided a court with jurisdiction to entertain suit on such a judgment though properly rendered in another state. Lockman v. Lockman, 220 N.C. 95, 16 S.E.2d 670 (1941).

Section within Police Power. — This section, forbidding the business of running a "bucket shop," is clearly within the police power of the State. State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905).

History of Section. — The act defining and declaring contracts in "futures" unlawful was passed in 1889, Chapter 221. In 1905, Chapter 538, the legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in G.S. 1 and 2, the statute contains several additional sections relating to the statute of 1889, all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The law of 1905 then, in its closing section, provided: "This act shall not be construed so as to apply to any person, firm, or corporation, etc." This is the first time these words appear in legislation of the State on this subject, and, so far as they had reference to the law of 1889, it is clear the legislature, in the original statutes, only intended that they should affect questions of proof. See Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

Intent of last sentence of present first paragraph. — The last sentence of the present first paragraph was inserted "unnecessarily and out of abundance of caution" — and it does not confer any exclusive right or privilege upon manufacturers or wholesale merchants; nor does it authorize them to engage in any business prohibited by the section. It simply provides that the courts shall not construe the section to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business. See State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

The 1931 act amended the "Bucket Shop Act" of 1889, now this section, so as to exempt contracts with respect to purchase or sale where they are made in accordance with the regulations of any exchange, and where the rules of the exchange permit either party to require delivery. It was intended to remove the ban of illegality from transactions on legitimate exchanges, as distinguished from "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." Gatewood v. North Carolina, 203 U.S. 531, 27 S. Ct. 167, 51 L. Ed. 305 (1906).

This section clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of differences in the prices of the commodity at the time fixed. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

Example of "Margin". — A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbroker's parlance as a "margin." West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925); McClain v. Fleshman, 106 F. 880 (3d Cir. Pa. 1901), decided under former § 2145 of the Consolidated Statutes.

"Bucket Shop" Defined. — A "bucket shop" has been defined as "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." Gatewood v. North Carolina, 203 U.S. 531, 27 S. Ct. 167, 51 L. Ed. 305 (1906).

For other definitions, see State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905).

Test of Validity under Section. — The test of the validity of a contract for "futures" which this section requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract. State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

When there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done — nothing is bought or sold or contracted for, there is only a bet. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

Purchase and Sale on Margin. — This section does not render void a contract for the purchase and sale of stocks on margin when actual delivery of the stocks is made to the purchaser or to his agent, and the stocks are paid for in whole or in part. Cody v. Hovey, 216 N.C. 391, 5 S.E.2d 165 (1939).

Intention of Parties. — The true test of validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. Williams v. Carr, 80 N.C. 295 (1879); State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925).

The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it in the intention of both parties that the cotton should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? Rankin v. Mitchem, 141 N.C. 277, 53 S.E. 854 (1906); Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908); G.G. Edgerton & Son v. J.T. Edgerton & Bros., 153 N.C. 167, 69 S.E. 53 (1910); L. Harvey & Son v. Pettaway, 156 N.C. 375, 72 S.E. 364 (1911); Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911); Hold v. Wellons, 163 N.C. 124, 79 S.E. 450 (1913).

The intent of the parties that the merchandise contracted for should not be actually delivered is the cardinal element of a "futures" contract made illegal by this section and the courts will disregard the form and ascertain whether the intent of the parties was to speculate in the rise and fall of the price of the commodity. Fenner v. Tucker, 213 N.C. 419, 196 S.E. 357 (1938).

Both Parties Must Have Intent. — It was never held that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both. Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911).

Parties to Contract. — The owner of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11 (1912).

Unauthorized Act of Agent. — A bona fide wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of this section, is bound by the acts and statements of his agent in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may not recover on the contract merely because he was a bona fide wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one. Alex. Sprunt & Sons v. May, 156 N.C. 388, 72 S.E. 821 (1911).

Agent's Right to Recover. — An agent for a principal to a contract made in violation of this section, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of G.S. 16-4, making it a misdemeanor. Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908).

Effect of Contract Made in Foreign State. — An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another state where it is lawful. Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11 (1912).

Action upon judgment obtained in foreign state. See Cody v. Hovey, 217 N.C. 407, 8 S.E.2d 479 (1940).

Subsequent Promise to Repay Is Void. — A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void. Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908).

Contracts Held Void. — Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased, it was held that the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and this section, relating to gambling, etc., is not available to the defendant as a defense. Gladstone v. Swain, 187 N.C. 712, 122 S.E. 755 (1924).

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in the courts of North Carolina and the promisor's repeated promise to pay it cannot impart any validity to it. Garseed v. Sternberger, 135 N.C. 501, 47 S.E. 603 (1904); Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908); Burrus v. Witcover, 158 N.C. 384, 74 S.E. 11, 39 L.R.A. (n.s.) 1005 (1912); Cobb Bros. & Co. v. Guthrie, 160 N.C. 313, 76 S.E. 81 (1912); Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained. Martin v. Bush, 199 N.C. 93, 154 S.E. 43 (1930).

A contract for "cotton futures" in which no actual delivery is intended or contemplated is void and no action may be maintained thereon. Bodie v. Horn, 211 N.C. 397, 190 S.E. 236 (1937).

Applied in Marx v. Maddrey, 94 F. Supp. 784 (E.D.N.C. 1951).

Cited in Meyer v. Fenner, 196 N.C. 476, 146 S.E. 82 (1929); Royster v. Hancock, 235 N.C. 110, 69 S.E.2d 29 (1952); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 561 (1978).

II. PRACTICE AND PROCEDURE.

Burden of Proof. — Where in an action by an assignee and trustee under G.S. 23-1, et seq., it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the defense that the contracts were void under this section, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. Martin v. Bush, 199 N.C. 93, 154 S.E. 43 (1930).

When the defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon the plaintiff to show that it was a lawful one, i.e., that actual delivery was intended by the parties, and not merely that either had the privilege of calling therefor. Burns v. Tomlinson, 147 N.C. 645, 61 S.E. 614 (1908), decided under former § 2146 of the Consolidated Statutes.

Burden Not upon Administrator. — Where an administrator paid certain notes and it was later alleged by the legatees that the notes were given for a gambling contract which should not have been paid, the burden of proving that the notes were given for a valid contract was not upon the administrator. Overman v. Lanier, 157 N.C. 544, 73 S.E. 192 (1911), decided under former § 2146 of the Consolidated Statutes.

Parol Evidence. — The section, rendering void and unenforceable a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for the loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925).

Evidence Sufficient. — The purchaser makes out a prima facie case upon evidence that the contract was founded upon a gambling or wagering consideration in violation of this section. West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925), decided under former § 2145 of the Consolidated Statutes.

Where the plaintiff himself testified that he did not buy certain cotton in the ordinary course of his business as a cotton manufacturer for use in his mill, this was prima facie a "future contract." Burns v. Tomlinson, 147 N.C. 634, 61 S.E. 615 (1908), decided under former § 2145 of the Consolidated Statutes.

When Jury Question Presented. — Where the contract is not a gambling one on its face the underlying purpose and intent of the parties should be left to the jury. Harvey v. Pettaway, 156 N.C. 375, 72 S.E. 364 (1911).

Where there was evidence offered by the plaintiffs tending to show that they were wholesale dealers in cotton as a commodity, and that they purchased certain cotton as a commodity and sold it to manufacturers and exporters, and dealt in actual spot cotton and were in no wise dealers in futures, they were entitled to have this issue submitted to a jury. Eure v. Sabiston, 195 F. 721 (4th Cir. 1912).

Upon conflicting evidence as to whether or not the contract is a gambling contract, it becomes a question for the jury under proper instructions from the court. West v. Satterfield, 190 N.C. 89, 129 S.E. 177 (1925), decided under former § 2146 of the Consolidated Statutes.

Judgment by Default Void. — A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by this section which also declares that actions thereon may not be maintained in the courts of this State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc. Randolph v. Heath, 171 N.C. 383, 88 S.E. 731 (1916).

§ 16-4. Entering into or aiding contract for "futures" misdemeanor.

If any person shall become a party to any contract declared void in this Article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a Class 1 misdemeanor.

If any person shall, while in this State, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any such contract made in another state, or in this State do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a Class 1 misdemeanor. (1889, c. 221, ss. 3, 4; Rev., ss. 3823, 3824; C.S., s. 2147; 1993, c. 539, s. 304; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

This Section Is Constitutional. — Garseed v. Sternberger, 135 N.C. 501, 47 S.E. 603 (1904); State v. McGinnis, 138 N.C. 724, 51 S.E. 50 (1905); State v. Clayton, 138 N.C. 732, 50 S.E. 866 (1905); Rankin v. Mitchem, 141 N.C. 277, 53 S.E. 854 (1906); Randolph v. Heath, 171 N.C. 383, 88 S.E. 731 (1916).

§ 16-5. Opening office for sales of "futures" misdemeanor.

If any person, corporation or other association of persons, either as principal or agent, shall establish or open an office or place of business in this State for the purpose of carrying on or engaging in making such contracts as are forbidden in this Article, he shall be guilty of a Class 1 misdemeanor. (1905, c. 538, ss. 1, 2; Rev., s. 3825; C.S., s. 2148; 1993, c. 539, s. 305; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 16-6. Evidence in prosecutions under this Article.

No person shall be excused on any prosecution under the provisions of this Article from testifying touching anything done by himself or others contrary to the provisions thereof, but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this Article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principal or agent, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this Article. (1905, c. 538, ss. 3, 4, 5; Rev., s. 3826; C.S., s. 2149.)

Chapter 17.

Habeas Corpus.

Article 1.

Constitutional Provisions.

Sec.
17-1. Remedy without delay for restraint of liberty.
17-2. Habeas corpus not to be suspended.

Article 2.

Application.

17-3. Who may prosecute writ.
17-4. When application denied.
17-5. By whom application is made.
17-6. To judge of appellate division or superior court in writing.
17-7. Contents of application.
17-8. Issuance of writ without application.

Article 3.

Writ.

17-9. Writ granted without delay.
17-10. Penalty for refusal to grant.
17-11. Sufficiency of writ; defects of form immaterial.
17-12. Service of writ.

Article 4.

Return.

17-13. When writ returnable.
17-14. Contents of return; verification.
17-15. Production of body if required.

Article 5.

Enforcement of Writ.

17-16. Attachment for failure to obey.
17-17. Liability of judge refusing attachment.
17-18. Attachment against sheriff to be directed to coroner; procedure.
17-19. Precept to bring up party detained.
17-20. Liability of judge refusing precept.
17-21. Liability of judge conniving at insufficient return.

Sec.
17-22. Power of county to aid service.
17-23. Obedience to order of discharge compelled.
17-24. No civil liability for obedience.
17-25. Recommittal after discharge; penalty.
17-26. Disobedience to writ or refusing copy of process; penalty.
17-27. Penalty for false return.
17-28. Penalty for concealing party entitled to writ.

Article 6.

Proceedings and Judgment.

17-29. Notice to interested parties.
17-30. Notice to district attorney.
17-31. Subpoenas to witnesses.
17-32. Proceedings on return; facts examined; summary hearing of issues.
17-33. When party discharged.
17-34. When party remanded.
17-35. When the party bailed or remanded.
17-36. Party held in execution not to be discharged.
17-37. When party ill, cause determined in his absence.
17-38. No second committal after discharge; penalty.

Article 7.

Habeas Corpus for Custody of Children in Certain Cases.

17-39 through 17-40. [Repealed.]

Article 8.

Habeas Corpus Ad Testificandum.

17-41. Authority to issue the writ.
17-42. Contents of application.
17-43. Service of writ.
17-44. Applicant to pay expenses and give bond to return.
17-45. Duty of officer to whom writ delivered or on whom served.
17-46. Prisoner to be remanded.

Article 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const., art. 1, s. 18; Rev., s. 1819; C.S., s. 2203.)

Cross References. — As to costs in habeas corpus, see G.S. 6-21.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

Purpose of this section and § 17-2 is to insure that a remedy is provided to inquire into the lawfulness of an inmate's restraint. Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Habeas corpus is high prerogative writ. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Waiver. — A defendant may waive the benefit of this article by express consent, failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

§ 17-2. Habeas corpus not to be suspended.

The privileges of the writ of habeas corpus shall not be suspended. (Const., art. 1, s. 21; Rev., s. 1820; C.S., s. 2204.)

Cross References. — For constitutional provision, see N.C. Const., Art. I, § 21.

CASE NOTES

Purpose of § 17-1 and this section is to insure that a remedy is provided to inquire into the lawfulness of an inmate's restraint. Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Section Cannot Be Abrogated. — This section is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each, and prevent conflict. This is done by giving to N.C. Const., Art. XII, § 1, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons to be made by military authority, but requiring, by force of N.C. Const., Art. I, § 21, the persons arrested to be surrendered for trial to the civil authorities, on habeas corpus, should they not be delivered over without the writ. Ex parte Moore, 64 N.C. 802 (1870).

ARTICLE 2.

Application.

§ 17-3. Who may prosecute writ.

Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in G.S. 17-4, may prosecute a writ of habeas corpus, according to the provisions of this Chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (1868-9, c. 116, s. 1; Code, s. 1623; Rev., s. 1821; C.S., s. 2205.)

CASE NOTES

Court Is Not Permitted to Act as One of Errors and Appeals. — In habeas corpus proceedings, the court is not permitted to act as one of errors and appeals, but the right to afford relief, on such hearings, arises only when the petitioner is held unlawfully or on a sentence manifestly entered by the court without power to impose it. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Habeas corpus is not available as a substitute for appeal. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Judgment must be void as distinguished from erroneous. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); Brown v. North Carolina, 341 F.2d 87 (4th Cir. 1965).

As Where Court Had No Jurisdiction or Judgment Was Not Authorized by Law. — In habeas corpus proceedings, the court has jurisdiction to discharge petitioner only when the record discloses that the court which imprisoned him did not have jurisdiction of the offense or of the person of defendant, or that the judgment was not authorized by law. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Habeas corpus relief may be obtained only on determination that the court which imprisoned the petitioner did not have jurisdiction of the offense or of the prisoner, or that judgment was not authorized by law. Brown v. North Carolina, 341 F.2d 87 (4th Cir. 1965).

The only questions open to inquiry are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

The sole question for determination at habeas corpus hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully restrained of his liberty. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Where one is actually confined for a longer term of imprisonment than is legal, a writ of habeas corpus will issue to the end that a proper sentence may be imposed. State v. Green, 85 N.C. 600 (1881).

Prisoner Under Illegal Sentence. — Where a defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny," and was sentenced to imprisonment in the penitentiary, a writ of habeas corpus will issue, in order that he may be taken from the penitentiary and held to answer the charge in the court below. State v. Queen, 91 N.C. 659 (1884).

One Imprisoned for Contempt. — Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by habeas corpus proceedings, taken to the Supreme Court, if necessary, by writ of certiorari. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

Proceedings to obtain control of a minor child between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family are not proceedings under this section, to set the infant free but are proceedings to fix and determine the right of custody. In re Thompson, 228 N.C. 74, 44 S.E.2d 475 (1947).

Relief of Soldier in Army. — A soldier actually and rightfully in the army can have no relief by the writ of habeas corpus against any abuse of military authority, and if he is wrongfully held as a soldier, he is not entitled to a habeas corpus while he is undergoing punishment or awaiting trial for a military offense. Cox v. Gee, 60 N.C. 516 (1864).

Cited in State v. Hamrick, 2 N.C. App. 227, 162 S.E.2d 567 (1968).

§ 17-4. When application denied.

Application to prosecute the writ shall be denied in the following cases:

(1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

(2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

(3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

(4) Where no probable ground for relief is shown in the application. (1868-9, c. 116, s. 2; Code, s. 1624; Rev., s. 1822; C.S., s. 2206; 1971, c. 528, s. 1.)

CASE NOTES

Cannot Be Used as Writ of Error. — The writ of habeas corpus cannot be used in the nature of a writ of error. State v. Dunn, 159 N.C. 470, 74 S.E. 1014 (1912).

Habeas corpus is in the nature of a writ of error to the extent of examining into the legality of a person's detention, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. State v. Edwards, 192 N.C. 321, 135 S.E. 37 (1926); In re Chase, 193 N.C. 450, 137 S.E. 305 (1927), cert. denied, 278 U.S. 600, 49 S. Ct. 9, 73 L. Ed. 529 (1928).

Nor Substitute for Appeal. — The writ of habeas corpus may not be used as a substitute for appeal. In re Smith, 218 N.C. 462, 11 S.E.2d 317 (1940).

Administrative Discretion. — The difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by reason of established procedure and also by this section. In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948).

Where one is imprisoned under the final process of a court of competent jurisdiction the writ of habeas corpus may not successfully be sued out since this section expressly forbids it. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906); In re Holley, 154 N.C. 163, 69 S.E. 872 (1910); Howie v. Spittle, 156 N.C. 180, 72 S.E. 207 (1911).

In a proceeding wherein there was no question of the superior court having jurisdiction of the offense and of the person of the defendant, and the power to render the judgment imposed, the defendant was not entitled to relief by habeas corpus on the ground that the record failed to show that a verdict was rendered in the case or that he had entered any plea, since any omissions in the minutes of the court with respect to procedure followed during the course of trial could be amended by the court. State v. Cannon, 244 N.C. 399, 94 S.E.2d 339 (1956).

In construing the term, "final judgment or decree of a competent tribunal," it has come to be well understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the cause and was manifestly without power to enter the judgment or impose the sentence in question, in such case there would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. State v. Queen, 91 N.C. 659 (1884); In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Meaning of "Competent Jurisdiction". — The term, "competent jurisdiction," used by this section in making an exception to the power of this court to review a judgment in habeas corpus proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Presumption of Validity. — Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not so appear, they are not subject to review in habeas corpus proceedings. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

Reason for Rule. — Without reference to the positive prohibition of this section, it is otherwise clear that the power cannot extend to cases where the person is confined on final process. For if so, this unseemly and discordant result would follow, that one superior court judge might try and sentence a person to death or the penitentiary, and another might issue the writ of habeas corpus and discharge the prisoner. Results so disgraceful and destructive to the orderly and harmonious administration of justice were never contemplated by the framers of our judicial system; on the contrary, they were carefully guarded against, both by the Constitution and legislation. In re Schenck, 74 N.C. 607 (1876).

Where Sentence Erroneous. — The application must be refused, even where it appears that the applicant is imprisoned in the State's prison, and the sentence of the court is erroneous, and the applicant, in default of appeal, must be left to his remedy by writ of certiorari when he is detained by virtue of a final judgment of a court of competent jurisdiction. In re Schenck, 74 N.C. 607 (1876).

Indictment returned by a grand jury is sufficient ground to detain a defendant for trial, and the defendant is not entitled to his release in a habeas corpus proceeding. State v. Murphy, 10 N.C. App. 11, 177 S.E.2d 917 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 830, cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Prior Writ of Habeas Corpus. — See In re

Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

Conviction Based on Illegal Evidence Authorized by Unconstitutional Statute. — An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an unconstitutional statute, may not be passed upon in habeas corpus proceedings, for such would be to permit one superior court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. State v. Dunn, 159 N.C. 470, 74 S.E. 1014 (1912).

Applied in In re Croom, 175 N.C. 455, 95 S.E. 903 (1918); State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922); In re Renfrow, 247 N.C. 55, 100 S.E.2d 315 (1957).

Cited in In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954); Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

§ 17-5. By whom application is made.

Application for the writ may be made either by the party for whose relief it is intended or by any person in his behalf. (1868-9, c. 116, s. 3; Code, s. 1625; Rev., s. 1823; C.S., s. 2207.)

CASE NOTES

Application May Be Withdrawn. — One who has petitioned for a writ of habeas corpus may withdraw his application whenever he chooses. State v. Wiley, 64 N.C. 821 (1870).

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 17-6. To judge of appellate division or superior court in writing.

Application for the writ shall be made in writing, signed by the applicant —

(1) To any one of the justices or judges of the appellate division.

(2) To any one of the superior court judges, either during a session or in vacation. (1868-9, c. 116, s. 4; Code, s. 1626; Rev., s. 1824; C.S., s. 2208; 1969, c. 44, s. 41; 1971, c. 528, s. 2.)

CASE NOTES

Remedy May Be Demanded Before Judge of Any Court of Competent Jurisdiction. — The Constitution required the legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right to "prosecute a writ of habeas corpus," it followed ex vi termini, that they were entitled to demand this remedy before any judge of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before the Magna Charta, and was only reaffirmed, like many other cardinal principles, in that instrument and those that followed reaffirming it. Harkins v. Cathey, 119 N.C. 649, 26 S.E. 136 (1896).

Jurisdiction of Courts. — The courts of this State, as well as the individual judges, have jurisdiction to issue writs of habeas corpus, returnable to them in term time, and as a court. In re Bryan, 60 N.C. 1 (1863).

Source of Authority of State Judges. — It is to be observed that the authority of the state judges in cases of habeas corpus emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States has given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. In re Bryan, 60 N.C. 1 (1863).

Jurisdiction Arises on Presentation of Petition. — Presenting a petition to a judge for a writ of habeas corpus gives him jurisdiction of the subject. State v. Edney, 60 N.C. 463 (1864).

Judges Mentioned Have Equal Powers. — A single judge of the Supreme Court has the same and no other jurisdiction to issue the writ than a judge of the superior court, and the same limitation of power to issue the writ in certain cases extends equally to the two classes of judges. In re Schenck, 74 N.C. 607 (1876).

Before Whom Writ Made Returnable. — The judge issuing the writ may make it returnable before himself, or, for convenience, before any other judge. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

The particular judge before whom the writ is returnable need not be either the resident or presiding judge of any particular term of court. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Section 1-76 et seq., concerning venue, refers to "actions" and has no application to habeas corpus proceedings. McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

Review of Discretionary Power of Judge as to Place Writ Is Returnable. — Since any judge of the superior court or justice of the Supreme Court has the power to issue a writ of habeas corpus at any time or any place, he has the discretionary power to make the writ returnable at such place as he may determine, which discretion will not be reviewed in the absence of a showing of abuse or failure to afford full opportunity to be heard, and therefore an exception to the refusal of a motion for change of venue of habeas corpus proceedings cannot be sustained. McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

Applied in In re Cox, 24 N.C. App. 99, 210 S.E.2d 223 (1974).

§ 17-7. Contents of application.

The application must state, in substance, as follows:

(1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

(2) The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

(4) If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

(5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (1868-9, c. 116, s. 5; Code, s. 1627; Rev., s. 1825; C.S., s. 2209.)

CASE NOTES

Allegation of Prior Writ. — A petition for habeas corpus must allege that the imprisonment has not been already adjudged upon a prior writ of habeas corpus. In re Brittain, 93 N.C. 587 (1885).

Prior Writ of Habeas Corpus. — See In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

Failure to Allege Prior Writ. — Where a defendant had not been tried when his writ of habeas corpus was filed, and he did not assert in the petition that the legality of his restraint had not been already adjudged upon a prior writ of habeas corpus, he did not comply with the provisions of this section, relating to the contents of a petition for the writ of habeas corpus. State v. Murphy, 10 N.C. App. 11, 177 S.E.2d 917 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 830, cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Parties may waive all errors and dispense with all forms in the proceedings on the petition. State v. Edney, 60 N.C. 463 (1864).

Applied in Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Cited in State v. Green, 2 N.C. App. 391, 163 S.E.2d 14 (1968).

§ 17-8. Issuance of writ without application.

When the appellate division or superior court division, or any judge of either division, has evidence from any judicial proceeding before such court or judge that any person within this State is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (1868-9, c. 116, s. 10; Code, s. 1632; Rev., s. 1826; C.S., s. 2210; 1969, c. 44, s. 42.)

CASE NOTES

When Illegal Imprisonment Appears on Appeal or Certiorari. — If a case comes before the Supreme Court by appeal, or by certiorari, and upon the trial it appears that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of this section, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of habeas corpus, even of its own motion, and discharge the prisoner. In re Schenck, 74 N.C. 607 (1876).

ARTICLE 3.

Writ.

§ 17-9. Writ granted without delay.

Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this Chapter, prohibited from prosecuting the writ. (1868-9, c. 116, s. 6; Code, s. 1628; Rev., s. 1827; C.S., s. 2211.)

CASE NOTES

Duty of Court to Issue. — There can be no doubt of the duty and power of the court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. In re Boyett, 136 N.C. 415, 48 S.E. 789 (1904).

§ 17-10. Penalty for refusal to grant.

If any judge authorized by this Chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars ($2,500). (1868-9, c. 116, s. 9; Code, s. 1631; Rev., s. 1828; C.S., s. 2212.)

CASE NOTES

The writ of habeas corpus always issues when legally applied for, because this section subjects a judge who refuses to entertain the petition to a penalty of $2,500. In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

Cited in McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

§ 17-11. Sufficiency of writ; defects of form immaterial.

No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient —

(1) If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and anyone who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

(2) If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person

intended. (1868-9, c. 116, ss. 7, 8; Code, ss. 1629, 1630; Rev., s. 1829; C.S., s. 2213.)

§ 17-12. Service of writ.

The writ of habeas corpus may be served by any qualified elector of this State thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (1868-9, c. 116, s. 32; Code, s. 1657; Rev., s. 1833; C.S., s. 2214.)

ARTICLE 4.

Return.

§ 17-13. When writ returnable.

Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (1868-9, c. 116, s. 31; Code, s. 1656; Rev., s. 1830; C.S., s. 2215.)

§ 17-14. Contents of return; verification.

The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally —

(1) Whether he has or has not the party in his custody or under his power or restraint.

(2) If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

(3) If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

(4) If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (1868-9, c. 116, s. 11; Code, s. 1633; Rev., s. 1831; C.S., s. 2216.)

§ 17-15. Production of body if required.

If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (1868-9, c. 116, s. 14; Code, s. 1636; Rev., s. 1832; C.S., s. 2217.)

Article 5.

Enforcement of Writ.

§ 17-16. Attachment for failure to obey.

If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this State, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (1868-9, c. 116, s. 15; Code, s. 1637; Rev., s. 1834; C.S., s. 2218.)

CASE NOTES

Section Intended to Compel Return and Not to Punish. — The attachment warranted by this section does not rest on the idea of punishing for a contempt of the judge, or court, but of compelling a return to the writ and a production of a body. It is a substitute for the provision in the old Habeas Corpus Act, which punished the officer or person refusing or neglecting to make due return, "upon conviction by indictment," with a fine of $500 for the first offense, and of $1,000, and incapacity to hold office, for the second. Ex parte Moore, 64 N.C. appx. 802 (1870). See also Ex parte Kerr, 64 N.C. appx. 816 (1870).

No Power to Arrest Governor. — Under the Habeas Corpus Act, a judge has no power to order the arrest of the Governor of the State. Ex parte Moore, 64 N.C. appx. 802 (1870).

Excuse for Refusal to Make Return. — Where a military officer detaining persons arrested in counties declared by the Governor to be in a state of insurrection, answered to a writ of habeas corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ, it was held that such return was a sufficient excuse, under this section, and, therefore, that such officer was not liable to be attached. Ex parte Moore, 64 N.C. appx. 802 (1870).

Cited in Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993); Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

§ 17-17. Liability of judge refusing attachment.

If any judge willfully refuses to grant the writ of attachment, as provided for in G.S. 17-16, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 2; Code, s. 1638; Rev., s. 1835; C.S., s. 2219.)

§ 17-18. Attachment against sheriff to be directed to coroner; procedure.

If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (1868-9, c. 116, s. 16; Code, s. 1639; Rev., s. 1836; C.S., s. 2220.)

Cross References. — As to requirement of coroner to act for sheriff in certain cases, see G.S. 152-8.

§ 17-19. Precept to bring up party detained.

The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted. (1868-9, c. 116, s. 17; Code, s. 1640; Rev., s. 1837; C.S., s. 2221.)

§ 17-20. Liability of judge refusing precept.

If any judge refuses to grant the precept provided for in G.S. 17-19, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 3; Code, s. 1641; Rev., s. 1838; C.S., s. 2222.)

§ 17-21. Liability of judge conniving at insufficient return.

If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 4; Code, s. 1642; Rev., s. 1839; C.S., s. 2223.)

§ 17-22. Power of county to aid service.

In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases. (1868-9, c. 116, s. 18; Code, s. 1643; Rev., s. 1840; C.S., s. 2224.)

CASE NOTES

Posse comitatus discussed. — See Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896).

Power of the county, or "posse comitatus," means the men of the county in which the writ is to be executed. Ex parte Moore, 64 N.C. appx. 802 (1870).

§ 17-23. Obedience to order of discharge compelled.

Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this Chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars ($2,500), besides any special damages which such party may have sustained. (1868-9, c. 116, s. 24; Code, s. 1649; Rev., s. 1841; C.S., s. 2225.)

§ 17-24. No civil liability for obedience.

No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (1868-9, c. 116, s. 25; Code, s. 1650; Rev., s. 1842; C.S., s. 2226.)

§ 17-25. Recommittal after discharge; penalty.

If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 3581; C.S., s. 2227; 1993, c. 539, s. 306; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

When Rearrest Valid. — A party, set at large by writ of habeas corpus, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction. State ex rel. Barbee v. Weatherspoon, 88 N.C. 19 (1883).

§ 17-26. Disobedience to writ or refusing copy of process; penalty.

If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars ($1,000), or imprisoned not exceeding 12 months, and if such person be an officer, shall moreover be removed from office. (1868-9, c. 116, s. 27; Code, s. 1652; Rev., s. 3597; C.S., s. 2228.)

§ 17-27. Penalty for false return.

If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, s. 28; Code, s. 1653; Rev., s. 3582; C.S., s. 2229; 1993, c. 539, s. 307; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 17-28. Penalty for concealing party entitled to writ.

If anyone having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, ss. 29, 30; Code, ss. 1654, 1655; Rev., s. 3583; C.S., s. 2230; 1993, c. 539, s. 308; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 6.

Proceedings and Judgment.

§ 17-29. Notice to interested parties.

When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1; Code, s. 1634; Rev., s. 1843; C.S., s. 2231.)

§ 17-30. Notice to district attorney.

When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the district attorney of the district in which the person prosecuting the writ is detained. (1868-9, c. 116, s. 13; Code, s. 1635; Rev., s. 1844; C.S., s. 2232; 1973, c. 47, s. 2.)

CASE NOTES

Hearing May Be Continued. — If it appears from the return on a writ of habeas corpus that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor (now district attorney) an opportunity to examine into the case. State v. Jones, 113 N.C. 669, 18 S.E. 249 (1893).

§ 17-31. Subpoenas to witnesses.

Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpoena, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases. (1868-9, c. 116, s. 34; Code, s. 1659; Rev., s. 1845; C.S., s. 2233.)

Cross References. — As to issuance of subpoenas, see G.S. 7A-103 and 8-59.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.

The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (1868-9, c. 116, s. 19; Code, s. 1644; Rev., s. 1846; C.S., s. 2234.)

CASE NOTES

Proceedings Must Be Summary. — Proceedings under the writ of habeas corpus, which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if an action could be arrested by an appeal, they would lose many of their most beneficial results. State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887).

Hearing Not Perfunctory. — The words of the section preclude the idea that such hearing shall be perfunctory and merely formal. In re Bailey, 203 N.C. 362, 166 S.E. 165 (1932), rev'd on other grounds, 289 U.S. 412, 53 S. Ct. 667, 77 L. Ed. 1292 (1933).

Discretion of Judge. — The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890); In re Bailey, 203 N.C. 362, 166 S.E. 165 (1932), rev'd on other grounds, 289 U.S. 412, 53 S. Ct. 667, 77 L. Ed. 1292 (1933).

Questions Open to Inquiry. — Where the petitioner in habeas corpus proceedings is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922).

Evidence Not Reviewable. — The Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

When Question of Insanity Presented. — When the petitioner in habeas corpus has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the superior court in this State by whom the proceedings of habeas corpus are heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded. In re Chase, 193 N.C. 450, 137 S.E. 305 (1927), cert. denied, 278 U.S. 600, 49 S. Ct. 9, 73 L. Ed. 529 (1928).

Release of Person Committed to State Mental Institution. — A person committed to a State mental institution under Chapter 122 (see now Chapter 122C) was not entitled to invoke the provisions of former G.S. 35-4 for a determination of the restoration of sanity by a jury trial as a condition precedent to his release, the proper remedy being habeas corpus under this section. In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

Hearing Confined to Record. — The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere. In re Schenck, 74 N.C. 607 (1876); Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

Presumption of Innocence and Burden of Proof. — The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction, is illegal; therefore, where, upon the return of a sheriff to a writ of habeas corpus, it appeared that the petitioners were in custody on a mittimus, regular in every way, from a justice of the peace, for failure to give bond for their appearances at the next term of the superior court to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was upon the petitioner to show wherein it was illegal, and not upon the State to show that they were lawfully in custody. State v. Jones, 113 N.C. 669, 18 S.E. 249 (1893).

Petitioner Serving Sentence under Void Judgment Is Entitled to Immediate Release. — Where upon habeas corpus it appears that petitioner is serving a sentence under a void judgment, petitioner is entitled to his immediate release. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Review of Denial of Writ. — In habeas corpus proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the N.C. Const., Art. IV, § 12, under the power given to the court to "issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts." In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Appeal to the Supreme Court will not lie from the refusal of a superior court judge to discharge the defendant from custody in proceedings in habeas corpus, the remedy being by a petition for a writ of certiorari which is addressed to the sound discretion of the Supreme Court. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917); In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

Writ of Certiorari Proper Remedy. — Where it appears that, upon the return of the writ, the judge declined to hear evidence or investigate the charge, the writ of certiorari should issue. Walton v. Gatlin, 60 N.C. 310 (1864); Ex parte Biggs, 64 N.C. 202 (1870); State v. Jefferson, 66 N.C. 309 (1872); State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in habeas corpus proceedings in matters not involving the care and custody of children, N.C. Const., Art. IV, § 12, shall only be exercised by certiorari. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

When Writ of Certiorari Denied. — A petition for certiorari in the Supreme Court will be denied in habeas corpus proceedings when it appears therefrom that the prisoner is not entitled to his discharge. In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

If the judge, upon the investigation of the evidence on a petition for habeas corpus, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies, either in favor of the State or the petitioner. Walton v. Gatlin, 60 N.C. 310 (1864); State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887); State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

In habeas corpus proceedings, where it appears from the application for certiorari in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Proceeding Where Judgment Reversed. — If, upon certiorari, the court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no procedendo issues to any particular judge, but the petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ of habeas corpus. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

Judicial Review of Questions of Law. — In deciding questions which arise under writs of habeas corpus the judiciary may review and control the action of the Governor in regard to points of law; but cannot interfere with such action in regard to any matter within the discretion of the Governor. In re Hughes, 61 N.C. 57 (1867).

Cited in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

§ 17-33. When party discharged.

If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

(1) Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.
(2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.
(3) Where the process is defective in some matter of substance required by law, rendering such process void.
(4) Where the process, though in proper form, has been issued in a case not allowed by law.
(5) Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.
(6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (1868-9, c. 116, s. 20; Code, s. 1645; Rev., s. 1847; C.S., s. 2235.)

CASE NOTES

Sentence Partly Void. — Where a prisoner is detained by virtue of a sentence in part valid and part otherwise, he may not be liberated on habeas corpus until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired. State v. Hooker, 183 N.C. 763, 11 S.E. 351 (1922).

Internal Correctional Policy Is Administrative Matter. — The difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny. In re Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters. In re Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

Adverse Administrative Decision as to Correctional Status. — Where defendant, a youthful offender, was unsatisfied with an essentially administrative determination whereby his correctional status was affected adversely, diminishing his prospect for an early release, standing by itself, raises no habeas corpus question. In re Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

Recovery from a mental disease after commitment to an institution would seem to be an event "which has taken place afterwards," within the meaning of subdivision (2) of this section, entitling an inmate to discharge under G.S. 17-32. In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

Imprisonment for Contempt. — In a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a reviewing tribunal may, on a habeas corpus, discharge the party if it appears plainly that the facts do not amount to a contempt. State v. Queen, 91 N.C. 659 (1884).

Petitioner's relief for rescission of his Mutual Agreement Parole Program (M.A.P.P.) contract had to come through administrative procedures before the Division of Prisons and the Parole Commission; habeas corpus was not appropriate for obtaining judicial review of the Parole Commission's decision, absent a clear violation of constitutional rights. Freeman v. Johnson, 92 N.C. App. 109, 373 S.E.2d 565 (1988).

State Cannot Appeal Order of Discharge. — The State cannot appeal from an order in habeas corpus proceedings discharging from imprisonment one convicted of crime. Proceedings in habeas corpus, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results. State v. Miller, 97 N.C. 451, 1 S.E. 776 (1887); In re Williams, 149 N.C. 436, 63 S.E. 108 (1908).

Cited in Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

§ 17-34. When party remanded.

It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either —

(1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

(2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

(3) For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

(4) That the time during which such party may be legally detained has not expired. (1868-9, c. 116, s. 21; Code, s. 1646; Rev., s. 1848; C.S., s. 2236.)

CASE NOTES

Applied in In re Croom, 175 N.C. 455, 95 S.E. 903 (1918).

§ 17-35. When the party bailed or remanded.

If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto. (1868-9, c. 116, s. 22; Code, s. 1647; Rev., s. 1849; C.S., s. 2237.)

CASE NOTES

When Person Admitted to Bail. — A prisoner may be admitted to bail in a habeas corpus proceeding if the trial judge determines that the prisoner is so entitled. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

No Discharge after Indictment. — Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

Judge May Admit Person Charged to Bail. — Any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ of habeas corpus, adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

Court May Hold Person to Bail Although Sentence Invalid. — Although a sentence is not valid the defendant may not be unconditionally released, as the court may hold him to bail. State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917).

§ 17-36. Party held in execution not to be discharged.

When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail but shall be presently remanded, where he shall remain until discharged in due course of law. (2 Hen. V, c. 2; R.C., c. 31, s. 111; Code, s. 937; Rev., s. 1850; C.S., s. 2238.)

§ 17-37. When party ill, cause determined in his absence.

When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced. (1868-9, c. 116, s. 23; Code, s. 1648; Rev., s. 1851; C.S., s. 2239.)

§ 17-38. No second committal after discharge; penalty.

No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars ($2,500) to the party aggrieved thereby. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 1852; C.S., s. 2240.)

CASE NOTES

Surrender by Sureties. — Where the defendant was not originally liable to arrest and had been discharged upon habeas corpus, he cannot be held upon a surrender by his sureties. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906).

When Rearrest Permissible. — According to the express terms of this section, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. State v. Weatherspoon, 88 N.C. 19 (1883).

ARTICLE 7.

Habeas Corpus for Custody of Children in Certain Cases.

§§ 17-39 through 17-40: Repealed by Session Laws 1967, c. 1153, s. 1.

Cross References. — As to action or proceeding for custody of minor child, see G.S. 50-13.1 et seq.

ARTICLE 8.

Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ.

Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the State, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any magistrate or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such magistrate or clerk may reside, to be examined as a witness before such magistrate or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a magistrate, or a clerk, and such person is confined in a county in which such magistrate or clerk does not reside, application for habeas corpus to testify may be made to any justice or judge of the General Court of Justice. (1868-9, c. 116, ss. 37, 38; Code, ss. 1663, 1664; Rev., ss. 1855, 1856; C.S., s. 2243; 1969, c. 44, s. 43; 1971, c. 528, s. 3.)

CASE NOTES

Inherent Power of Court. — The right to bring a person, whose presence is necessary, before a court for the exercise of its powers is inherent in every court of general jurisdiction, and its exercise is essential to the preservation of its power and dignity. State v. Hoskins, 77 N.C. 530 (1877); Harkins v. Cathey, 119 N.C. 649, 26 S.E. 136 (1896).

Section Inapplicable to State. — This section applies only to parties strictly so called, and not to the State. Ex parte Harris, 73 N.C. 65 (1875), citing State v. Adair, 68 N.C. 68 (1873).

Murderer Is Competent Witness. — One who has been convicted of murder, and is under sentence of death, is a competent witness; and the solicitor (now district attorney) for the State is entitled to a habeas corpus to bring such condemned prisoner into court for the purpose of testifying before the grand jury. Ex parte Harris, 73 N.C. 65 (1875).

Objection to Convicted Witness Untena-

ble. — When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of habeas corpus ad testificandum under this section is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead in the eyes of the law, could not testify, the witness having been present and having testified. State v. Jones, 176 N.C. 702, 97 S.E. 32 (1918).

Applied in State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

§ 17-42. Contents of application.

The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant; and shall state —

(1) The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

(2) That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (1868-9, c. 116, s. 39; Code, s. 1665; Rev., s. 1857; C.S., s. 2244.)

CASE NOTES

Applied in State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

§ 17-43. Service of writ.

The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this Chapter for the service and enforcement of the writ of habeas corpus cum causa. (1868-9, c. 116, s. 40; Code, s. 1666; Rev., s. 1858; C.S., s. 2245.)

§ 17-44. Applicant to pay expenses and give bond to return.

The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (1868-9, c. 116, s. 41; Code, s. 1667; Rev., s. 1859; C.S., s. 2246; 1971, c. 528, s. 4.)

§ 17-45. Duty of officer to whom writ delivered or on whom served.

It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars ($500.00). (1868-9, c. 116, s. 42; Code, s. 1668; Rev., s. 1860; C.S., s. 2247.)

§ 17-46. Prisoner to be remanded.

After having testified, the prisoner shall be remanded to the prison from which he was taken. (1868-9, c. 116, s. 43; Code, s. 1669; Rev., s. 1861; C.S., s. 2248.)

ply. — When the State has procured the [illegible] dence of a witness under sentence of death, the [illegible] [illegible] that this section is admissible. [illegible] applying to the State, has [illegible] that the time set for the execution has passed.

law, could not testify, the witness having been [illegible]

Applied in State v. Sanders, 312 N.C. [illegible] 324 S.E.2d 834 (1985).

§ 17-42. Contents of application.

The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state —

(1) The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

(2) That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (1868-9, c. 116, s. 39; Code, s. 1665; Rev., s. 1857; C.S., s. 2244.)

CASE NOTES

Applied in State v. [illegible], 3[illegible] N.C. 592, 3[illegible] S.E.2d [illegible] (19[illegible]).

§ 17-43. Service of writ.

The writ of habeas corpus to testify shall be served by the same person, and in like manner, [illegible] required, and enforced by the court or officer issuing the same as [illegible] this Chapter for the service and enforcement of the writ of habeas corpus [illegible]. (1868-9, c. 116, s. 40; Code, s. 1666; Rev., s. 1858; C.S., s. 2245.)

§ 17-44. Applicant to pay expenses and give bond to return.

The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, [illegible] or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, [illegible] or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (1868-9, c. 116, s. 41; Code, s. 1667; Rev., s. 1859; C.S., s. 2246; 1971, c. 528, s. 4.)

§ 17-45. Duty of officer to whom writ delivered or on whom served.

It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars ($500.00). (1868-9, c. 116, s. 42; Code, s. 1668; Rev., s. 1860; C.S., s. 2247.)

Chapter 17A.

Law-Enforcement Officers.

§§ 17A-1 through 17A-9: Recodified as §§ 17C-1 to 17C-12.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 763, s. 1, effective January 1, 1980, and has been recodified as Chapter 17C.

Chapter 17B.

North Carolina Criminal Justice Education and Training System.

§§ 17B-1 through 17B-6: Recodified as §§ 17D-1 to 17D-4.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 763, s. 2, effective January 1, 1980, and has been recodified as Chapter 17D.

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

Sec.
17C-1. Findings and policy.
17C-2. Definitions.
17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.
17C-4. Compensation.
17C-5. Chairman; vice-chairman; other officers; meetings; reports.
17C-6. (See Editor's Note) Powers of Commission.
17C-7. Functions of the Department of Justice.

Sec.
17C-8. System established.
17C-9. Criminal Justice Standards Division of the Department of Justice established; appointment of director; duties.
17C-10. Required standards.
17C-11. Compliance; enforcement.
17C-12. Grants under the supervision of Commission and the State; donations and appropriations.
17C-13. Pardons.

§ 17C-1. Findings and policy.

The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service. (1971, c. 963, s. 1; 1979, c. 763, s. 1.)

Cross References. — As to authority of private correctional officers employed pursuant to a contract with the Federal Bureau of Prisons, see G.S. 148-37.3.

Editor's Note. — This Chapter is Chapter 17A as rewritten by Session Laws 1979, c. 763, s. 1, effective January 1, 1979, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

Session Laws 1983, c. 558, s. 6, provides that the provisions of Chapter 17C as they pertain to sheriffs and their deputies shall no longer apply. For provisions relating to the North Carolina Sheriffs' Education and Training Standards Commission, see now G.S. 17E-1 et seq.

Session Laws 2009-574, ss. 30.1 and 30.2, provide: "SECTION 30.1. The North Carolina Department of Correction and the North Carolina Department of Justice may study all of the following:

"(1) Issues that impede the timely certification of correctional officers and probation/parole officers and ways to expedite the certification process.

"(2) The current minimum education and training requirements for correctional and probation/parole officers and whether those requirements are necessary and appropriate for certified employees of the Department of Correction.

"(3) Inconsistencies between rules promulgated by the North Carolina Criminal Justice Education and Training Standards Commission and applicable State and federal laws, and ways to resolve those inconsistencies.

"(4) The current process of certifying criminal justice training schools and programs or courses of instruction and whether that process could be expedited.

"(5) Ways to improve communication and cooperation between the Criminal Justice Standards Division and the Department of Correction regarding the employment, education, training, and retention of correctional officers and probation/parole officers.

"(6) Ways to expedite and enhance the technical assistance the Criminal Justice Standards Division provides to the Department of Correction pursuant to Chapter 17C of the General Statutes.

"(7) The feasibility and advisability of establishing a separate training and standards commission for State correctional officers and probation/parole officers.

"SECTION 30.2. The Department of Correction and the Department of Justice may report their findings and recommendations no later than April 1, 2010, to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee."

Session Laws 2009-574, s. 52.1, provides: "For legislative studies authorized by this act, out-of-state travel must be authorized by the President Pro Tempore of the Senate or the Speaker of the House of Representatives, as appropriate."

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

Legislative Intent. — The intent of the Legislature in enacting Chapter 17C was to enhance the criminal justice profession through mandated education, training and standards regarding character and moral fitness. Mullins v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n, 125 N.C. App. 339, 481 S.E.2d 297 (1997).

Purpose and Intent. — To effectuate the legislative mandate of establishing qualifications for citizenship, good moral character, competence and reliability, the Commission considered what conduct it deemed unacceptable for criminal justice officers and those aspiring to join the criminal justice profession and incorporated the conduct deemed egregious by society by referencing the criminal laws in the administrative rules. Mullins v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n, 125 N.C. App. 339, 481 S.E.2d 297 (1997).

Hearings. — The ability to hold hearings is a power that is reasonably necessary for the Commission to accomplish the purposes for which it was created. It is necessary for the Commission to have a means by which to gather evidence and investigate to determine if individuals are complying with the provisions of Chapter 17C. Mullins v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n, 125 N.C. App. 339, 481 S.E.2d 297 (1997).

Cited in Kennedy v. Haywood County, 158 N.C. App. 526, 581 S.E.2d 119, 2003 N.C. App. LEXIS 1174 (2003).

OPINIONS OF ATTORNEY GENERAL

Chapter Is Applicable to Police Officers Appointed by Secretary of Administration under § 143-340. — See opinion of Attorney General to Mr. John Faircloth, Director, N.C. Criminal Justice Training and Standards Council, 43 N.C.A.G. 99 (1973).

Officers Subject to Requirements of Criminal Justice Education and Training Standards Commission. — Special peace officers appointed for conservation and development pursuant to G.S. 113-28.1 and forest rangers appointed pursuant to Article 4 of Chapter 113 and similar law-enforcement officers employed by the State or agencies thereof, who have the power of arrest, are subject to the requirements of the North Carolina Criminal Justice Training and Standards Council (now North Carolina Criminal Justice Education and Training Standards Commission). See opinion of Attorney General to Mr. John Faircloth, Director, N.C. Criminal Justice Training and Standards Council, 43 N.C.A.G. 179 (1973).

Chapter Does Not Apply to Director of State Bureau of Investigation. — The Director of the State Bureau of Investigation is legally eligible to take the oath of office reserved to a North Carolina Criminal Justice Officer, even where the director has not met the Chapter 17C education and training requirements, as Chapter 17C does not apply to the Director. See opinion of Attorney General to The Honorable John Glenn, Chairman, The North Carolina Criminal Justice Education and Training Standards Commission, 1999 N.C. AG LEXIS 30 (12/1/99).

§ 17C-2. Definitions.

Unless the context clearly otherwise requires, the following definitions apply in this Chapter:

(1) Commission. — The North Carolina Criminal Justice Education and Training Standards Commission.

(2) Criminal justice agencies. — The State and local law-enforcement agencies, the State correctional agencies, other correctional agencies maintained by local governments, and the juvenile justice agencies, but shall not include deputy sheriffs, special deputy sheriffs, sheriffs'

jailers, or other sheriffs' department personnel governed by the provisions of Chapter 17E of these General Statutes.

(3) Criminal justice officers. — The administrative and subordinate personnel of all the departments, agencies, units or entities comprising the criminal justice agencies who are sworn law-enforcement officers, both State and local, with the power of arrest; State correctional officers; State probation/parole officers; State probation/parole officers-surveillance; officers, supervisory and administrative personnel of local confinement facilities; State juvenile justice officers; chief court counselors; and juvenile court counselors.

(4) Entry level. — The initial appointment or employment of any person by a criminal justice agency, or any appointment or employment of a person previously employed by a criminal justice agency who has not been employed by a criminal justice agency for the 12-month period preceding this appointment or employment, or any appointment or employment of a previously certified criminal justice officer to a position which requires a different type of certification. (1971, c. 963, s. 2; 1979, c. 763, s. 1; 1983, c. 558, s. 2; c. 745, s. 2; 1989, c. 757, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 4(a); 1997-503, s. 2; 2001-490, s. 1.1.)

Local Modification. — Eastern Band of the Cherokee: 1987, c. 427, s. 4.

Editor's Note. — Session Laws 2001-490, s. 1.5, effective June 30, 2001, repealed Session Laws 2000-67, s. 17.3, which would have amended this section effective June 30, 2001, unless the Criminal Justice Education and Training Standards Commission established and implemented by the convening of the 2001 General Assembly a new certification system for employees in the Department of Correction, as originally requested of the Commission in Session Laws 1999-237, s. 18.14, for implementation no later than July 1, 2000.

CASE NOTES

For discussion as to forest rangers and the public duty doctrine, see Myers v. McGrady, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005), rev'd and remanded, review improvidently allowed, 350 N.C. 460, 628 S.E.2d 761 (2006).

OPINIONS OF ATTORNEY GENERAL

Salary Continuation Plan. — If an employee is in a position which (1) requires certification by the Criminal Justice Education and Training Standards Commission, and (2) is within a category listed in G.S. 143-166.13 as defined by the Commission, the employee is covered by the Salary Continuation Plan covered by that section. Otherwise, the employee is not covered. See opinion of Attorney General to Mr. Gerald Hodnett, Personnel Director, Department of Correction, 57 N.C.A.G. 79 (1987).

§ 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(a) There is established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission." The Commission shall be composed of 33 members as follows:

(1) Police Chiefs. — Three police chiefs selected by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor.

(2) Police Officers. — Three police officials appointed by the North Carolina Police Executives Association and two criminal justice offic-

ers certified by the Commission as selected by the North Carolina Law-Enforcement Officers' Association.

(3) Departments. — The Attorney General of the State of North Carolina; the Secretary of Crime Control and Public Safety; the Secretary of Correction; the President of the North Carolina Community Colleges System; the Secretary of Juvenile Justice and Delinquency Prevention.

(3a) Repealed by Session Laws 2001-440, s. 1.2, effective June 30, 2001.

(4) At-large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one law-enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association; one criminal justice professional selected by the North Carolina Criminal Justice Association; one sworn law-enforcement officer selected by the North State Law-Enforcement Officers' Association; one member selected by the North Carolina Law-Enforcement Women's Association; and one District Attorney selected by the North Carolina Association of District Attorneys.

(5) Citizens and Others. — The President of The University of North Carolina; the Dean of the School of Government at the University of North Carolina at Chapel Hill; and two citizens, one of whom shall be selected by the Governor and one of whom shall be selected by the Attorney General. The General Assembly shall appoint four persons, two upon the recommendation of the Speaker of the House of Representatives and two upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. Appointments by the General Assembly shall be for two-year terms to conclude on June 30th in odd-numbered years.

(6) Correctional Officers. — Four correctional officers in management positions employed by the Department of Correction shall be appointed, two from the Division of Community Corrections upon the recommendation of the Speaker of the House of Representatives and two from the Division of Prisons upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. Appointments by the General Assembly shall serve two-year terms to conclude on June 30th in odd-numbered years. The Governor shall appoint one correctional officer employed by the Department of Correction and assigned to the Office of Staff Development and Training. The Governor's appointment shall serve a three-year term.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to September 1, 1983, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a) of this section, serving as a police chief; three members from subdivision (2) of subsection (a) of this section, one serving as a police official, and two criminal justice officers; one member from subdivision (4) of subsection (a) of this section, appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5) of subsection (a) of this section, one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: one member from subdivision (1) of subsection (a) of this section, serving as a police chief; one member from subdivision (2) of subsection (a) of this section, serving as a police official; and two members from subdivision (4) of subsection (a) of this section, one appointed by the League of Municipalities and one appointed by the North Carolina Association of District Attorneys.

For the terms of three years: two members from subdivision (1) of subsection (a) of this section, one police chief appointed by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor; one member from subdivision (2) of subsection (a) of this section, serving as a police official; and three members from subdivision (4) of subsection (a) of this section, one appointed by the North Carolina Law-Enforcement Women's Association, one appointed by the North Carolina Criminal Justice Association, and one appointed by the North State Law-Enforcement Officers' Association.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of Crime Control and Public Safety, the Secretary of Correction, the President of The University of North Carolina, the Dean of the School of Government at the University of North Carolina at Chapel Hill, the President of the North Carolina Community Colleges System, and the Secretary of Juvenile Justice and Delinquency Prevention shall be continuing members of the Commission during their tenure. These members of the Commission shall serve ex officio and shall perform their duties on the Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. A vacancy may be created by removal of a Commission member by majority vote of the Commission for misconduct, incompetence, or neglect of duty. A Commission member may be removed only pursuant to a hearing, after notice, at which the member subject to removal has an opportunity to be heard. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 31; 1983, c. 558, s. 3; c. 618, ss. 1, 2; c. 807, ss. 1, 2; 1987, c. 282, s. 4; 1989, c. 757, s. 2; 1995, c. 490, s. 15; 1997-443, s. 11A.118(a); 1998-202, s. 4(c); 2000-137, s. 4(d); 2000-140, s. 38.1(a); 2001-487, s. 5; 2001-490, s. 1.2; 2006-264, ss. 29(c), (d).)

Editor's Note. — Session Laws 2001-490, s. 1.5, effective June 30, 2001, repealed Session Laws 2000-67, s. 17.3, which would have amended this section effective June 30, 2001, unless the Criminal Justice Education and Training Standards Commission established and implemented by the convening of the 2001 General Assembly a new certification system for employees in the Department of Correction, as originally requested of the Commission in Session Laws 1999-237, s. 18.14, for implementation no later than July 1, 2000.

§ 17C-4. Compensation.

(a) Members of the Commission who are State officers or employees shall receive no compensation for serving on the Commission, but may be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Commission who are full-time salaried public officers or employees other than State officers or employees shall receive no compensation for serving on the Commission, but may be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Commission may receive compensation and reimbursement for expenses in accordance with G.S. 138-5.

(b) The Chairman of the Commission may appoint such ad hoc members of the Commission's standing and select committees as are necessary to carry out the business of the Commission, and such service shall be reimbursed as provided in G.S. 17C-4(a), subject to the approval of the Attorney General. (1971, c. 963, s. 4; 1979, c. 763, s. 1; 1989, c. 757, s. 3.)

§ 17C-5. Chairman; vice-chairman; other officers; meetings; reports.

(a) The Commission shall elect one of the members of the Commission as Chairman at the first regular meeting after July 1 of each year. The ex officio members shall not be eligible for election as Chairman.

(b) The Commission shall select a vice-chairman and such other officers and committee chairmen from among its members as it deems desirable at the first regular meeting of the Commission after its creation and at the first regular meeting after July 1 of each year thereafter. Nothing in this subsection, however, shall prevent the creation or abolition of committees or offices of the Commission, other than the office of vice-chairman, as the need may arise at any time during the year.

(c) The Commission shall hold at least four regular meetings per year upon the call of the chairman. Special meetings shall be held upon the call of the chairman or the vice-chairman, or upon the written request of five members of the Commission. Such special meetings must be held within 30 days.

(d) The Commission shall present regular and special reports and recommendations to the Attorney General or the General Assembly, or both, as the need may arise or as the Attorney General or General Assembly may request. (1971, c. 963, s. 5; 1979, c. 763, s. 1; 1983, c. 807, s. 3.)

§ 17C-6. (See Editor's Note) Powers of Commission.

(a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17C-10:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any criminal justice agency of information with respect to the employment, education, retention, and training of its criminal justice officers, and (ii) the submission by any criminal justice training school of information with respect to its criminal justice training programs that are required by this Chapter.

(2) Establish minimum educational and training standards that must be met in order to qualify for entry level employment and retention as a criminal justice officer in temporary or probationary status or in a permanent position. The standards for entry level employment shall include education and training in response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions.

(3) Certify and recertify, suspend, revoke, or deny, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level and retained as criminal justice officers.

(4) Establish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by this Chapter.

(5) Certify and recertify, suspend, revoke, or deny, pursuant to the standards that it has established for the purpose, criminal justice training schools and programs or courses of instruction that are required by this Chapter.

(6) Establish minimum standards and levels of education and experience for all criminal justice instructors and school directors who participate in programs or courses of instruction that are required by this Chapter.

(7) Certify and recertify, suspend, revoke, or deny, pursuant to the standards that it has established for the purpose, criminal justice instructors and school directors who participate in programs or courses of instruction that are required by this Chapter.

(8) Investigate and make such evaluations as may be necessary to determine if criminal justice agencies, schools, and individuals are complying with the provisions of this Chapter.

(9) Adopt and amend bylaws, consistent with law, for its internal management and control.

(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter.

(11) Establish minimum standards and levels of training for certification and periodic recertification of operators of and instructors for training programs in radio microwave, laser, and other electronic speed-measuring instruments.

(12) Certify and recertify, suspend, revoke, or deny, pursuant to the standards that it has established, operators and instructors for training programs for each approved type of radio microwave, laser, and other electronic speed-measuring instruments.

(13) In conjunction with the Secretary of Crime Control and Public Safety, approve use of specific models and types of radio microwave, laser, and other speed-measuring instruments and establish the procedures for operation of each approved instrument and standards for calibration and testing for accuracy of each approved instrument.

(13a) Expired effective September 30, 2007. See note.

(14) Establish minimum standards for in-service training for criminal justice officers. In-service training standards shall include training in response to, and investigation of, domestic violence cases, as well as training investigation for evidence-based prosecutions.

(15) Establish minimum standards and levels of training for certification of instructors for the domestic violence training required by subdivisions (2) and (14) of this subsection.

(16) Establish standards and guidelines for the annual firearms certification of qualified retired law enforcement officers, as defined in G.S. 14-415.10(4a), to efficiently implement the provisions of G.S. 14-415.25. The standards shall provide for the courses, qualifications, and the issuance of the annual firearms qualification certification. The Commission may adopt any rules necessary to effect the provisions of this section, and may charge a reasonable fee to applicants for the costs incurred in compliance with this subdivision.

(b) The Commission shall have the following powers, which shall be advisory in nature and for which the Commission is not authorized to undertake any enforcement actions:

(1) Identify types of criminal justice positions, other than entry level positions, for which advanced or specialized training and education are appropriate, and establish minimum standards for the certification of persons as being qualified for those positions on the basis of specified education, training, and experience; provided, that compliance with these minimum standards shall be discretionary on the part of criminal justice agencies with respect to their criminal justice officers;

(2) Certify, pursuant to the standards that it has established for the purpose, criminal justice officers for those criminal justice agencies

that elect to comply with the minimum education, training, and experience standards established by the Commission for positions for which advanced or specialized training, education, and experience are appropriate;

(3) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice training schools and programs or courses of instruction;

(4) Study and make reports and recommendations concerning criminal justice education and training in North Carolina;

(5) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice;

(6) Study, obtain data, statistics, and information and make reports concerning the recruitment, selection, education, retention, and training of persons serving criminal justice agencies in this State; to make recommendations for improvement in methods of recruitment, selection, education, retention, and training of persons serving criminal justice agencies;

(7) Make recommendations concerning any matters within its purview pursuant to this Chapter;

(8) Appoint such advisory committees as it may deem necessary;

(9) Do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter;

(10) Formulate basic plans for and promote the development and improvement of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with its rules and regulations;

(11) Maintain liaison among local, State and federal agencies with respect to criminal justice education and training;

(12) Promote the planning and development of a systematic career development program for criminal justice professionals.

(c) All decisions and rules and regulations heretofore made by the North Carolina Criminal Justice Training and Standards Council and the North Carolina Criminal Justice Education and Training System Council shall remain in full force and effect unless and until repealed or suspended by action of the North Carolina Criminal Justice Education and Training Standards Commission established herein. The present Councils are terminated on December 31, 1979, and their power, duties and responsibilities vest in the North Carolina Criminal Justice Education and Training Standards Commission effective January 1, 1980.

(d) The standards established by the Commission pursuant to G.S. 17C-6(a)(11) and 17C-6(a)(12) and by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6(a)(13) shall not be less stringent than standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, National Bureau of Standards, or the Federal Communications Commission. (1971, c. 963, s. 6; 1975, c. 372, s. 2; 1979, c. 763, s. 1; 1979, 2nd Sess., c. 1184, ss. 1, 2; 1989, c. 757, s. 4; 1994, Ex. Sess., c. 18, s. 2; 1995, c. 509, s. 14.1; 2000-140, s. 38.1(b); 2002-159, s. 29; 2003-280, s. 3; 2004-186, ss. 2.1, 2.3, 2.5; 2005-27, ss. 1, 2; 2007-427, s. 2; 2009-546, s. 2.)

Cross References. — As to admissibility into evidence of results of photographic speed-measuring instruments, see G.S. 8-50.3.

Editor's Note. — Session Laws 2003-280, ss. 1 and 4, as amended by Session Laws 2003-380, s. 5, and as amended by Session Laws 2005-27, ss. 1 and 2, effective July 1, 2003, and expiring September 30, 2007, provide for a new G.S. 160A-300.4, pertaining to the use of photographic speed-measuring systems, applicable only to the City of Charlotte, and which may be used only in certain designated corridors of the city.

Session Laws 2004-186, s. 2.2, provides: "The North Carolina Criminal Justice Education and Training Standards Commission shall ensure that the domestic violence education and training required by Section 2.1 of this part is incorporated into all Basic Law Enforcement Training (BLET) courses as soon as practicable. However, the domestic violence education and training shall be part of the required BLET curriculum no later than March 1, 2005."

Session Laws 2004-186, s. 2.4, provides: "The North Carolina Criminal Justice Education and Training Standards Commission shall ensure that the domestic violence in-service training required by Section 2.3 of this part is available no later than March 1, 2005."

Session Laws 2004-186, s. 2.6, provides: "The North Carolina Criminal Justice Education and Training Standards Commission shall ensure that the standards and training required for certification under Section 2.5 of this part are implemented no later than March 1, 2005."

Session Laws 2004-186, s. 2.14, provides: "The North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission shall report to the General Assembly on or before March 1, 2005, on the exact standards implemented and the dates they were implemented."

Effect of Amendments. — Session Laws 2009-546, s. 2, effective August 28, 2009, inserted "suspend, revoke, or deny" near the beginning of subdivisions (a)(3), (a)(5), (a)(7) and (a)(12).

CASE NOTES

The ability to hold hearings is a power that is reasonably necessary for the Commission to accomplish the purposes for which it was created. It is necessary for the Commission to have a means by which to gather evidence and investigate to determine if individuals are complying with the provisions of Chapter 17C. Mullins v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n, 125 N.C. App. 339, 481 S.E.2d 297 (1997).

§ 17C-7. Functions of the Department of Justice.

(a) The Attorney General shall provide such staff assistance as the Commission shall require in the performance of its duties.

(b) The Attorney General shall have legal custody of all books, papers, documents, or other records and property of the Commission.

(c) Any papers, documents, or other records which become the property of the Commission that are placed in the criminal justice officer's personnel file maintained by the Commission shall be subject to the same disclosure requirements as set forth in Chapters 126, 153A, and 160A of the General Statutes regarding the privacy of personnel records. (1979, c. 763, s. 1; 1989, c. 757, s. 5.)

§ 17C-8. System established.

The North Carolina Criminal Justice Education and Training Standards Commission shall establish a North Carolina Criminal Justice Education and Training System. The system shall be a cooperative arrangement among criminal justice agencies, both State and local, and criminal justice education and training schools, both public and private, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments. Members of the system shall include the North Carolina Justice Academy as well as such other public or private agencies or institutions within the State, that are engaged in criminal justice education and training, and desire to be affiliated with the system for the purpose of achieving greater coordination of criminal justice education and training efforts in North Carolina. (1979, c. 763, s. 1.)

§ 17C-9. Criminal Justice Standards Division of the Department of Justice established; appointment of director; duties.

(a) There is hereby established, within the Department of Justice, the Criminal Justice Standards Division, hereinafter called "the Division," which shall be organized and staffed in accordance with applicable laws and regulations and within the limits of authorized appropriations.

(b) The Attorney General shall appoint a director for the Division chosen from a list of three nominees submitted to him by the Commission who shall be responsible to and serve at the pleasure of the Attorney General and the Commission.

(c) The Division shall administer such programs as are assigned to it by the Commission. The Division shall also administer such additional related programs as may be assigned to it by the Attorney General or the General Assembly. Administrative duties and responsibilities shall include, but are not limited to, the following:

(1) Administering any and all programs assigned to the Division by the Commission and reporting any violations of or deviations from the rules and regulations of the Commission as the Commission may require;

(2) Compiling data, developing reports, identifying needs and performing research relevant to beneficial improvement of the criminal justice agencies;

(3) Developing new and revising existing programs for adoption consideration by the Commission;

(4) Monitoring and evaluating programs of the Commission;

(5) Providing technical assistance to relevant agencies of the criminal justice system to aid them in the discharge of program participation and responsibilities;

(6) Disseminating information on Commission programs to concerned agencies and/or individuals;

(7) Taking such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities;

(8) The director may divulge any information in the Division's personnel file of a criminal justice officer or applicant for certification to the head of the criminal justice agency employing the officer or considering the applicant for employment when the director deems it necessary and essential to the retention or employment of said officer or applicant. The information may be divulged whether or not such information was contained in a personnel file maintained by a State or by a local government agency. (1979, c. 763, s. 1; 1983, c. 807, s. 4.)

§ 17C-10. Required standards.

(a) Criminal justice officers shall not be required to meet any requirement of subsections (b) and (c) of this section as a condition of continued employment, nor shall failure of any such criminal justice officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible if the criminal justice officer held a permanent appointment prior to June 1, 1986, and is an officer, supervisor or administrator of a local confinement facility; prior to March 15, 1973, and is a sworn law enforcement officer with power of arrest; prior to January 1, 1974, and is a State adult correctional officer; prior to July 1, 1975, and is a State probation/parole officer; prior to July 1, 1974, and is a State youth services officer; prior to January 15, 1980, and is a State probation/parole intake officer, prior to April 1, 1983, and is a State parole case analyst; prior to December 14, 1983, and is a State probation/parole officer-surveillance; or prior to February 1, 1987, and is a State probation/parole intensive officer.

The legislature finds, and it is declared to be the policy of this Chapter, that such criminal justice officers have satisfied such entry level requirements by their experience. It is the intent of the Chapter that all criminal justice officers employed at the entry level after the Commission has adopted the required standards shall meet the requirements of this Chapter. All criminal justice officers who are exempted from the required entry level standards by this subsection shall be subject thereafter to the requirements of subsections (b) and (c) of this section as well as the requirements of G.S. 17C-6(a) in order to retain certification.

If any criminal justice officer exempted from the required standards by this provision fails to serve as a criminal justice officer for a 12-month period, said officer shall be required to comply with the required entry level standards established by the Commission pursuant to the authority otherwise granted in this section and in G.S. 17C-6(a).

(b) The Commission shall provide, by regulation, for a period of probationary employment and certification for criminal justice officers. The Commission may prescribe such training requirements as are required for the award of either probationary or permanent certification of officers, in addition to the pre-employment requirements authorized in G.S. 17C-6(a). Any criminal justice officer appointed on a temporary or probationary basis who does not comply with the training provisions of this Chapter is not authorized to exercise the powers of a criminal justice officer to include the power of arrest. If, however, a criminal justice officer has enrolled in a Commission-approved preparatory program of training that concludes later than the end of the officer's probationary period, and the Commission does not require such training to be completed prior to the award of probationary certification, the Commission may extend, for good cause shown, the probationary period for a period not to exceed six months.

Upon separation of a criminal justice officer from a criminal justice agency within the prescribed period of temporary or probationary appointment, the officer's probationary certification shall be terminated by the Commission. Upon the reappointment to the same agency or appointment to another criminal justice agency of an officer who has separated from an agency within the probationary period, the officer shall be charged with the cumulative amount of time served during his initial or subsequent appointments and allowed the remainder of the probationary period to complete the Commission's requirements. Upon reappointment to the same agency or appointment to another agency of an officer who has separated from an agency within the probationary period and who has remained out of service for more than one year after the date of separation, the officer shall be allowed another probationary period to satisfy the Commission's requirements.

(c) In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment, training, and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Commission for the reasonable amount of time it will take to achieve the standards required. Such an educational waiver shall not exceed 12 months.

(d) The Commission may issue a certificate evidencing satisfaction of the requirements of subsections (b) and (c) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Commission for approved criminal justice education and training programs in this State. (1971, c. 963, s. 1; 1979, c. 763, s. 1; 1981, c. 8; c. 400; 1983, c. 745, s. 3; 1989, c. 757, s. 6.)

CASE NOTES

Hearings. — The ability to hold hearings is a power that is reasonably necessary for the Commission to accomplish the purposes for which it was created. It is necessary for the Commission to have a means by which to gather evidence and investigate to determine if individuals are complying with the provisions of Chapter 17C. Mullins v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n, 125 N.C. App. 339, 481 S.E.2d 297 (1997).

Cited in Vandiford v. North Carolina Dep't of Cor., 97 N.C. App. 640, 389 S.E.2d 408 (1990).

OPINIONS OF ATTORNEY GENERAL

Salary Continuation Plan. — If an employee is in a position which (1) requires certification by the Criminal Justice Education and Training Standards Commission, and (2) is within a category listed in G.S. 143-166.13 as defined by the Commission, the employee is covered by the Salary Continuation Plan covered by that section. Otherwise, the employee is not covered. See opinion of Attorney General to Mr. Gerald Hodnett, Personnel Director, Department of Correction, 57 N.C.A.G. 79 (1987).

§ 17C-11. Compliance; enforcement.

(a) Any criminal justice officer who the Commission determines does not comply with this Chapter or any rules adopted under this Chapter shall not exercise the powers of a criminal justice officer and shall not exercise the power of arrest unless the Commission waives that certification or deficiency. The Commission shall enforce this section by the entry of appropriate orders effective upon service on either the criminal justice agency or the criminal justice officer.

(a1) Any criminal justice training school, program, or course of instruction that the Commission determines does not comply with this Chapter, or any rules adopted under this Chapter, shall not continue to offer programs or courses of instruction unless the Commission waives that certification or deficiency. Any criminal justice instructor, school director, commission certified operator, and any commission certified instructor, who the Commission determines does not comply with this Chapter, or any rules adopted under this Chapter, shall not act as an instructor, school director, or operator unless the Commission waives that certification or deficiency. The Commission shall enforce this section by the entry of appropriate orders effective upon service on the criminal justice training school or the individual holding commission certification.

(b) Any person who desires to appeal the proposed denial, suspension, or revocation of any certification authorized to be issued by the Commission shall file a written appeal with the Commission not later than 30 days following notice of denial, suspension, or revocation.

(c) The Commission may appear in its own name and apply to courts having jurisdiction for injunctions to prevent violations of this Chapter or of rules issued pursuant thereto; specifically, the performance of criminal justice officer functions by officers or individuals who are not in compliance with the standards and requirements of G.S. 17C-6(a) and G.S. 17C-10. A single act of performance of a criminal justice officer function by an officer or individual who is performing such function in violation of this Chapter is sufficient, if shown, to invoke the injunctive relief of this section. (1979, c. 763, s. 1; 1989, c. 757, s. 7; 2001-490, s. 1.3; 2009-546, s. 3.)

Effect of Amendments. — Session Laws 2009-546, s. 3, effective August 28, 2009, added subsection (a1).

§ 17C-12. Grants under the supervision of Commission and the State; donations and appropriations.

(a) The Commission may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this section shall be detailed in an annual report of the Commission. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Commission pursuant to this section shall be deposited in the State Treasury to the account of the Commission.

(b) The Commission may authorize the reimbursement to each political subdivision of the State not exceeding sixty percent (60%) of the salary and of the allowable tuition, living and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions do in fact adhere to the selection and training standards established by the Commission.

(c) The Commission by rules and regulations, shall provide for administration of the grant program authorized by this section. In promulgating such rules, the Commission shall promote the most efficient and economical program of criminal justice training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(d) The Commission may provide grants as a reimbursement for actual expenses incurred by the State or political subdivision thereof for the provisions of training programs of officers from other jurisdictions within the State. (1971, c. 963, ss. 8, 9; 1979, c. 763, s. 1.)

§ 17C-13. Pardons.

When a person presents competent evidence that he has been granted an unconditional pardon for a crime in this State, any other state, or the United States, the Commission may not deny, suspend, or revoke that person's certification based solely on the commission of that crime or for an alleged lack of good moral character due to the commission of that crime. (1989, c. 757, s. 8.)

standards and requirements of G.S. 17C-6(a) and G.S. 17C-10. A single act of performance of a criminal justice officer function by an officer or individual who is performing such function in violation of this Chapter is sufficient, if shown, to invoke the injunctive relief of this section. (1979, c. 763, s. 1; 1989, c. 757, s. 7; 2001-490, s. 1.3; 2009-546, s. 3.)

Effect of Amendments. — Session Laws 2009-546, s. 3, effective August 28, 2009, added subsection (a1).

§ 17C-12. Grants under the supervision of Commission and the State; donations and appropriations.

(a) The Commission may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this section shall be detailed in an annual report of the Commission. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Commission pursuant to this section shall be deposited in the State Treasury to the account of the Commission.

(b) The Commission may authorize the reimbursement to each political subdivision of the State not exceeding sixty percent (60%) of the salary and of the allowable tuition, living, and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions do in fact adhere to the selection and training standards established by the Commission.

(c) The Commission by rules and regulations, shall provide for administration of the grant program authorized by this section. In promulgating such rules, the Commission shall promote the most efficient and economical program of criminal justice training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(d) The Commission may provide grants as a reimbursement for actual expenses incurred by the State or political subdivisions thereof for the provisions of training programs of officers from other jurisdictions within the State. (1971, c. 963, ss. 8, 9; 1979, c. 763, s. 1.)

§ 17C-13. Pardons.

When a person presents competent evidence that he has been granted an unconditional pardon for a crime in this State, any other state, or the United States, the Commission may not deny, suspend, or revoke that person's certification based solely on the commission of that crime or for an alleged lack of good moral character due to the commission of that crime. (1989, c. 757, s. 8.)

Chapter 17D.
North Carolina Justice Academy.

Sec.

17D-1. Definitions.
17D-2. Academy established; duties.
17D-3. Donations.
17D-4. Application of State highway and motor vehicles laws at the academy; authority of Department of Justice to regulate traffic, etc.

§ 17D-1. Definitions.

As used in this Chapter, unless the context otherwise requires:

(1) "Academy" means the North Carolina Justice Academy.

(2) "Academy property" means property that is owned or leased in whole or in part by the State of North Carolina and which is subject to the general management and control of the Department of Justice and is located in Salemburg, North Carolina, or at any other locations within the State which are dedicated to the use of the North Carolina Justice Academy subsequent to this Chapter being enacted.

(3) "The Commission" means the North Carolina Criminal Justice Education and Training Standards Commission.

(4) "Criminal justice agencies" means the State and local law enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, the courts of the State and the juvenile justice agencies.

(5) "Criminal justice personnel" means any person who serves or assists any State or local agency engaged in crime prevention, crime reduction, crime investigation, training or educating of persons employed by criminal justice agencies, or enforcement of the criminal law; or any person employed by a criminal justice agency.

(6) "Department" means the Department of Justice. (1973, c. 749; 1977, c. 831, s. 1; 1979, c. 763, s. 2; 1997-456, s. 27.)

Editor's Note. — This Chapter is Chapter 17B as rewritten by Session Laws 1979, c. 763, s. 2, effective January 1, 1980, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

Subdivisions (a) to (f) of this section were renumbered as subdivisions (1) to (6) pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

§ 17D-2. Academy established; duties.

(a) The North Carolina Department of Justice shall establish a North Carolina Justice Academy.

(b) The Department of Justice shall employ the staff of the academy and direct its operations.

(c) Duties of the academy. The North Carolina Justice Academy shall have, but is not limited to, the following functions:

(1) It may provide training programs for criminal justice personnel.

(2) It may provide technical assistance upon request to criminal justice agencies to aid them in the discharge of their responsibilities.

(3) It may develop, publish, and distribute educational and training materials.

(4) It may take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities. (1973, c. 749; 1979, c. 763, s. 2.)

Editor's Note. — Session Laws 2007-547, s. 11, provides: "The North Carolina Justice Academy shall establish protocols suitable for the training of State and local law enforcement officers. The protocols shall be made available to all State and local law enforcement agencies so that the agencies may conduct training on:

"(1) The phenomenon of human trafficking and State and federal laws on human trafficking.

"(2) How to recognize and identify victims of one or more of the practices set forth in G.S. 14-43.11, G.S. 14-43.12, or G.S. 14-43.13.

"(3) Methods for protecting trafficking victims and possible trafficking victims, and advising them of their rights.

"(4) Procedures and techniques for handling specialized needs of victims who may face cultural, language, and other barriers that impede ability to request and obtain available services.

"Nothing in this section shall be construed to require the North Carolina Justice Academy to conduct training of State or local law enforcement officers."

§ 17D-3. Donations.

The Department of Justice may accept for any of its purposes and functions under this Article any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation. Any arrangements pursuant to this section shall be detailed in an annual report of the academy. Such reports shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Department of Justice pursuant to this section shall be deposited in the State Treasury to the account of the academy. All moneys involved shall be subject to audit by the State Auditor. (1979, c. 763, s. 2.)

§ 17D-4. Application of State highway and motor vehicles laws at the academy; authority of Department of Justice to regulate traffic, etc.

(a) Except as otherwise provided in this section, all of the provisions of Chapter 20 of the General Statutes relating to the use of highways of the State and the operation of vehicles thereon are applicable to all streets, alleys, driveways, and parking lots on academy property. Nothing in this section modifies any rights of ownership or control of academy property, now or hereafter vested in the State of North Carolina ex rel., Department of Justice.

(b) The Department of Justice may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic and the parking of vehicles and other modes of conveyance on the campus. In fixing speed limits, the Department of Justice is not subject to G.S. 20-141(f) or (g), but may fix any speed limit reasonable and safe under the circumstances as conclusively determined by the Department of Justice. The Department of Justice may not regulate traffic on streets open to the public as of right, except as specifically provided in this section.

(c) The Department of Justice may by ordinance provide for the registration of vehicles maintained or operated on the campus by any student, faculty member, or employee of the academy and may fix fees for such registration. The ordinance may make it unlawful for any person to operate an unregistered vehicle on the campus when the vehicle is required by the ordinance to be registered.

(d) The Department of Justice may by ordinance set aside parking lots on the campus for use by students, faculty, and employees of the academy and members of the general public attending schools, conferences, or meetings at the academy, visiting or making use of any academy facilities, or attending to official business with the academy. The Department of Justice may issue permits to park in these lots and may charge a fee therefor. The Department of Justice may also by ordinance make it unlawful for any person to park a vehicle in any lot or other parking facility without procuring the requisite permit and displaying it on the vehicle.

(e) The Department of Justice may by ordinance provide for the issuance of stickers, decals, permits or other indicia representing the registration of vehicles or the eligibility of vehicles to park on the campus and may by ordinance prohibit the forgery, counterfeiting, unauthorized transfer, or unauthorized use of such stickers, decals, permits or other indicia.

(f) Violation of an ordinance adopted under any portion of this section is a Class 3 misdemeanor. An ordinance may provide that certain acts prohibited thereby shall not be enforced by criminal sanctions, and in such cases a person committing any such act shall not be guilty of a misdemeanor.

(g) An ordinance adopted under this section may provide that a violation will subject the offender to a civil penalty. Penalties may be graduated according to the seriousness of the offense or the number of prior offenses committed by the person charged. The Department of Justice may establish procedure for the collection of these penalties and may enforce the penalties by civil action in the nature of debt. The Department of Justice may also provide for appropriate administrative sanctions if an offender does not pay a validly due penalty or has committed repeated offenses. Appropriate administrative sanctions include, but are not limited to, revocation of parking permits, termination of vehicle registration, and termination or suspension of enrollment in or employment by the academy.

(h) An ordinance adopted under this section may provide that any vehicle illegally parked may be removed to a storage area, in which case the person so removing the vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(i) Evidence that a vehicle was found parked or unattended in violation of a council ordinance is prima facie evidence that the vehicle was parked by:

(1) The person holding an academy parking permit for the vehicle;

(2) If no academy parking permit has been issued for the vehicle, the person in whose name the vehicle is registered with the academy pursuant to subsection (c); or

(3) If no academy parking permit has been issued for the vehicle and the vehicle is not registered with the academy, the person in whose name it is registered with the North Carolina Department of Motor Vehicles or the corresponding agency of another state or nation.

The rule of evidence established by this subsection applies only in civil, criminal, or administrative actions or proceedings concerning violations of ordinances of the Department of Justice. G.S. 20-162.1 does not apply to such actions or proceedings.

(j) The Department of Justice shall cause to be posted appropriate notice to the public of applicable traffic and parking restrictions.

(k) All ordinances adopted under this section shall be filed in the offices of the North Carolina Attorney General and the Secretary of State. The Department of Justice shall provide for printing and distributing copies of its traffic and parking ordinances.

(*l*) All moneys received pursuant to this section shall be State funds as defined in G.S. 143C-1-1. (1977, c. 831, s. 2; 1979, c. 763, s. 2; 1993, c. 539, s. 309; 1994, Ex. Sess., c. 24, s. 14(c); 2006-203, s. 12.)

the academy visiting or making use of any academy facilities or attending to official business with the academy. The Department of Justice may issue permits to park in these lots and may charge a fee therefor. The Department of Justice may also by ordinance make it unlawful for any person to park a vehicle in any lot or other parking facility without procuring the requisite permit and displaying it on the vehicle.

(e) The Department of Justice may by ordinance provide for the issuance of stickers, decals, permits, or other indicia representing the registration of vehicles or the eligibility of vehicles to park on the campus and may by ordinance prohibit the forgery, counterfeiting, unauthorized transfer, or unauthorized use of such stickers, decals, permits or other indicia.

(f) Violation of an ordinance adopted under any portion of this section is a Class 3 misdemeanor. An ordinance may provide that certain acts prohibited thereby shall not be enforced by criminal sanctions, and in such cases a person committing any such act shall not be guilty of a misdemeanor.

(g) An ordinance adopted under this section may provide that a violation will subject the offender to a civil penalty. Penalties may be graduated according to the seriousness of the offense or the number of prior offenses committed by the person charged. The Department of Justice may establish procedures for the collection of these penalties and may enforce the penalties by civil action in the nature of debt. The Department of Justice may also provide for appropriate administrative sanctions if an offender does not pay a validly due penalty or has a record of repeated offenses. Appropriate administrative sanctions include, but are not limited to, revocation of parking permits, termination of vehicle registration, and termination or suspension of enrollment in or employment at the academy.

(h) An ordinance adopted under this section may provide that any vehicle illegally parked may be removed to a storage area, in which case the person removing the vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(i) Evidence that a vehicle was found parked or unattended in violation of an ordinance is prima facie evidence that the vehicle was parked by:

(1) The person holding an academy parking permit for the vehicle;

(2) If no academy parking permit has been issued for the vehicle, the person in whose name the vehicle is registered with the academy pursuant to subsection (c); or

(3) If no academy parking permit has been issued for the vehicle and the vehicle is not registered with the academy, the person in whose name it is registered with the North Carolina Department of Motor Vehicles or the corresponding agency of another state or nation.

The rule of evidence established by this subsection applies only in civil, criminal, or administrative actions or proceedings concerning violations of ordinances of the Department of Justice. G.S. 20-162.1 does not apply to such actions or proceedings.

(j) The Department of Justice shall cause to be posted appropriate notice to the public of applicable traffic and parking restrictions.

(k) All ordinances adopted under this section shall be filed in the office of the North Carolina Attorney General and the Department of Justice shall provide for printing and distributing copies of its traffic and parking ordinances.

(l) All moneys received pursuant to this section shall be State funds as defined in G.S. 143C-1-1. (1977, c. 851, s. 2; 1979, c. 759, s. 3; 1993, c. 539, s. 299; 1994, Ex. Sess., c. 24, s. 14(c); 2006-203, s. 13.)

Chapter 17E.

North Carolina Sheriffs' Education and Training Standards Commission.

Sec.
17E-1. Findings and policy.
17E-2. Definitions.
17E-3. North Carolina Sheriffs' Education and Training Standards Commission established; members; terms; vacancies.
17E-4. Powers and duties of the Commission.
17E-5. Functions of the Department of Justice.
17E-6. Justice Officers' Standards Division established; appointment of director; duties.

Sec.
17E-7. Required standards.
17E-8. Special requirements; authorizations.
17E-9. Compliance; enforcement.
17E-10. Donations to the Commission; grants and appropriations.
17E-11. Application and construction of Chapter.
17E-12. Pardons.

§ 17E-1. Findings and policy.

The General Assembly finds and declares that the office of sheriff, the office of deputy sheriff and the other officers and employees of the sheriff of a county are unique among all of the law-enforcement offices of North Carolina. The administration of criminal justice has been declared by Chapter 17C of the General Statutes to be of statewide concern to the people of the State. The sheriff is the only officer of local government required by the Constitution. The sheriff, in addition to his criminal justice responsibilities, is the only officer who is also responsible for the courts of the State, and acting as their bailiff and marshall. The sheriff administers and executes criminal and civil justice and acts as the ex officio detention officer.

The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff.

The offices of sheriff and deputy sheriff are therefore of special concern to the public health, safety, welfare and morals of the people of the State. The training and educational needs of such officers therefore require particularized and differential treatment from those of the criminal justice officers certified under Chapter 17C of the General Statutes. (1983, c. 558, s. 1; 1995, c. 103, s. 1.)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2281 (1997).

CASE NOTES

Sheriff's Department is Local Governmental Entity. — In the injured party's suit against a sheriff and individual detention officers arising out of a five-day episode in the county detention center where she alleged that they ignored her requests for medical treatment, the trial court properly concluded that the office of North Carolina sheriff was a "person" under 42 U.S.C.S. § 1983 because: (1) the state constitution created the office of sheriff, N.C. Const. art. VII, § 2, but included that provision within the article governing local governments, along with provisions for counties, cities, towns, and other governmental subdivisions, N.C. Const. art. VII, § 1; (2) state statutes, including G.S. 17E-1, 160A-288.2, 143-166.50, and 97-2, characterized a sheriff's department as a local governmental entity; (3) there was no contention that the State would be potentially liable for any monetary judgment entered against the sheriff and the detention officers; and (4) the State did not have, with respect to a sheriff, the minimum degree of control required for Eleventh Amendment immunity. Boyd v. Robeson County, — N.C. App. —, 615 S.E.2d 296, 2005 N.C. App. LEXIS 520 (2005), cert. denied, — N.C. —, 615 S.E.2d 866 (2005).

Termination for Political Reasons. — In North Carolina, deputy sheriffs may be lawfully terminated for political reasons; the office of deputy sheriff is that of policy maker, and the deputy sheriff is an alter ego of the sheriff generally. Jenkins v. Medford, 119 F.3d 1156 (4th Cir. 1997), cert. denied, 522 U.S. 1090, 118 S. Ct. 881, 139 L. Ed. 2d 869 (1998).

Cited in Braswell v. Ellis, 950 F. Supp. 145 (E.D.N.C. 1995); Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996); Knight v. Vernon, 23 F. Supp. 2d 634 (M.D.N.C. 1998); Knight v. Vernon, 214 F.3d 544, 2000 U.S. App. LEXIS 12098 (4th Cir. 2000).

§ 17E-2. Definitions.

Unless the context clearly requires otherwise, the following definitions apply to this Chapter:

(1) "Commission" means the North Carolina Sheriffs' Education and Training Standards Commission.

(2) "Office" or "department" means the sheriff of a county, his deputies, his employees and such equipment, space, provisions and quarters as are supplied for their use.

(3) "Justice officer" means:

a. A person who, through the special trust and confidence of the sheriff, has taken the oath of office prescribed by Chapter 11 of the General Statutes as a peace officer in the office of the sheriff. This term includes "deputy sheriffs", "reserve deputy sheriffs", and "special deputy sheriffs", but does not include clerical and support personnel not required to take an oath. The term "special deputy" means a person who, through appointment by the sheriff, becomes an unpaid criminal justice officer to perform a specific act directed by the sheriff; or

b. A person who, through the special trust and confidence of the sheriff, has been appointed as a detention officer by the sheriff; or

c. A person who is either the administrator or other custodial personnel of district confinement facilities as defined in G.S. 153A-219; however, nothing in this Chapter transfers any supervisory or administrative control over employees of district confinement facilities to the office of the sheriff; or

d. A person who, through the special trust and confidence of the sheriff, is under the direct supervision and control of the sheriff and serves as a telecommunicator, or who is presented to the Commission for appointment as a telecommunicator by an employing entity other than the sheriff for the purpose of obtaining certification from the Commission as a telecommunicator. (1983, c. 558, s. 1; c. 745, s. 1; 1991, c. 265, s. 1; 1995, c. 103, s. 2; 1997-443, s. 20.11(b).)

CASE NOTES

Applied in Knight v. Vernon, 214 F.3d 544, 2000 U.S. App. LEXIS 12098 (4th Cir. 2000).

Cited in Knight v. Vernon, 23 F. Supp. 2d 634 (M.D.N.C. 1998).

§ 17E-3. North Carolina Sheriffs' Education and Training Standards Commission established; members; terms; vacancies.

(a) There is hereby established the North Carolina Sheriffs' Education and Training Standards Commission. The Commission shall be composed of 17 members as follows:

(1) Sheriffs. — Twelve sheriffs appointed by the North Carolina Sheriffs' Association, 10 representing each of the Commission Districts established in this section, and two appointed at large in such manner as shall be prescribed by the Constitution or bylaws of the Association.

(2) Appointees of the General Assembly. — One person appointed by the Speaker of the House of Representatives pursuant to G.S. 120-121 and one person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate pursuant to G.S. 120-121.

(3) County Commissioners. — One county commissioner appointed by the Governor as recommended from three nominees from the North Carolina Association of County Commissioners.

(4) Others. — The President of the Community Colleges System or the President's designee and the Dean of the School of Government at the University of North Carolina at Chapel Hill or the Dean's designee shall be ex officio, nonvoting members of the Commission.

(b) Terms. — Members shall be appointed for staggered terms. Beginning September 1, 1995, sheriffs representing Commission Districts 3, 6, and 9 shall be appointed to three-year terms; sheriffs representing Commission Districts 1, 4, and 7 shall be appointed to one-year terms; sheriffs representing Commission Districts 2, 5, 8, and 10 and the two at-large sheriffs, shall be appointed to two-year terms. The appointee of the House of Representatives shall serve a term of two years. The appointee of the Senate shall serve a term of two years. The county commissioner appointed by the North Carolina Association of County Commissioners shall serve a term of two years. After the initial terms established herein have expired, all sheriffs appointed to the Commission shall be appointed to terms of three years.

If an individual ceases to be a sheriff then his seat on the Commission becomes vacated upon his ceasing to be qualified to hold that seat. Any individual appointed or designated to serve on this Commission shall serve until his successor is appointed and qualified.

(c) Vacancies. — If any vacancy occurs in the membership of the Commission, the appointing authority shall appoint another person to fill the unexpired term of the vacating member.

(d) Compensation. — None of the members of the Commission shall receive compensation for serving on the Commission. However, if the North Carolina Department of Justice has funds available, then members of the Commission who are State officers or employees may be reimbursed for their expenses in accordance with G.S. 138-6; members of the Commission who are full-time salaried public officers or employees other than State officers or employees may be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Commission may receive compensation and reimbursement for expenses in accordance with G.S. 138-5.

(e) Officers. — The chairman shall be elected from among the membership. The Commission shall select its other officers from among the membership as it deems necessary. All officers serve for one year, or until successors are qualified.

(f) Removal. — The Commission may remove a member for misfeasance, malfeasance, nonfeasance or neglect of duty.

(g) The Commission has power to adopt its own rules of procedure. The Commission shall meet no less than four times a year. It shall also meet on the call of the chairman or vice-chairman, or any four members of the Commission.

(h) The Commission may appoint any resident of the State to an adjunct or special committee created or appointed by it to study or make recommendations or reports on any subject matter related to its duties or the office of sheriff.

(i) Members of the Commission shall have the authority to designate, in writing, one member of his office to represent them and, if the member possesses voting authority, vote for them on the Commission at all meetings the voting member is unable to attend. This voting authority shall extend to all matters brought before the Commission which require a vote, to include the entry of final agency decisions and the adoption of administrative rules.

(j) The State is divided into 10 Commission Districts established for the appointment of members of the North Carolina Sheriffs' Education and Training Standards Commission as follows:

District 1: The Counties of Bertie, Camden, Chowan, Currituck, Gates, Hertford, Pasquotank, Perquimans, Tyrrell, and Washington.

District 2: The Counties of Caswell, Edgecombe, Franklin, Granville, Halifax, Nash, Northampton, Person, Vance, and Warren.

District 3: The Counties of Beaufort, Craven, Dare, Duplin, Hyde, Jones, Lenoir, Martin, Pamlico, and Pitt.

District 4: The Counties of Chatham, Durham, Greene, Harnett, Johnston, Lee, Orange, Wake, Wayne, and Wilson.

District 5: The Counties of Alleghany, Alexander, Ashe, Catawba, Gaston, Lincoln, Surry, Watauga, Wilkes, and Yadkin.

District 6: The Counties of Alamance, Davidson, Davie, Forsyth, Guilford, Iredell, Randolph, Rockingham, Rowan, and Stokes.

District 7: The Counties of Bladen, Brunswick, Carteret, Columbus, Cumberland, New Hanover, Onslow, Pender, Robeson, and Sampson.

District 8: The Counties of Anson, Cabarrus, Hoke, Mecklenburg, Montgomery, Moore, Richmond, Scotland, Stanly, and Union.

District 9: The Counties of Avery, Burke, Caldwell, Cleveland, Madison, McDowell, Mitchell, Polk, Rutherford, and Yancey.

District 10: The Counties of Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Swain, and Transylvania. (1983, c. 558, s. 1; 1991 (Reg. Sess., 1992), c. 1005, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 562, s. 1; c. 767, s. 33; 1995, c. 103, s. 3; c. 490, s. 48; 2006-264, s. 29(e).)

Effect of Amendments. — Session Laws 2006-264, s. 29(e), effective August 27, 2006, substituted "Community Colleges System" for "Department of Community Colleges" and "Dean of the School of Government at the University of North Carolina at Chapel Hill" for "Director of the Institute of Government" and made related changes in subdivision (a)(4).

§ 17E-4. Powers and duties of the Commission.

(a) The Commission shall have the following powers, duties, and responsibilities, which are enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17E-8 and G.S. 17E-9:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any agency of information with respect to the employment, education, and training of its justice officers, and (ii) the submission by any training school of information with respect to its programs that are required by this Chapter;

(2) Establish minimum educational and training standards that may be met in order to qualify for entry level employment as an officer in temporary or probationary status or in a permanent position. The standards for entry level employment of officers shall include training in response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions. For purposes of the domestic violence training requirement, the term "officers" shall include justice officers as defined in G.S. 17E-2(3)a., except

that the term shall not include "special deputy sheriffs" as defined in G.S. 17E-2(3)a.;

(3) Certify, pursuant to the standards that it may establish for the purpose, persons as qualified under the provisions of this Chapter who may be employed at entry level as officers;

(4) Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter;

(5) Certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction that are required by this Chapter;

(6) Establish standards and levels of education or equivalent experience for teachers who participate in programs or courses of instruction that are required by this Chapter;

(7) Certify, pursuant to the standards that it has established for the purpose, teachers who participate in programs or courses of instruction that are required by this Chapter;

(8) Investigate and make such evaluations as may be necessary to determine if agencies are complying with the provision of this Chapter;

(9) Adopt and amend bylaws, consistent with law, for its internal management and control;

(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter;

(11) Establish minimum standards for in-service training for justice officers. In-service training standards shall include training in response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions. For purposes of the domestic violence training requirement, the term "justice officer" shall include those defined in G.S. 17E-2(3)a., except that the term shall not include "special deputy sheriffs" as defined in G.S. 17E-2(3)a.;

(12) Establish minimum standards and levels of training for certification of instructors for the domestic violence training required by subdivisions (2) and (11) of this subsection.

The Commission may certify, and no additional certification shall be required from it, programs, courses and teachers certified by the North Carolina Criminal Justice Education and Training Standards Commission. Where the Commission determines that a program, course, instructor or teacher is required for an area which is unique to the office of sheriff, the Commission may certify such program, course, instructor, or teacher under such standards and procedures as it may establish.

(b) The Commission shall have the following powers, which shall be advisory in nature and for which the Commission is not authorized to undertake any enforcement actions:

(1) Certify, pursuant to the standards that it has established for the purpose, justice officers for those law-enforcement agencies that elect to comply with the minimum education, training, and experience standards established by the Commission for positions for which advanced or specialized training, education, and experience are appropriate;

(2) Consult and cooperate with counties, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions, public or private, concerning the development of training schools and programs or courses of instruction;

(3) Study and make reports and recommendations concerning justice education and training in North Carolina;

(4) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of justice;

(5) Study, obtain data, statistics, and information and make reports concerning the recruitment, selection, education and training of persons serving justice agencies in this State; to make recommendations for improvement in methods of recruitment, selection, education and training of persons serving sheriffs' departments;

(6) Study and make reports and recommendations to the Governor, Attorney General, Chief Justice, President of the Senate and Speaker of the House, concerning the manpower, salary and equipment needs of the sheriffs of the State;

(7) Make recommendations concerning any matters within its purview pursuant to this Chapter;

(8) Appoint such advisory committees as it may deem necessary;

(9) Do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter;

(10) Formulate basic plans for and promote the development and improvement of a comprehensive system of education and training for the officers and employees of agencies consistent with its rules and regulations;

(11) Maintain liaison among municipal, State and federal agencies with respect to education and training;

(12) Promote the planning and development of a systematic career development program for sheriffs' department personnel. (1983, c. 558, s. 1; 1991, c. 265, s. 2; 1995, c. 103, ss. 4, 5; 2004-186, ss. 2.7, 2.9, 2.10, 2.12.)

Editor's Note. — Session Laws 2004-186, s. 2.8, provides: "The North Carolina Sheriffs' Education and Training Standards Commission shall ensure that the domestic violence education and training required by Section 2.7 of this part is incorporated into all Basic Law Enforcement Training (BLET) courses as soon as practicable. However, the domestic violence education and training shall be part of the required BLET curriculum no later than March 1, 2005."

Session Laws 2004-186, s. 2.11, provides: "The North Carolina Sheriffs' Education and Training Standards Commission shall ensure that the domestic violence in-service training required by Section 2.9 of this part is available no later than March 1, 2005."

Session Laws 2004-186, s. 2.13, provides: "The North Carolina Sheriffs' Education and Training Standards Commission shall ensure that the standards and training required for certification under Section 2.11 of this part are implemented no later than March 1, 2005."

Session Laws 2004-186, s. 2.14, provides: "The North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission shall report to the General Assembly on or before March 1, 2005, on the exact standards implemented and the dates they were implemented."

CASE NOTES

Cited in Britt v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n, 348 N.C. 573, 501 S.E.2d 75 (1998).

§ 17E-5. Functions of the Department of Justice.

(a) The Attorney General shall provide such staff assistance as the Commission shall require and direct in the performance of its duties.

(b) The Attorney General shall have legal custody of all books, papers, documents, or other records and property of the Commission. (1983, c. 558, s. 1.)

§ 17E-6. Justice Officers' Standards Division established; appointment of director; duties.

(a) There is hereby established, within the Department of Justice, the Justice Officers' Standards Division hereinafter called "the Division," which shall be organized and staffed in accordance with applicable laws and regulations and within the limits of authorized appropriations.

(b) The Attorney General shall appoint a director for the Division chosen from a list of nominees submitted to him by the Commission who shall be responsible to and serve at the pleasure of the Attorney General and the Commission.

(c) The Division shall administer such programs as are assigned to it by the Commission. Administrative duties and responsibilities shall include, but are not limited to, the following:

(1) Administering any and all programs assigned to the Division by the Commission and reporting any violations of or deviations from the rules and regulations of the Commission as the Commission may require;

(2) Compiling data, developing reports, identifying needs and performing research relevant to improvement of the agencies;

(3) Developing new and revising existing programs for adoption consideration by the Commission;

(4) Monitoring and evaluating programs of the Commission;

(5) Providing technical assistance to agencies of the justice system to aid them in the discharge of program participation and responsibilities;

(6) Disseminating information on Commission programs to concerned agencies or individuals;

(7) Taking such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities;

(8) The director may divulge any information in the Division's personnel file of a justice officer or applicant for certification to the head of the department employing the officer or considering the applicant for employment when the director deems it necessary and essential to the retention or employment of said officer or applicant. The information may be divulged whether or not such information was contained in a personnel file maintained by a State or by a local government agency. (1983, c. 558, s. 1; 1995, c. 103, s. 6.)

§ 17E-7. Required standards.

(a) Justice officers, other than those set forth in subsection (c1) of this section, shall not be required to meet any requirements of subsections (b) and (c) of this section as a condition of continued employment, nor shall failure of a justice officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible if the officer held an appointment prior to July 1, 1983, and is a sworn law-enforcement officer with power of arrest. The legislature finds, and it is hereby declared to be the policy of this Chapter, that such officers have satisfied such requirements by their experience. It is the intent of the Chapter that all justice officers employed at the entry level after the Commission has adopted the required standards shall meet the requirements of this Chapter. All justice officers who are exempted from the required entry level standards by this subsection are subject to the requirements of subsections (b) and (c) of this section as well as the requirements of G.S. 17E-4(a) in order to retain certification.

(b) The Commission shall provide, by regulation, that no person may be appointed as a justice officer at entry level, except on a temporary or probationary basis, unless such person has satisfactorily completed an initial preparatory program of training at a school certified by the Commission or has been exempted from that requirement by the Commission pursuant to this Chapter. Upon separation of a justice officer from a sheriff's department within the temporary or probationary period of appointment, the probationary certification shall be terminated by the Commission. Upon the reappointment to the same department or appointment to another department of an officer who has separated from a department within the probationary period, the officer shall be charged with the amount of time served during his initial appointment and allowed the remainder of the probationary period to complete the basic training requirement. Upon the reappointment to the same department or appointment to another department of an officer who has separated from a department within the probationary period and who has remained out of service for more than one year from the date of separation, the officer shall be allowed another probationary period to complete such training as the Commission shall require by rule for an officer returning to service.

(c) In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, may fix other qualifications for the employment and retention of justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of the office, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Commission for the reasonable amount of time it will take to achieve the standards required. Upon petition from a sheriff, the Commission may grant a waiver of any provisions of this section (17E-7) for any justice officer serving that sheriff.

(c1) Any justice officer appointed as a telecommunicator at the entry level after March 1, 1998, shall meet all requirements of this Chapter. Any person employed in the capacity of a telecommunicator as defined by the Commission on or before March 1, 1998, shall not be required to meet any entry-level requirements as a condition of continued employment but shall be reported to the Commission for certification. All justice officers who are exempted from the required entry-level standards by this subsection are subject to the requirements of subsections (b) and (c) of this section as well as the requirements of G.S. 17E-4(a) in order to retain certification.

(d) The Commission may issue a certificate evidencing satisfaction of the requirements of subsections (b), (c), and (c1) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction. (1983, c. 558, s. 1; 1987, c. 783, s. 8; 1991, c. 265, s. 3; 1995, c. 103, s. 7; 1997-443, s. 20.11(c).)

§ 17E-8. Special requirements; authorizations.

(a) Nothing in this Chapter shall be construed as a condition precedent to the taking of the oath of office or the exercise of the powers, duties or privileges of the offices of sheriff or justice officer.

(b) Any sheriff or justice officer, who has taken the oath of office, or person who has received a special deputation for the purpose from the sheriff, acts validly, and his arrests, executions, levies and sales are valid, without regard to whether he has complied with this Chapter or the rules or regulations adopted under this Chapter, unless he has been ordered to cease and desist from such actions by the court, or pursuant to G.S. 17E-9. (1983, c. 558, s. 1; 1995, c. 103, s. 8.)

OPINIONS OF ATTORNEY GENERAL

Deputization of Citizens to Recapture Escaped Inmates. — The state or a local government cannot provide to a private prison operator the authority to deputize citizens to assist its employees in recapturing escaped inmates. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

§ 17E-9. Compliance; enforcement.

(a) Any justice officer who the Commission determines does not comply with this Chapter or any rules adopted under this Chapter shall not exercise the powers of a justice officer and shall not exercise the power of arrest unless the Commission waives that certification or deficiency. The Commission shall enforce this section by the entry of appropriate orders effective upon service on either the department or the justice officer.

(b) Any person who desires to appeal the proposed denial, suspension, or revocation of any certification authorized to be issued by the Commission shall file a written appeal with the Commission not later than 30 days following notice of denial, suspension, or revocation.

(c) The Commission may appear in its own name and apply to courts having jurisdiction for injunctions to prevent violations of this Chapter or of rules issued pursuant thereto; specifically, the performance of justice officer functions by officers or individuals who are not in compliance with the standards and requirements of this Chapter or of rules issued pursuant thereto. A single act of performance of a justice officer function by an officer or individual who is performing such function in violation of this Chapter is sufficient, if shown, to invoke the injunctive relief of this section. (1983, c. 558, s. 1; 1995, c. 103, s. 9; 2001-490, s. 1.4.)

§ 17E-10. Donations to the Commission; grants and appropriations.

(a) The Commission may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of same. Any arrangement pursuant to this section shall be detailed in a biennial report of the Commission to the General Assembly. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Commission pursuant to this section shall be deposited in the State Treasury to the account of the Commission.

(b) The Commission may authorize grants pursuant to this section and consistent with the powers conferred upon the Commission under G.S. 17E-6.

(c) The Commission in providing for the administration of the grant program authorized by this section shall promote the most efficient and economical program of criminal justice education and training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(d) The Commission may provide grants as a reimbursement for actual expenses incurred by the State or any political subdivision thereof for the provision of training programs providing said political subdivisions and State law-enforcement agencies do adhere to the selection and training standards established by the Commission. (1983, c. 558, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 9.)

§ 17E-11. Application and construction of Chapter.

(a) Nothing in this Chapter shall apply to the sheriff elected by the people.

(b) Nothing in this Chapter shall be construed as modifying the character of a sheriff from an elective office, or as modifying the character of the office of deputy sheriff from an appointive office.

(c) If a justice officer, or a criminal justice officer as defined in G.S. 17C-2(c), becomes sheriff, the justice officer is not required to maintain certification for the period served as sheriff. The Commission shall reinstate certification upon the conclusion of the period of service as sheriff and in conformance with the rules of the Commission for the application for certification. (1983, c. 558, s. 1; 1991, c. 265, s. 4.)

§ 17E-12. Pardons.

When a person presents competent evidence that the person has been granted an unconditional pardon of innocence for a crime in this State, any other state, or the United States, the Commission may not deny, suspend, or revoke that person's certification based solely on the commission of that crime or for alleged lack of good moral character due to the commission of that crime. (1995, c. 103, s. 10.)

Chapter 18.

Regulation of Intoxicating Liquors.

§§ 18-1 through 18-152: Repealed by Session Laws 1971, c. 872, s. 3.

Chapter 18A.

Regulation of Intoxicating Liquors.

§§ 18A-1 through 18A-69: Repealed by Session Laws 1981, c. 412, s. 1.

Cross References. — For provisions covering the subject matter of the repealed Chapter, see Chapter 18B. See also the Editor's note under G.S. 18B-100.

READY REFERENCE INDEX

A

ABANDONMENT AND NONSUPPORT OF CHILDREN.
Investigation of offenses involving, §§15-155.1 to 15-155.3.

ADDRESS CONFIDENTIALITY PROGRAM, §§15C-1 to 15C-13.

ARRAIGNMENT, §§15A-941 to 15A-945.

ARREST, §§15-43, 15A-401 to 15A-406.
Police processing and duties upon arrest, §§15A-501 to 15A-505.

B

BAIL, §§15A-531 to 15A-547.1.

C

CRIME VICTIMS FINANCIAL RECOVERY ASSISTANCE ACT, §§15B-26 to 15B-38.

CRIME VICTIMS' RIGHTS, §§15A-830 to 15A-841.

CRIMINAL PROCEDURE.
Abandonment and nonsupport of children.
  Investigation of offenses involving, §§15-155.1 to 15-155.3.
Address confidentiality program, §§15C-1 to 15C-13.
Appeals.
  Appeals from magistrates and district court judges, §§15A-1431, 15A-1432.
  Appeal to appellate division, §§15A-1441 to 15A-1453.
  Post-trial motions and appeal, §15A-1401.
Arraignment, §§15A-941 to 15A-945.
Arrest, §§15-43, 15A-401 to 15A-406.
  Police processing and duties upon arrest, §§15A-501 to 15A-505.
Attorneys at law.
  Entry and withdrawal of attorney in criminal case, §§15A-141 to 15A-144.
Bail, §§15A-531 to 15A-547.1.
Commitment to prison, §15-126.
  Order, §15A-1301.
Credits against the service of sentences and for attainment of prison privileges, §§15-196.1 to 15-196.4.
Crime victims' rights, §§15A-830 to 15A-841.
Criminal process, §§15A-301 to 15A-305.
  Special criminal process for attendance of defendants, §§15A-711, 15A-771 to 15A-773.
Custody.
  Bail, §§15A-531 to 15A-547.1.
  Commitment, §15A-521.
  Initial appearance, §15A-511.
  Police processing and duties upon arrest, §§15A-501 to 15A-505.
Death penalty.
  Capital punishment, §§15A-2000 to 15A-2006.
  Execution, §§15-187 to 15-195.
  Informing jury in case involving death penalty, §§15-176.3 to 15-176.5.

CRIMINAL PROCEDURE —Cont'd
Definitions, §15A-101.
Detainers.
  Interstate agreement on detainers, §§15A-761 to 15A-767.
Discovery.
  Superior court, §§15A-901 to 15A-910.
Dismissal.
  Voluntary dismissal, §§15A-931, 15A-932.
District courts.
  Infractions.
    Procedure for hearing and disposition, §§15A-1111 to 15A-1118.
  Trial procedure, §15A-1101.
DNA database and databanks, §§15A-266 to 15A-270.
Electronic surveillance, §§15A-286 to 15A-299.
Expunction of records, §§15A-145 to 15A-148.
Extradition.
  Uniform criminal extradition act, §§15A-721 to 15A-750.
Eyewitness identification reform act, §§15A-284.50 to 15A-284.53.
Fines, §§15A-1361 to 15A-1365.
Fugitives from justice, §§15-49 to 15-54.
General provisions, §§15-1 to 15-10.4.
Imprisonment, §§15A-1351 to 15A-1355.
Incapacity to proceed, §§15A-1001 to 15A-1009.
Indictments, §§15-144 to 15-155, 15A-641 to 15A-646.
Infractions.
  Procedure for hearing and disposition in district court, §§15A-1111 to 15A-1118.
Innocence inquiry commission, §§15A-1460 to 15A-1470.
Insanity.
  Defendants found not guilty by reason of insanity, §§15A-1321, 15A-1322.
Jury.
  Informing jury in case involving death penalty, §§15-176.3 to 15-176.5.
  Informing jury of possible punishment upon conviction, §15-176.9.
  Superior court.
    Criminal jury trial in superior court, §§15A-1221 to 15A-1243.
    Right to trial by jury, §15A-1201.
    Selecting and impaneling jury, §§15A-1211 to 15A-1217.
Medical release of inmates, §§15A-1369 to 15A-1369.5.
Mistrial, §§15A-1061 to 15A-1065.
Motions.
  Motion for appropriate relief and other post-trial relief, §§15A-1411 to 15A-1422.
  Post-trial motions and appeal, §15A-1401.
  Practice, §§15A-951 to 15A-959.
  Suppression of evidence, §§15A-971 to 15A-980.
Nontestimonial identification, §§15A-271 to 15A-282.
Order in courtroom.
  Maintenance of order, §§15A-1031 to 15A-1035.
Parole, §§15A-1370.1 to 15A-1376.
Pen registers and trap and trace devices, §§15A-260 to 15A-264.
Pleadings and joinder, §§15A-921 to 15A-928.
Pleas, §§15A-1011, 15A-1012.
  Guilty pleas in superior court.
    Procedures relating to, §§15A-1021 to 15A-1027.
Post-release supervision, §§15A-1368 to 15A-1368.6.
Preliminary proceedings.
  First appearance before district court judge, §§15A-601 to 15A-606.
  Grand jury, §§15A-621 to 15A-631.

CRIMINAL PROCEDURE —Cont'd
Preliminary proceedings —Cont'd
  Indictment and related instruments, §§15A-641 to 15A-646.
  Probable cause hearing, §§15A-611 to 15A-615.
Probable cause hearing, §§15A-611 to 15A-615.
Probation, §§15A-1341 to 15A-1347.
Reports.
  Dispositions in criminal cases, §§15A-1381 to 15A-1383.
Restitution, §§15A-1340.34 to 15A-1340.38.
Review of criminal trials, §15-217.1.
Searches and seizures, §15A-231.
  Consent, §§15A-221 to 15A-223.
  Record and disposition of seized, etc., articles, §§15-11 to 15-17.
  Warrants, §§15-24.1, 15A-241 to 15A-259.
    Administrative search and inspection warrants, §15-27.2.
Sentencing.
  Felony sentencing, §§15A-1340.13 to 15A-1340.17.
  General provisions, §§15A-1331 to 15A-1335.
  Misdemeanor sentencing, §§15A-1340.20 to 15A-1340.23.
  Structured sentencing, §§15A-1340.10 to 15A-1340.12.
Superior court.
  Discovery in superior court, §§15A-901 to 15A-910.
  Jury.
    Criminal jury trial in superior court, §§15A-1221 to 15A-1243.
    Right to trial by jury, §15A-1201.
    Selecting and impaneling jury, §§15A-1211 to 15A-1217.
  Trial in superior court, §§15-166 to 15-176.1.
Suppression of evidence.
  Motion to suppress evidence, §§15A-971 to 15A-980.
Suspension of sentence and probation, §§15-203 to 15-209.
Urgent necessity, §15A-285.
Venue, §§15-129 to 15-133, 15A-131 to 15A-136.
Victims' rights, §§15A-830 to 15A-841.
Witnesses.
  Attendance, §§15A-801 to 15A-805.
    Securing attendance of prisoners as witnesses, §§15A-821 to 15A-823.
    Uniform act to secure attendance of witnesses from without a state in criminal proceedings, §§15A-811 to 15A-816.
  Fair treatment for victims and witnesses, §§15A-824 to 15A-841.
  Immunity.
    Granting of immunity to witnesses, §§15A-1051 to 15A-1055.

D

DEATH PENALTY.
Capital punishment, §§15A-2000 to 15A-2006.
Execution, §§15-187 to 15-195.
Informing jury in case involving death penalty, §§15-176.3 to 15-176.5.
North Carolina racial justice act, §§15A-2010 to 15A-2012.

DNA DATABASE AND DATABANKS, §§15A-266 to 15A-270.

E

ELECTRONIC SURVEILLANCE, §§15A-286 to 15A-299.

EXPUNCTION OF RECORDS, §§15A-145 to 15A-148.

EXTRADITION.
Uniform criminal extradition act, §§15A-721 to 15A-750.

EYEWITNESS IDENTIFICATION REFORM ACT, §§15A-284.50 to 15A-284.53.

F

FAIR TREATMENT FOR VICTIMS AND WITNESSES, §§15A-824 to 15A-841.

FELONY SENTENCING, §§15A-1340.13 to 15A-1340.17.

FINES, §§15A-1361 to 15A-1365.

FUGITIVES FROM JUSTICE, §§15-49 to 15-54.

FUTURES CONTRACTS, §§16-3 to 16-6.

G

GAMING CONTRACTS, §§16-1, 16-2.

H

HABEAS CORPUS.
Application, §§17-3 to 17-8.
Constitutional provisions, §§17-1, 17-2.
Enforcement of writ, §§17-16 to 17-28.
Habeas corpus ad testificandum, §§17-41 to 17-46.
Proceedings and judgment, §§17-29 to 17-38.
Return, §§17-13 to 17-15.
Writ, §§17-9 to 17-12.
  Enforcement of writ, §§17-16 to 17-28.

I

INCAPACITY TO PROCEED, §§15A-1001 to 15A-1009.

INDICTMENTS, §§15-144 to 15-155, 15A-641 to 15A-646.

INFRACTIONS.
Procedure for hearing and disposition in district court, §§15A-1111 to 15A-1118.

INNOCENCE INQUIRY COMMISSION, §§15A-1460 to 15A-1470.

INTERSTATE AGREEMENT ON DETAINERS, §§15A-761 to 15A-767.

J

JURY AND JURY TRIAL.
Informing jury in case involving death penalty, §§15-176.3 to 15-176.5.
Informing jury of possible punishment upon conviction, §15-176.9.
Superior court.
  Criminal jury trial in superior court, §§15A-1221 to 15A-1243.
  Right to trial by jury, §15A-1201.
  Selecting and impaneling jury, §§15A-1211 to 15A-1217.

M

MISDEMEANOR SENTENCING, §§15A-1340.20 to 15A-1340.23.

MOTION FOR APPROPRIATE RELIEF AND OTHER POST-TRIAL RELIEF, §§15A-1411 to 15A-1422.

N

NONTESTIMONIAL IDENTIFICATION, §§15A-271 to 15A-282.

NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, §§17C-1 to 17C-13.

NORTH CAROLINA JUSTICE ACADEMY, §§17D-1 to 17D-4.

NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, §§17E-1 to 17E-12.

P

PAROLE, §§15A-1370.1 to 15A-1376.

PEN REGISTERS AND TRAP AND TRACE DEVICES, §§15A-260 to 15A-264.

PLEAS, §§15A-1011, 15A-1012.
Guilty pleas in superior court.
  Procedures relating to, §§15A-1021 to 15A-1027.

POST-RELEASE SUPERVISION, §§15A-1368 to 15A-1368.6.

PROBATION, §§15A-1341 to 15A-1347.

R

RESTITUTION, §§15A-1340.34 to 15A-1340.38.

S

SEARCHES AND SEIZURES, §15A-231.
Consent, §§15A-221 to 15A-223.
Record and disposition of seized, etc., articles, §§15-11 to 15-17.
Warrants, §§15-24.1, 15A-241 to 15A-259.
  Administrative search and inspection warrants, §15-27.2.

SENTENCING.
Felony sentencing, §§15A-1340.13 to 15A-1340.17.
General provisions, §§15A-1331 to 15A-1335.
Misdemeanor sentencing, §§15A-1340.20 to 15A-1340.23.
Structured sentencing, §§15A-1340.10 to 15A-1340.12.
Suspension of sentence and probation, §§15-203 to 15-209.

SUPRESSION OF EVIDENCE.
Motions, §§15A-971 to 15A-980.

V

VICTIMS COMPENSATION, §§15B-1 to 15B-38.

VICTIMS' RIGHTS, §§15A-830 to 15A-841.

W

WITNESSES.
Attendance, §§15A-801 to 15A-805.
  Securing attendance of prisoners as witnesses, §§15A-821 to 15A-823.
  Uniform act to secure attendance of witnesses from without a state in criminal proceedings, §§15A-811 to 15A-816.
Fair treatment for victims and witnesses, §§15A-824 to 15A-841.
Immunity.
  Granting of immunity to witnesses, §§15A-1051 to 15A-1055.

State Library of North Carolina
Raleigh

STATE LIBRARY OF NORTH CAROLINA
3 3091 00759 6026